PART II

DANCING ON

THE HEAD OF

A PIN
The breakfast carts rattle through the concrete prison at about half past five, and as they approach death row the first sounds of morning repeat the last sounds of night—remote-controlled locks clanking open and clunking closed, electric gates whirring, heavy metal doors crashing shut, voices wailing, Klaxons blaring. A maximum-security prison has no soft sounds.

At the end of each corridor of death-house cells, a guard opens a heavy door of steel bars, and a prison trusty pushes a breakfast cart inside. The door closes behind him, and when it locks, a second door opens and the trusty is on the tier. He steers his cart along the corridor, stopping at each cell to pass a tray of powdered eggs and lukewarm grits through a small slot in the bars. Inside the cell, on a thin mattress perhaps thirty inches wide, an inmate wakes, blinks his eyes. He is, perhaps, confused for a moment: Is he facing the dull concrete wall to his right, or the identical dull wall a single body length away to his left, or the identical dull ceiling of his featureless box? In any case, he orients himself in a moment, then stands, takes one step to the bars, and hauls in his tray. He sits on the bunk and eats with his tray on his knees. When he is finished, he returns the tray to the slot and, typically, goes back to sleep. Sleep—"downy sleep, Death's counterfeit," as Shakespeare put it—is the best way to pass time on death row.

Toward nine o'clock, the day resumes as the men of death row come reluctantly awake again. Perhaps a man now runs his eyes around the place he calls his "house." There are three concrete walls to it, a concrete floor, and a concrete ceiling. The fourth wall is made of bars, which open onto the corridor, which is about eight feet wide. On the other side of the corridor, beyond another grille of steel, are grimy little windows, and beyond the windows are empty prison grounds bounded by coils of razor wire. From side to side, his house is about two paces wide; from back to front, about three paces deep. It is one
pace from the steel bunk to the steel sink-and-toilet combination. The toilet has no seat, just a molded rim of steel. Concrete and steel, steel and concrete.

Under the bunk or next to it is a small steel locker for the prisoner’s belongings. Tightly fixed to one wall is a small bar for hanging a towel. High up the rear of the cell is a ventilation grate about a foot square, and from this grate the prisoner has probably run a clothesline to the bars at the front of the cell. Dangling from the line are his damp white socks, white boxer shorts, blue dungarees, and orange T-shirts—the men of death row wear orange to distinguish them from the rest of the prison population. The prisoner does his laundry in the sink or in the toilet and hangs it overhead to dry. Laundry is a good way to pass time. Once a man learns the slowest, most meticulous way of washing socks, he can stretch that task out over several hours.

The man’s walls may be bare, or decorated with his own artwork, or with pictures of family, or pictures of far-off places, pictures of Jesus, or of Muhammad, or of nude women, or of nude men. A condemned prisoner can survey his whole house with one quick sweep of his eyes: It is essentially a bathroom with a bunk where the tub would ordinarily be. He spends an average of twenty-three hours a day inside, knows every hairline crack and rusty paint chip. If this is a winter morning, it is very cold on death row; if this is summer, it is very hot. It stinks the same regardless of the season, the air thick with the odor of smoking, sweating, dirty, defecating men.

Morning is typically the time for calisthenics, if a man still cares about keeping fit. He lies down on the floor between his bunk and the wall and does sit-ups, then flips over for push-ups, then stands for some knee bends or a little shadowboxing. Perhaps he chins himself on the bars like a monkey, or jogs in place, pumping a book in each hand to tone his biceps. Then he turns himself to the staggering task that is every man’s burden on death row: filling the hours until he can sleep again.

The options are few. There is talk—endless, disembodied, cacophonous, mostly inane talk. The prisoner steps to the front of his cell and begins declaiming loudly, and his voice echoes along the corridor. No one can see him because all the cells face the same way, with
thick walls between them. But everyone can hear him. Talking this way is called "getting on the bars," and some men will get on the bars for hours at a stretch, yammering about motorcycles or politics or blood or fishing. They will tell their life stories for the hundredth time. They'll debate the relative merits of Ferraris versus Lamborghinis, of Ted Nugent versus Marvin Gaye, of the Lakers versus the Celtics, of white women versus black women, of AK-47s versus MAC-10s. They'll describe the engineering specifications of a Harley-Davidson motorcycle from stem to stern. They'll make bets on whether it will rain before sundown. Some men are insane, and get on the bars to rave about astral projection or screaming vaginas or men coming through the ventilation shafts at night. Sixteen men live on each tier, so the conversation soon gets stale, yet it continues, month after month, year after year.

It is possible to shout messages through the air ducts to prisoners on the floors above and below, but "getting on the vents," as this is called, is no way to hold a discourse. It suffices for brief communication only, like smoke signals or semaphore. Real talk is limited to the tired palaver on the bars, and ways must be found to escape its loud monotony. So a man on death row soon learns to cut earplugs from the spongy soles of his prison-issue shower slides, and to sew dental floss to them in case a plug gets stuck in his ear canal. Most men also own a boom box with a set of headphones, which they slip on to slip away. If the music moves a man, perhaps he dances in place. Perhaps he sings along, and his flat, toneless voice joins the rest of the noise on the tier.

Some men keep their houses very tidy, which passes some time and keeps the roaches at bay. Reading passes more time, at least among the men who are literate. Books, newspapers, and magazines make their way from cell to cell, and it's an unwritten but absolute rule that no one steals the reading material. There is no clear logic to the list of publications permitted by Florida's prison officials. Gun magazines are understandably forbidden, but so are many travelogues of such distant places as France and Italy—these are banned under the no-maps policy, as if a map of Tuscany could help a man escape from Starke. Playboy and Playgirl, Penthouse, and Hustler are allowed, apparently on the theory that masturbation has a pacifying effect. A pathological pederast got parts of the Montgomery Ward catalogue through the mail so he could
savor the pictures of boys in their underwear. But an inmate who wanted to have a Mozart score sent to him was turned down. Prisoners are allowed to receive up to four books in the mail four times a year, which means that voracious readers have to ration their pleasure. They savor maybe twenty-five or fifty pages before putting the book down for a day or two, lest their allotment go too fast. And while it is possible to request books from the prison library, this service is unreliable: One man sent in a request for Dickens and got back Louis L’Amour. This reflects the taste of the average prisoner. The day L’Amour died was a sad day on Florida’s death row.

At about 11 a.m., the trusties rattle up once more with their carts and pass lunch trays through the slots in the cell bars. A typical lunch might be a thin sandwich on enriched white bread, a carton of milk, a starchy vegetable, and a square of cake. After lunch, perhaps another hour can be killed with a nap. Then, a literate inmate has writing to do. Long letters to friends, family, lawyers; bad poems and bad novels; journal entries spun from empty days; convoluted claims of innocence, to be shipped off to journalists; legal briefs challenging prison conditions—a few of which are quite ingenious. One inmate came across an Eastern religion that required its adherents to eat only vegetarian meals and to pray each day while kneeling on a special rug. Declaring himself to be among the faithful of that sect, he filed suit demanding his religious freedom. Eventually he won, and soon his religion became the hottest one on death row, as men discovered the joys of special meals and a patch of carpet on their concrete floors. The sect lost some of its popularity, though, when prisoners saw that their vegetarian meals came on trays labeled with their names. This made it too easy for an enemy somewhere in the prison to mix a little spit or urine or ground glass into their food.

Some men’s writing is devoted to elaborate cons. They comb personal ads in magazines and newspapers, looking for likely marks. A popular diversion is to strike up pen-pal relationships with lonely homosexuals, then get on the bars and scornfully read the letters they receive. One guy came across the address of an elderly woman in Georgia, and sent her a moving letter. He said he was a pilot, he had been badly injured in a crash, and he needed a few thousand dollars for an
operation. The woman's tender heart was touched, and she sent a check for the full amount. The scam would have worked had the warden not called the woman's bank. Other ploys have worked even better. One day, a man arrived at the prison administration building and announced he was there to pick up Frances. The warden was summoned. "What on earth are you talking about?" he asked.

"Frances," said the man. "She is in your prison and today is her release date. I'm here to pick her up, and we're going to be married." Solemnly, the man acknowledged that Frances had done some bad things in the past, but he knew from her letters that she had mended her ways. And he produced the letters, each one lovingly cherish in its original envelope. On each envelope, in compliance with prison regulations, was the author's cell number, which was on death row. "Look," the warden said. "There's no Frances getting out today or any day. Your pen pal is never walking out of here. Go on home."

When an inmate gets tired of writing, he can draw. On sketch pads purchased from the prison canteen, he can engineer airplanes. He can map the battles of great wars, real and imagined. He can design vast mansions, down to the last inch of the floor plan, every stick of furniture, each swatch of upholstery, each doorknob and light fixture. He can draw Christ on the cross, or a muscular biker with evil tattoos. He can sketch an electric chair draped with the American flag, or scenes of hideous gore. (In recent years, a small but lucrative market has sprung up for inmate art. John Wayne Gacy, a serial killer executed in Illinois in 1994, sold drawings of clowns and cartoon characters for as much as two thousand dollars.)

And still all of these activities don't begin to fill the time—not when there are 365 identical days of the year and the years pile up one on the next. Time is the thing these men have in crushing abundance; they struggle to consume it in profligate portions. A condemned man learns to make picture frames from aluminum foil. He plays poker with the man in the next cell, each of them crouched close to the bars on either side of their common wall, dealing the cards onto a towel in the corridor. He plays chess with the guy three cells down, getting on the bars to shout his moves. Anything to make the time slide: Crocheting is popular. The killers of death row hook yarn into hats, slippers, shawls,
oven mitts. Knitting is banned, because you can kill a man with a knitting needle.

Caged in a room two paces wide and three paces deep, even the most creative man, bent on self-distraction, needs something more powerful than his own wits to get him through. That something is television. God, it drives the hard-liners in the legislature and the firebrands of talk radio crazy to think that prisoners on death row have TV sets in their cells. Coddling the criminals! Indulging them with luxuries! It would be hard to find a prison guard, though, who opposed the sets. Television is the only thing that makes death row manageable. The prison staff has a special nickname for those TV sets, thirteen inches diagonal, black-and-white screen, one in every cell. "Electronic tranquilizers," they call them. Once, when a Florida lawmaker told a prison official he should strip those sets from the cells of those vermin, the prison man said, "Fine. You go in there and take them out." The place could not exist without the tube.

Some dim bulbs on death row watch cartoons all day long. (One man heard about his last-minute stay of execution while watching The Flintstones.) Some men are devoted to soap operas. Whole tiers get on the bars every night and race one another for the right answers during Jeopardy! Some watch the cop shows and cheer for the bad guys. At noon, and again at six in the evening, most prisoners watch the news—and they all watch the same station so they can have something in common to talk about. Sensational murder trials are followed with acute interest, and if the defendant gets something less than the death penalty, the men on the row get on the bars to decry the sentence. "Man, that bastard should be sitting here with me!" someone shouts. "What the fuck? I killed one guy and I'm here, he kills two and gets rewarded?"

Television fuels the gambling. The men of death row bet the ball games, bet the boxing matches, bet the dog race results. A couple of death row prisoners once discovered that by listening to the finishes at the dog track live on an obscure AM radio band, they could learn the winners a full hour before the information turned up on TV. They cleaned up on bets, losing just enough to cover their scam.

And television nourishes the last tendrils of identity by which the
inmates distinguish themselves from the gray heap of waste souls around them. A World War II documentary comes on the tube, and the white supremacists cheer Hitler. A Malcolm X documentary comes on, and now the Muslim brotherhood is cheering. A man falls in love with the lady who does the weather. Another man fantasizes about the blond boy on a particular sitcom. Yet another man measures his week by the approach of the Saturday afternoon bass-fishing shows. When the human mind runs out of ideas—as it does very quickly on death row, where the men are mostly stupid and the time is very long—television fills the void. And so the tube glows and natters almost ceaselessly as life crawls by in the death house.

Dinner arrives about 4 p.m.: a pork chop, or a piece of liver, maybe chicken, or “mystery meat,” and more starchy vegetables. Prison cooks know about a million ways to fix potatoes. As the prisoners sit on their bunks, facing their toilets with their trays on their knees, they shout complaints about the food. Someone finds a hair in his tray. “Musta been a black guy fixed my food,” he calls out. “I got wool in my mystery meat.” Someone calls back, “Mine musta been a blond.”

The other luxury that makes the time barely endurable is the canteen cart. For each man on death row, the prison maintains a sort of bank account, where the inmate collects the money he gets from family, lawyers, friends, and the suckers he can con without being caught. He is allowed to spend up to $25 a week from this account at the prison canteen. Since he can’t get out of his cell to go to the canteen, the canteen comes to him. On Thursdays, runners take orders for “dry goods”—chips, pastries, coffee, tea, hot chocolate, tobacco, paper, pens, and so forth. The limit is four of each item (with the exception of candy bars; ten of those are permitted), but the limits can be evaded. Death row is a thriving barter economy. Say a man wants more than four pastries—he bargains. Maybe he doesn’t smoke, so he orders extra cigarettes for the man next door while the man next door orders pastries for him. The bargaining is endless, and another way to pass time. More expensive items are also peddled by the canteen: radios, sneakers, art supplies.

Dry goods ordered on Thursday are delivered the following Monday. On Tuesday, runners take orders from the canteen for sandwiches,
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dry soups, and sodas. These are delivered on Wednesday. On Friday the ice cream cart comes around, stocked with bread, lunch meat, and Howard Johnson’s ice cream. The canteen also sells orange juice, of course—it wouldn’t be Florida without orange juice. On the row, juice is the essential ingredient in “buck,” which is home-brewed prison booze. Take orange juice, add a little sugar and a few bread scraps for yeast, and—in the heat of a cell in summer—fermentation begins. Most buck doesn’t taste very good, but, hey: If a man plans properly, he can brew enough during the week to get buzzed while watching a ball game on Sunday. Just like home. And if a man has no juice he can get some buck going using the syrup from the fruit cup at lunch. Resourcefulness is all.

A man learns to shift. Even on death row, he is part of that same human race that figured out how to budge boulders with a stick, how to chip flint into arrows, how to coax fire from a spark. He has technology in his genes. So he learns to use a handheld mirror—a “spook”—to see what’s going on along the corridor. He holds the mirror through the bars, at a forty-five degree angle to his face; he can see everything. He learns to make a fan from a piece of cardboard, a length of yarn, and a pen. He learns to make a “waterbug,” a crude wire heating element that can boil water for coffee or soup. And then he learns other uses for his waterbug, like heating baby oil into a sort of napalm.

At one point, the men on death row learned to make zip guns: A section of radio antenna formed the barrel, the heads of matches worked for gunpowder, and the bullets were balléd-up pieces of toothpaste tube. The zip gun problem got so bad that the warden proposed banning matches, which the guards promptly told him was nuts. A prison without matches? What are they gonna light their cigarettes with? The zip gun problem persisted.

Finally, the desperate warden took a couple of disposable butane lighters into the cellblocks and handed them to a lifer with a gift for fashioning explosives. “Make a bomb,” the warden said. You have to take risks to run a prison. A week later, the lifer pronounced the task impossible; there was no way to detonate a butane lighter, he said. So matches were banned, and that was the end of the zip-gun era. But something more lethal may yet come along; the men of death row can
be devilishly clever. "Hell," one boasted once, "if they'd give us a little education in physics, I bet we could come up with cold fusion."

Twice a week, the sixteen men on each tier are taken outside for two hours of exercise in a narrow yard, reserved for them. There is just space enough for half a basketball court, a volleyball court with a string for a net, and a bench with a rusty set of weights. In the early days of the modern death penalty, there was a patch of dirt for playing football, dusty in summer, muddy in winter, but that was soon paved over. More blacks than whites play basketball; more whites than blacks play volleyball. Some men do not exercise at all, preferring to loll by the fence in the sunshine, trying to get some color on their prison pallors.

A chain-link fence separates the death row yard from the main prison yard; now and then, a man from the general prison population might sidle up to the other side of the fence and slip a marijuana joint or a few pills through the mesh. Some men do not come outside at all, for reasons of sloth or safety. Older, weaker men might come out only once every few months, and then only in pairs, to talk and walk in slow circles around the fence. They travel in pairs for safety. Snitches and child molesters almost never take exercise; someone might try to kill them. Still, there's not a lot of fighting on the yard because each infraction means losing your exercise privilege for a year.

Twice a week, usually after dinner, there is shower time. A man strips to his shorts, slips his feet into his shower slides, and shuffles alongside a guard to a steel cage the size of a shower stall. He's locked in, and the water comes on. He hopes it is warm. Five minutes later, the water stops, and he's led back to his house.

Lights out comes at 11 p.m., but only the ceiling fixtures in the cells are dimmed; the corridor lights burn eternally. Televisions flicker with talk shows and old movies into the wee hours. Men lie on their bunks and stare. Sex on death row is primarily a solo affair, consummated in these dark hours with fantasy lovers conjured from imagination and porn. It is not unheard of, though, that an enterprising trusty might, for a fee, arrive at the bars of a man's cell to perform fellatio. Or on visiting day, a guard might—again, for a fee—look the other way as a man and his guest duck into the bathroom together.

The prison is never completely quiet. Gates are always clanging,
there's the tread of guards, the nightmare ravings of the insane, the muffled sobs of despair. Night noise segues into the din of a new morning. The clock creeps round to 5:30 A.M., and another, identical, day comes to death row.

In this dull hell there are those men who, like John Spenkelink, use the time and discipline and solitude of death row to make something more of themselves than they ever managed on the outside. Vernon Ray Cooper, for example, had been a high school dropout and sometime cab driver. He and a friend named Steve Ellis held up a grocery store in Pensacola in January 1974. They made their getaway in Cooper's black Camaro. As they sped onto Interstate 10 heading west, deputy sheriff Charles Wilkerson spotted their car and switched on his flashing lights. The Camaro stopped on a dark stretch of road. Someone —either Ellis or Cooper— got out of the car, walked quickly to the cruiser, and fired two shots into Wilkerson's head. The killer raced back to the Camaro and the car roared away.

Two more deputies, in separate cars, quickly caught up to the robbers and, after a wild chase, forced them to a stop just across the Alabama line. Ellis jumped from the driver's side and put his hands over his head. One of the deputies, gun drawn, began patting him down. Just then, Cooper, still inside the car, fired a shotgun blast into the floorboard. The lawman flinched—and in that momentary diversion Ellis pulled a .38 from under his coat. He raised it toward the deputy, but the deputy was quicker. The lawman fired, and Ellis was dead.

Cooper squeezed off another round from the shotgun, shattering the rear window of his car, and slipped the Camaro into gear. Hunched low, he steered the car more than a mile as the deputies fired round after round after him. When he crashed into an embankment, Cooper slipped out of the passenger door and started running. Some five hundred people joined the search. It was like something from a movie, flashlight beams streaking wildly through the trees, dogs baying, men shouting. After several hours, Cooper was discovered lying in a ditch, the sawed-off shotgun pressed beneath him. Charged with Wilkerson's murder, he steadfastly maintained that his dead partner had been the
triggerman. The prosecution offered a life sentence if Cooper would plead guilty, but he declined. He drew the death penalty.

On death row, Cooper began educating himself, reading widely and deeply, choosing his books carefully, everything from the Greek classics to modern poetry. Over time, he transformed himself from an ignorant cracker into the sort of man who would quote the forlorn poetry of a lesser English writer named Thomas Hood. “But now ’tis little joy,” Hood wrote in a favorite poem of Cooper’s, “to know I’m farther off from heaven than when I was a boy.” If you asked Vernon Cooper to describe his prison life, he would politely direct you to Oscar Wilde:

\[\begin{align*}
I \text{ know not whether Laws be right,} \\
Or whether Laws be wrong: \\
All that we know who lie in gaol \\
Is that the walls are strong; \\
And that every day is like a year, \\
A year whose days are long. \\
\ldots \ldots \ldots \ldots \ldots \ldots \\
\text{The vilest deeds like prison weeds,} \\
\text{Bloom well in prison-air;} \\
\text{It is only what is good in Man} \\
\text{That wastes and withers there:} \\
\text{Pale Anguish keeps the heavy gate,} \\
\text{And the Warden is Despair.} \\
\ldots \ldots \ldots \ldots \ldots \ldots \\
\text{Each narrow cell in which we dwell} \\
\text{Is a sad and dark latrine,} \\
\text{And the fetid breath of living Death} \\
\text{Chokes up each grated screen,} \\
\text{And all, but Lust, is turned to dust} \\
\text{In Humanity’s machine.}
\end{align*}\]

There are such men on death row, seemingly redeemable souls, men who could live out their lives behind bars with a little dignity and some grace. There are also men so vile as to beggar imagination.
Johnny Paul Witt was one of these. On an October morning in 1973, Witt set out from his home near Tampa with a friend named Gary Tillman. They were going hunting—for a human being. They had gone hunting together like this before, without success.

This time, they spotted a boy on a bicycle leaving the parking lot of a 7-Eleven store, where he had gone to buy some candy. Witt and Tillman stalked the boy as he rode through a woods toward home. Witt sprang, battered the boy’s head with a drill, and then, with Tillman’s help, gagged the boy tightly and stuffed him into the trunk of their car. They drove about ten miles to an orange grove, stopped, and pulled the boy from the trunk. He had died of suffocation.

They raped the body, first Tillman, then (impotently) Witt. They cut off the boy’s penis and put it in a jar, like a trophy. They buried the child in a shallow grave, buried the jar in another forest. Tillman got a life sentence for testifying against Witt; Johnny Paul Witt was condemned to death. On death row, he never left his six-by-nine cell, because he knew what would happen if he stepped outside.

Mere boys have gone to death row. George Vasil was just fifteen years old when he was sentenced to die, the youngest American in a death house at the time. He wanted what boys want at fifteen, wanted it desperately—but he was never able to get any because he was pimply with a mess of greasy black hair and wore thick glasses and had no charm. His first attempt at seduction was also his last; he fumbled and groped and when she resisted it turned to rape. Vasil was so agitated that he couldn’t manage an erection, and that frustrated him so much that he picked up a rock and hit the poor girl over the head. She began screaming so he stuffed her panties into her mouth. She died, battered and choking. Vasil was death row’s wretched youth.

Jacob John Dougan Jr., on the other hand, was an impressive and magnetic man, proprietor of the Black Karate Association at Jacksonville’s Afro American Cultural Development Center. Dougan was suave with the ladies, and much admired by young men, who flocked to his martial arts classes. Dougan’s teachings were an idiosyncratic blend of the physical and the philosophical, karate mixed with militant black nationalism. Dougan formed a coterie of his admirers into a
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brigade which he called either the Black Revolutionary Army or the Black Liberation Army—he waffled back and forth on the name.

On June 17, 1974, Dougan and four members of his army set out in their car in search of a white “devil” to kill. In a nearby beach town, they found an unlucky hitchhiker named Stephen Orlando, offered him a ride, then drove to a garbage dump and ordered Orlando out of the car. Elwood Barclay stabbed Orlando twice. As the victim struggled, Dougan fired shot after shot into his head until the gun jammed. Cheap American-made gun, Dougan later complained. He had wanted to fire more.

After killing the hitchhiker, Dougan took a note which he had prepared in advance and stuck it to the corpse with a knife. “Warning,” said the note, “to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. . . . All power to the people.” Over the next several days, Dougan and Barclay recorded a number of rambling screeds about white devils and black oppression and the comparative size of brains among the races. Then they sent the tapes to local radio and television stations. Jacksonville was terrorized, and for two months, there were no clues.

The case broke on a fluke. A detective happened across a letter of resignation from an antipoverty program, and something about the handwriting struck him as familiar. He retrieved the note that had been stuck to Orlando’s body. The writing was the same; the signature on the resignation letter was Jacob Dougan’s. Later, the voice and fingerprints on the tapes were also matched to Dougan. Ever the ladies’ man, Dougan was arrested by police in the bedroom of a girlfriend—a white devil, as it happened.

There were old men, too, on death row. Anthony Antone, an eccentric inventor, occasional jewel thief, and middleman in a murder-for-hire, was sixty-one years old when John Spenkelink was executed. During an earlier stint in prison, Antone’s head had been smashed by an inmate in a case of mistaken identity. After that, things were never quite right between the ears of the amiable Antone. “They removed part of my brain due to an infection of cockroaches crawling around in

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my head," he explained. The spindly old man wandered the exercise yard sweetly giving his neighbors the creeps. He would buttonhole them to explain that he had discovered the secret to escaping gravity. Just push an invisible button and off you go. Flying!

David Washington was death row’s beautiful athlete, quick, lithe, and graceful. When he wasn’t in the exercise yard, he could often be heard weeping in his cell. True remorse is rare on the row—most of the men there have nothing but empty space where their conscience should be. But even hardened observers tended to agree that Washington’s remorse was real and gut-wrenching. He had a wife and a baby in a Miami slum when, in September 1976, he lost his job and fell completely, violently, to pieces. Washington was in a laundromat one day, worried about being evicted, when a man approached and identified himself as a minister. The minister suggested they might get together for a date, suggested there might be a little money in it for handsome David Washington. So Washington went to the man’s house. The minister proposed that Washington strip and straddle his face.

"I just stabbed him with a knife," Washington later told an interviewer. "I stabbed him about five times. The only thing going through my mind, I said, ‘Here I am out here trying to get some money to feed my family, and here go a minister, supposed to be a minister in the church, running around doing stuff like this.’"

Tragically, once he snapped he stayed broken. In the span of a week, David Washington killed three times. He barged into the home of some old ladies in the neighborhood—he believed they ran a fencing operation, though newspapers reported only that the old women “ran frequent yard sales.” Washington brandished a gun and began tying them up. One of the women rose from her chair, and Washington started firing wildly. Blood everywhere, one woman dead. Next, Washington kidnapped a student from the University of Miami, robbed him of eighty dollars, and considered holding him for ransom. Instead—as the young man recited the Lord’s Prayer—Washington stabbed him to death.

He waived a jury trial, confessed everything to the judge, and received a death sentence. Until they paved the dirt football field in the death row exercise yard, Washington juked and glided through the
defense like a gazelle. He spent most of his time admitting and apologizing for what he'd done, which made many of the other men on the row uneasy.

Contrition was not the route that Bob Sullivan chose to pass his time. Indeed, when Sullivan's death sentence was imposed, the judge noted that the defendant displayed not "one scintilla of remorse." Sullivan's explanation was simple—he insisted he was innocent—but the evidence was very strong that Sullivan did rob a Howard Johnson's restaurant and murder the night manager. Many of the men on death row steadfastly protested their innocence; Sullivan was just the most energetic. Joseph Green Brown was unusual because when he said he was innocent, he actually appeared to be telling the truth.

Brown was convicted of raping and murdering a clothing store clerk in 1973, largely on the testimony of a man who claimed to be an accomplice. Within eight months of the trial, the alleged accomplice admitted that he had fabricated his story because he had a grudge against Brown. No other evidence linked Brown to the crime. His gun had been produced in court as the likely murder weapon; unfortunately for Brown, his attorney neglected to subpoena the FBI ballistics expert who could prove that Brown's gun had not killed the clerk. Brown waited sullenly as his appeals ground slowly through the courts, hoping for a sympathetic judge.

No man was better liked on the row than "Crazy Joe" Spaziano, a motorcycle gang member who was sentenced to death for the rape-murder of a teenaged girl. Spaziano was tough, crude, and funny—all traits admired by his fellow inmates. No man was more despised than Arthur Frederick Goode III, who raped and murdered two boys and gloated about it afterward. Goode spent all day on the bars, delivering running commentary on the "sexy" child actors on television, and he whimpered through the night. When prisoners passed along the corridor outside his cell, they often tossed a cup of urine or a ball of feces or a flaming page of newspaper at him. The guards generally ignored this—they hated Goode as much as the inmates did; he was always asking them if they had young sons at home. Eventually, after the inmates signed a petition demanding that Goode be moved off the row, he was

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Among the Lowest of the Dead: The Culture of Capital Punishment by David Von Drehle

relocated to the isolation cells of Q-wing, where he wrote rambling letters about the joys of pedophilia.

Even the lawyers and chaplains and activists who routinely visited death row inmates dreaded spending time with Goode. On the rare occasions when someone did take pity and paid him a visit, the only way to endure the hour was to ignore his paranoid and perverted rants. One day a lawyer named Joe Nursey traveled to death row to visit a client, the newly incarcerated serial killer Ted Bundy. As a favor to a softhearted friend, Nursey also agreed to see the despicable Freddy Goode. He met first with Goode, and for an hour the prisoner blabbered senselessly about a "bad one" who had somehow stolen into his cell and devoured his supply of cookies. Nursey nodded and smiled and let his mind drift. Christ, he thought, this guy is bizarre. At last the hour was over and Goode was led from the visiting room and Bundy was brought in.

At the time, Bundy was also living, temporarily, in an isolation cell on Q-wing. "Joe," Bundy said after he settled into a chair, "I have a confession to make." Nursey braced himself. When Ted Bundy says he wants to confess something, God knows what's coming next.

"I'm in the cell next to Goode," Bundy said. "And last night I talked him into giving me a cookie, and when he did—I feel really bad about this, see—well, I ate the whole box." It was true: A bad one had stolen Goode's cookies. A very bad one, indeed.

So many stories, each unique in its sordid details. Benny Demps had been one of ninety-seven prisoners on Florida's death row in 1972 when the news came that the U.S. Supreme Court had struck down the death penalty. He had known the relief of having his sentence reduced from death to life. But then he had stabbed an inmate to death, and now he was the only one of the ninety-seven who was back on the row. Daniel Coler was the only one facing death for a crime other than murder. He had raped his daughter, and though the U.S. Supreme Court had eliminated the death penalty for rape, Coler was still waiting for the Florida courts to comply with that order. Steve Beattie was the only man on death row who could say he had been Ann-Margret's bodyguard. After his star-guarding days, he had opened a health club in Miami; he had then murdered his business partner as part of an insur-
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ance fraud. Beattie passed long hours in his cell planning the best way to commit suicide. There were more than 130 death row stories by the late spring of 1979, and what was unique began to fade as they intertwined in a hideous tapestry. This was the death house: a mixed bag of misfits, failures, and predators; half-wits and a few semisavants; figures of tragedy and figures of horror; crazy men and sane ones. It's scary, and deeply depressing, how many ways there are for human lives to go wrong, how many faces evil wears, how many modes can be found to flout even the simplest of the Ten Commandments: Thou shalt not kill.

Two days after John Spenkelink went to the chair, The Miami Herald ran a postage-stamp-sized mug shot and a sentence or two describing every man on the row. This project required two entire broadsheet pages. They were as densely packed as freshman photos in the yearbook of a huge state university. In the governor's office, the Herald package was like a tennis racquet in the face. No one had really stopped to think just how many men were waiting to die. How could anyone keep them all straight, let alone get them all executed?

The shock of all those faces peering out of the pages of the Herald was also felt among the people who worked to thwart the death penalty. Before May 25, 1979, they were a pretty confident group. They had believed that the ambiguous facts of John Spenkelink's case would stymie the State, that his execution would be blocked, and months, or even years, would pass before prosecutors could push another, stronger, case to its end. Spenkelink had everything going for him, they thought: His crime was not unmitigated, he had shown himself fit for rehabilitation, and he had a terrific group of lawyers. (David Kendall would later become the personal attorney to President Bill Clinton.) They had not counted on the willingness of so many judges to let Florida get on with its grim business.

But now Spenkelink was dead, and the thought dawned that everyone on death row was vulnerable. Moreover, there was no great public outcry against the execution; any hopes of turning political pressure against the death penalty faded rapidly. The battle was going to have to be waged primarily in the courts.

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It was a dizzying prospect: If every man was vulnerable, and if the battle had to be fought in the courts, then every man in the Herald's death row census would potentially require the superhuman efforts marshaled on Spenkelink's behalf. Someone gifted with foresight might have looked at all those mug shots and realized that the drama of the modern death penalty was not going to be the gruesome story of inmates and their crimes—it was going to be a chaos of lawyers and litigation.

But where would all the lawyers come from? Under state law, a death-sentenced inmate in Florida was entitled to free legal counsel only through the first appeal to the state supreme court. After that, he was on his own. The small community of death-penalty opponents quickly realized that neither the Inc. Fund nor Millard Farmer's Team Defense had anything approaching the resources necessary to defend upwards of 130 condemned clients in Florida.

Over the next ten months, Governor Bob Graham signed six more death warrants; volunteer lawyers were found to block each execution with an appeal. Victories were still possible. In the same period, however, death row grew by more than twenty new inmates. Local trial judges around Florida were handing out death sentences like highballs at Caesar's Palace: The rate of new sentences soon approached one per week. The central problem—the problem of finding sufficient resources to fight the Spenkelink fight a hundred and fifty times over—only deepened.

Finding the lawyers to represent the flood of condemned men was like bailing out the Titanic with a teaspoon. The teaspoon had a name: Scharlette Holdman. Scharlette Holdman had a title: director of the Florida Clearinghouse on Criminal Justice.

It was a rather grand title, but anyone who has spent much time around the lobbies of government knows that, as a rough rule of thumb, the grander an organization's name, the smaller its actual resources. Exxon, the Tobacco Institute, the Rand Corporation—simple names, huge clout. By contrast, the Florida Clearinghouse on Criminal Justice was basically Holdman and a secretary and a few occasionally
compensated volunteers. The Clearinghouse had a one-room office in a drab two-story office block known around Tallahassee as the FOG Building, short for Forces of Good. Low rents for the FOG Building's shabby little offices attracted a broad array of underfunded, overmatched public interest organizations. Holdman, with an annual budget rarely exceeding $25,000, operated on one of the shortest shoestrings of them all.

Scharlette Holdman had brains, passion, charm; she had a foul mouth, a dark sense of humor, and a bottomless well of energy; she hated authority, scorned convention; she saw the world in starkly simple terms: The haves screw the have-nots. Crime, in her eyes, was the inevitable fruit of an unjust, racist system. If this view was too spare, too easy, it was nonetheless one she had come by honestly, and it was essential to her work. There were times when she stood virtually alone against the will of the public and the force of the State, and such stands are impossible without certainty.

She was the daughter of a hardheaded businessman from White Haven, Tennessee, a man who had started with nothing and hauled himself into the upper middle class as a landlord of the Memphis slums. Holdman's childhood coincided with a terrible time for the South, when racial segregation was laid bare. The body politic was shown to be diseased . . . and yet the institutions and authorities claimed that this system was a healthy and vital organ. Because Scharlette Holdman was an intelligent, spunky child—editor of the yearbook, captain of the cheerleaders, "president of everything" at her high school—she saw that power was being abused in defense of bigotry. And this turned her against authority, as it turned so many of her generation.

Her view of authority was also corroded at home. Holdman's father tolerated no back talk, brooked no dissent, even from Scharlette, who was arguably his favorite child. The father perceived great promise in his clever, energetic daughter, and looked to the day when he might turn his business over to her. Toward that end, he often took Scharlette along when he went to collect rents and evict clients at his slum properties. He called this "going niggering." His racism only deepened Holdman's sense of an unjust social order and her contempt for power.

She saved her rebellion until she was out of the house, and at first
it was mild—joining registration drives for black voters, that sort of thing. Her father disapproved, of course, so Holdman left Memphis State and moved to Washington to get some distance from him. She joined the antiwar protests there, but she still had a lot of the well-behaved yearbook editor in her. Holdman met and married the first man she dated in Washington, a third-generation college professor and Republican from Pennsylvania. She was twenty-one years old and worried about becoming an old maid. Her husband offered the prospect of a quiet and orderly life. "He didn't drink or beat up women," she later told an interviewer. "I said . . . 'I'll marry him.'"

Holdman was, apparently, more changed than she realized. Domestic life was too conventional for her, and at twenty-five she packed up her two small children, daughter Summer and son Tad, and moved to Boston, where she went to work in an organic bakery. Her split from the middle class was complete. She threw herself into liberal causes, eventually landing a job as director of the American Civil Liberties Union in Hawaii. From there, she moved with the ACLU to New Orleans, to Mississippi, and eventually to Miami. To Holdman, Florida in the late 1970s was the center of the action, the fulcrum of a great national change. Outsiders, many of them Yankees, were pouring into the state. When Holdman arrived, Reubin Askew was the governor, perhaps the best of the New South progressives. Battles were being fought over gay rights, abortion, the Equal Rights Amendment, and the death penalty, and Holdman could picture winning some of these battles. She threw herself eagerly into fundraising, cajoling potential donors with her view of Florida as "the bellwether state."

Money for the Miami ACLU chapter soon dried up, however, through circumstances outside Holdman's control. The national ACLU was defending the right of Nazis to march through the mostly Jewish city of Skokie, Illinois, and the liberal Jews who formed the spine of Holdman's support in Miami closed their checkbooks. She took a job that paid $600 a month, heading the Clearinghouse on Criminal Justice in Tallahassee. She had been on the job just a few months when John Spenkelink was executed.

Holdman, perhaps more than anyone else, perceived the legal vacuum on death row, perceived it in the most personal way possible. "I
said, Wait a minute. You mean, if I don’t find lawyers for these guys, the State’s gonna kill them all?” she recalled. And she concluded that
the answer was yes. Holdman took on the job despite being imperfectly
suited to it. Along her vagabond activist’s path, she had managed to
earn a master’s degree in anthropology, but she knew almost nothing
about the law. The Latinate language of legal writ writers—mandamus,
habeas corpus, certiorari—was all Greek to her. Someone told her that a
maximum of ten appellate steps stood between a death sentence and the
electric chair. Holdman found an old ledger and divided the pages into
ten columns, one for each step. Then she took the ledger to Deborah
Fins of the Inc. Fund and asked Fins to mark the steps where an inmate
was most vulnerable to a death warrant. Next, Holdman created a line
for every condemned prisoner in Florida, and began marking which
steps each man had completed. This was painstaking work, and the
men on death row were little help; most of them had even less under-
standing of the legal process than Holdman did. They had no idea
whether they were on step two or step eight; some of them couldn’t
even read. Even the smart ones could be flummoxed by legal proce-
dure. (Doug McCray, a former honor student, once received a sheaf of
routine legal papers in the mail, along with a note from a secretary
saying the papers were “for your execution”—meaning that they re-
quired his signature. McCray saw the word “execution” and went into
a panic.) Holdman had to scrounge through legal files and hunt down
lawyers across the state, trying to figure out precisely who stood where
on the road to Old Sparky.

Eventually, though, after months of effort, she compiled a crude,
but fairly complete, log of the legal status of Florida’s death row.
Whenever a new inmate was sentenced to death, Holdman added an-
other line in the ledger, and as the months went by and cases crawled
through the courts, she updated her ledger using pencil and correction
fluid. She was like a medic performing triage at a train wreck: The first
job was to determine who was closest to dying.

Yet that task was easy compared to the second: finding attorneys
willing to represent her clients. On the surface, this might not have
seemed so difficult; Florida was crawling with lawyers, some thirty
thousand of them licensed to practice. The state was a burgeoning
mecca of millionaires and entrepreneurs, real estate developers and boiler-room scam artists, drug dealers and grifters and tax-dodging financiers, and lawyers flourished amid all that money. Neither Scharlette Holdman nor the men on death row had any money to offer, though. Moreover, public-spirited lawyers had hundreds of needy and decent causes clamoring for their pro bono efforts. Churches and charities and destitute widows all needed free legal help, and all made more appealing clients than some murderer in the death house. Public opinion polls showed that upwards of 80 percent of Floridians favored the death penalty, and many of them might balk at the idea of taking their business to a defender of condemned thugs. For that matter, most lawyers in Florida felt the same way about capital punishment.

Even the few attorneys who believed in Holdman’s cause could be intimidated by a death case. All they had to do was look at David Kendall’s long fight for John Spenkelink. A proper appellate defense could drain thousands of dollars for private investigators and legal researchers, thousands more to prepare and copy and file briefs, and still more thousands traveling to far-flung courthouses. The cases could drag on for years and—worst of all, in the minds of some lawyers—the cost of failure was nearly unbearable. It was one thing to lose a landlord-tenant dispute done free through the Legal Aid Society. Your client would probably find another apartment. Take a capital case and lose, though, and you have a dead man on your conscience.

All day, every day, Holdman sat at her telephone in her shabby office at the FOG Building, chain-smoking Benson & Hedges cigarettes with one hand and dialing with the other. Quite a sight she was: hair frizzed, feet bare, body rocking in a cheap swivel chair, face lost in a cloud of smoke. She called the heads of local bar associations and asked for recommendations. She called managing partners at big law firms and inquired about their pro bono programs. She got rosters of various liberal organizations and cross-indexed them with the state legal directory, targeting potentially friendly lawyers for calls. She haunted law conferences, scouting for likely prospects. Holdman spent so much time on the telephone in search of lawyers that one Christmas her secretary gave her a cushion for the receiver to prevent cauliflower ear.

Luckily for Holdman—and, more to the point, for her clients—
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she had a glorious gift of gab. From the moment a lawyer answered the phone, Holdman kept up a steady line of pleading, cajoling, flattering, and noodging, all spiced with a dark but hilarious wit. Scharlette Holdman talking was a natural force, like a hurricane or a rockslide; she was unstoppable. If she was in the mood to tell the truth, she would ask the lawyer for "three years of your life and ten grand out of your pocket," which was her estimate of what a decent capital appeal might take. But Holdman was rarely so candid. Instead, she'd say that so-and-so on death row was in danger of dying unless a simple appeal was filed, and couldn't the lawyer just give her a week . . . just three days, maybe . . . a weekend . . . to draw up the brief? The lawyer on the other end of the line might start stammering for an excuse, but it had not taken Holdman long before she had heard every imaginable excuse and had learned how to cut in quickly and quash each one. She'd promise to gather all the files. She'd arrange all the typing. If the lawyer protested that he knew next to nothing about criminal appeals, Holdman would answer, in her sweetest former cheerleader's drawl: Don't worry, we'll get somebody to help you.

At the end of each call, she made a notation on an index card and added it to the pile she kept beside her ledger. "A street fighter," she wrote on the card of one eager prospect. "Will help us but only in a crunch," she noted on the card of a less enthusiastic possibility. "Only into $$$$$," she scribbled under the name of one unpromising target. Most of the time she had nothing to note but an outright rejection. But Holdman kept going, fueling herself with Kentucky Fried Chicken and coffee in the daytime, cheap whiskey or jug wine at night. Sometimes, during a frantic day of phone calls, she'd look up and it was 8 P.M. and she'd realize she had nothing in the refrigerator for the kids to eat. On such days, Holdman would make a mad dash to McDonald's and then hurry back to work. More than once, her electricity was cut off because she had been too busy to pay the bill.

It was an impossible job, countering the full power of Florida's government with nothing but a telephone, a pencil, and a motorized mouth. But her work allowed her to upset authority, and there was nothing Holdman loved more. Now and then she would take time away from the phone to organize a Yippie-style protest. One time, for
example, she and about a dozen volunteers, including the radical priest Daniel Berrigan, interrupted a meeting of the state cabinet with a mock execution. Another time, after discovering that Florida Attorney General Jim Smith’s birthday fell on the anniversary of the Spenkelink execution, Holdman baked a cake and decorated it with black licorice crosses, one for each of the death warrants signed to that point. She rounded up a group of kids to deliver the cake to Smith. When the attorney general emerged from his office to receive what he thought would be birthday greetings, he was met by a chorus of “Happy Deathday to You.” (Holdman later heard that a bomb squad had been called in to examine the cake. “If I’d known he wasn’t going to eat it, I wouldn’t have used real cake mix,” she joked.)

After about a year of her impossible work, Holdman had identified perhaps a hundred lawyers willing to help to some degree, ranging from the barest cooperation—a grudging agreement to sponsor the work of an out-of-state lawyer—to a few full-fledged commitments to shoulder one case after another. The population on death row was pushing 160 by then. She kept dialing.

Scharlette Holdman was the heart of the campaign to save the doomed of Florida’s death row. Craig Barnard was the brains. Holdman found the lawyers, Barnard advised and educated them. Law schools don’t teach you how to craft death penalty appeals; this was an arcane and complicated world unto itself, a world just beginning to be made. Craig Barnard, the chief assistant public defender in West Palm Beach, knew everything there was to know about this world.

His title hardly matched his status. Barnard’s official job was to run a single public defender’s office in one medium-sized district of the state. But death penalty opponents were in no position to worry about the authority granted by official titles. Craig Barnard had talent, vision, and dedication; he knew how to organize and how to lead people. They quickly made him their teacher, guide, rabbi, counselor, and chief strategist in the effort to save Florida’s condemned.

Holdman and Barnard were yin and yang—Holdman a brash, hard-drinking, sixties throwback; Barnard the quiet, pipe-smoking, so-
ber son of Midwest Republican stock. What they shared was a fervent belief that the government could not be trusted to decide who would live and who would die. Holdman recruited lawyers and Barnard mapped tactics; together they devoted themselves to preventing quick and easy executions. In the first months after Spenkelink, they succeeded case by case. Governor Graham signed four more warrants in 1979, and six in 1980. In all ten cases, defense lawyers were found, appeals were filed, executions were stayed.

Craig Barnard could count, however, and the math was flowing against him. Death row was growing like mold, and a small army of inmates was advancing steadily through the boxes in Holdman’s ledger. As long as they had the lawyers, they could fight case by case—but they didn’t have enough lawyers. Barnard’s task, the job of the guru, was to develop legal issues that would cut across many cases; if he could find the perfect issue, it would wrap up every case on death row.

Picture the distinction: Say John Doe is on death row. John Doe’s lawyer could file an appeal claiming that the key witness at Doe’s trial had an undisclosed grudge against Doe. Police knew about the grudge, and by law they should have disclosed it to the defense. They didn’t. The appeals lawyer had to dig it out. Therefore, Doe’s death sentence is illegal. Such an appeal might take months of investigation to develop, hundreds of hours of a lawyer’s time. And even if it was successful, it wouldn’t help anyone besides John Doe.

What if the lawyer could show, instead, that a certain provision of the Florida death penalty law, or a common practice of the Florida courts, was unconstitutional? An appeal like that would reverberate from case to case. If the law, or the common practice, was unconstitutional for one inmate, it would be for them all. Even if the law was eventually determined to be sound, the courts might take years to settle the matter. And everyone would be safe while the question was pending.

If Barnard could find and develop good, expansive, legal issues, and get them to the attention of key courts, then they might become constitutional roadblocks to every death warrant the governor signed. Given the shortage of lawyers, if he failed to come up with large-scale
legal issues an army of inmates would soon begin marching to the electric chair.

Of course, Craig Barnard didn’t invent the idea. Essentially, he was hoping to regain some of the momentum of the 1960s and early 1970s, when a few great lawyers with a few broad issues blocked hundreds of executions at a stroke. That was the Golden Age for anti–death penalty lawyers, and Barnard looked to it for guidance.

For most of American history, capital punishment was a state or even a local issue. Criminals were judged, convicted, and sentenced according to local rules and customs, and their executions were generally carried out by town sheriffs in courthouse squares. Federal judges took almost no interest in the death penalty, and even state appeals courts tended to give the matter little consideration. In frontier states like Florida, the death penalty was often a matter of expedience: Small towns in the wilderness simply couldn’t maintain secure jails for long-term prisoners, and the job of transporting an outlaw hundreds of miles to the state prison was more than the sheriff cared to do. Criminals were hanged in part because there was no place to lock them up. Thousands of people were executed in America under entirely local jurisdiction, with only cursory appeals at best.

Not surprisingly, a disproportionate number of the people executed under these customs were black, and the execution rate was most dramatically skewed for the crime of rape. Intercourse between black men and white women, if discovered, was widely prosecuted as rape regardless of the actual facts of the case, and few defendants got the sort of spirited defense that Atticus Finch provided in To Kill a Mockingbird. Black men were executed for raping white women so frequently that, in Florida and elsewhere, newspaper accounts simply reported that the defendant had committed “the usual crime.” Everyone knew what that meant. One such Florida prisoner was electrocuted just seven days after his sentence was imposed in 1937.

As sensibilities became more refined, however, decent folks began to object to the spectacle of local executions. In Florida in the 1920s, a coalition of women’s clubs lobbied the legislature to ban the practice,
arguing that the sight of bodies swinging in town squares had a brutalizing effect on their communities. Similar efforts around the country led to the centralizing of executions at state prisons, where they took place outside the public view, often at midnight or dawn. Still, the death penalty remained a state matter, with the federal government extremely reluctant to exert its own authority. Washington kept its nose out of the death chambers, just as it steered clear of the schools, courtrooms, prisons, and voting booths.

All that changed, and changed dramatically, in the 1950s and 1960s, when the U.S. Supreme Court, in the era of Chief Justice Earl Warren, asserted more vigorously than ever that the protections of the U.S. Constitution applied to actions in the states. For the first time, federal standards of equality were used to strike down such state and local practices as school segregation, segregation of buses and trains, poll taxes, and voter tests. The lengthened arm of the federal government reached into police stations: For example, in *Miranda v. Arizona*, the U.S. Supreme Court required that suspects be advised of their constitutional rights when arrested. The long arm reached into the courtrooms: In *Gideon v. Wainwright*, the high court declared that the federal guarantee of due process required that felony defendants in state trials be provided with lawyers.

Opponents of capital punishment urged the courts to reach into death rows as well. Anthony Amsterdam, at the time a Stanford University law professor, crafted arguments to persuade the federal courts that the death penalty violated the Eighth Amendment (which bars "cruel and unusual punishments") and the Fourteenth Amendment (which guarantees "equal protection of the laws"). Amsterdam’s arguments won serious consideration in the newly aggressive federal courts. In Florida in 1967, the zealous civil rights lawyer Tobias Simon filed a class action lawsuit based on Amsterdam’s theories. His suit blocked every Florida death sentence while the issues were considered. Then came *Furman v. Georgia*, the greatest of Amsterdam’s lawsuits, which overturned more than six hundred death sentences nationwide.

*Furman v. Georgia* was the ultimate "big issue" case, striking down all existing death penalty laws in the United States. For several years leading up to it, at Amsterdam’s urging, the U.S. Supreme Court had
wrestled over capital punishment; in 1968 the justices seemed within a hair's breadth of abolishing it. But the Court lost two liberal justices, Earl Warren and Abe Fortas, during the same tempestuous months in which Lyndon Johnson's presidency ended and Richard Nixon's began. In his election campaign, Nixon had strongly supported the death penalty as part of his "war on crime." He appointed two justices, Warren Burger and Harry Blackmun, who believed strongly that executions were constitutional. The arrival of Burger and Blackmun shifted the balance; nevertheless, a number of the justices remained disturbed by the practice, if not the theory, of capital punishment. Their concerns came to a head on January 17, 1972, when the Supreme Court heard oral arguments in *Furman.*

Amsterdam delivered a brilliant four-pronged attack on capital punishment. He began by presenting statistical proof that the death penalty in America was overwhelmingly used against the poor and minorities. More than half of the people legally executed in America since 1930 had been black, though blacks had committed far less than half of all crimes. Moreover, 90 percent of the people executed for the crime of rape had been black. These disparities were so great as to defy any claim that the executioner was color-blind.

Next, Amsterdam argued that the death penalty was imposed arbitrarily, almost randomly. Judges and juries meted out the sentence without clear standards to guide them, and as a result some men were on death row for armed robbery, while nearby, murderers served life or less. The only difference between them might be that the robber was tried by a "hanging judge," or that his jury didn't like the smirk on his face. Discretion in death sentencing was virtually unfettered.

Amsterdam's third point was his most audacious, but it turned out to be crucial: The death penalty was so rarely carried out in contemporary America that it could no longer be justified as a deterrent to crime. This point, too, was well documented. In the years leading up to Amsterdam's argument, use of the death penalty had steeply declined. There were forty-seven executions in America during 1962. The number dropped to twenty-one in 1963. Fifteen in 1964. Seven in 1965. Just one in 1966. Two in 1967. And none thereafter. (By comparison, 199 people were executed in America in 1935—the busiest year for the
nation's executioners—and no year passed in the 1930s or 1940s with fewer than a hundred executions.) What made this argument so daring was that the sharp drop in executions was partly a result of Amsterdam's own legal campaign to abolish the death penalty. He was, in effect, challenging a state of affairs he had helped to create.

In closing, Amsterdam argued that the death penalty had become "unacceptable in contemporary society," that the "evolving standards" of decent behavior had moved beyond the point of legal killing. This was the weakest of his arguments because nearly forty states still had death penalty laws on the books, and the justices tended to view state legislatures as barometers of social standards. But previous U.S. Supreme Court decisions suggested that the shortest route to abolishing the death penalty would be to persuade a majority of the justices that "standards of decency" had changed. Amsterdam had to try.

Behind closed doors, the nine justices of the Court revealed a wide range of reactions to Amsterdam's case, according to The Brethren, a detailed history of the Supreme Court in the early 1970s. Justices William Brennan and Thurgood Marshall, the Court's liberal stalwarts, accepted every point of the argument and voted to abolish capital punishment outright. Justice William Rehnquist, the new conservative beacon, came down on the opposite extreme. He rejected all of Amsterdam's case. These justices marked the frontiers, Left and Right.

Justice William O. Douglas, a cantankerous libertarian, agreed that the death penalty was arbitrary and should be struck down, but he was unpersuaded by the notion that standards of decency had evolved to the point that capital punishment was cruel and unusual punishment. He lined up closest to Brennan and Marshall. Chief Justice Burger and Justice Blackmun both expressed personal opposition to capital punishment—if they were legislators, they would vote against it—but they believed that the language of the Constitution clearly left the matter to the states. The Court had no business preempting the debate, they said, and sided near Rehnquist. That made three votes to strike down the death penalty and three to sustain it.

Justice Lewis Powell also strongly objected to the Court taking the question of the death penalty out of the hands of elected legislatures. This would be an egregious example of the sort of judicial activism he...
had always opposed. Though moved by Amsterdam's showing of racial
discrimination, Powell believed this was a vestige of the past and could
be dealt with case by case, without a sweeping decision in Furman.
With Rehnquist, Burger, and Blackmun, Powell's vote made four to
sustain the death penalty; one more and executions of the more than six
hundred people on America's death rows could resume. Justice Potter
Stewart, painfully aware of these 600-some lives dangling on his vote,
moved toward Douglas's view that the death penalty in practice had
become unconstitutionally arbitrary. With Brennan, Marshall, and
Douglas, Stewart's vote made four to strike the death penalty as it
existed.

That left Justice Byron White, known to all observers of the
Court as a strict law-and-order man. In his brusque opinions, White
backed prosecutors and police at almost every turn; no one would
normally expect him to reach a decision that would reduce the punish-
ment of some of the coarsest criminals in the country. But he was
deeply impressed by Amsterdam's presentation; he told his law clerks
that it was "possibly the best" oral argument he had ever heard. The
point that had won White was Amsterdam's boldest: that the death
penalty was applied too infrequently to serve any purpose. White cast
the deciding vote to strike down the death penalty, not because he
wanted to see an end to capital punishment, but because he wanted to
see more of it.

Some awfully tortured thinking went into yoking together such
disparate views as Marshall's blanket condemnation of capital punish-
ment and White's gung-ho call for more executions. Yet somehow they
wound up on the same side. The product of these deliberations was one
of the most difficult decisions in the long history of the U.S. Supreme
Court, published on June 29, 1972. The broad impact of Furman v.
Georgia, which struck down hundreds of separate laws in nearly forty
separate jurisdictions, was unprecedented. In its rambling, inchoate
length—nine separate opinions totaling some fifty thousand words—it
was easily the longest decision ever published by the Court. But for all
its wordy impact, Furman was almost useless as a precedent for future
cases. It set out no clear legal standards. As Powell noted in his stinging
dissent:

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Mr. Justice Douglas concludes that capital punishment is incompatible with notions of "equal protection" that he finds "implicit" in the Eighth Amendment. . . . Mr. Justice Brennan bases his judgment primarily on the thesis that the penalty "does not comport with human dignity." . . . Mr. Justice Stewart concludes that the penalty is applied in a "wanton" and "freakish" manner. . . . For Mr. Justice White it is the "infrequency" with which the penalty is imposed that renders its use unconstitutional. . . . Mr. Justice Marshall finds that capital punishment is an impermissible form of punishment because it is "morally unacceptable" and "excessive." . . .

I [will not] attempt to predict what forms of capital statutes, if any, may avoid condemnation in the future under the variety of views expressed by the collective majority today.

In other words, totally missing from the longest U.S. Supreme Court decision in history was any clear notion of how the death penalty might be fixed. Chief Justice Burger, in his own dissent, acknowledged this confusion, noting that the effect of Furman was to demand "an undetermined measure of change" in the nation's death penalty laws. He nonetheless invited the legislatures of the country to "make a thorough reevaluation of the entire subject."

That painfully splintered 5-to-4 vote turned out to be a high-water mark of the U.S. Supreme Court's willingness to intervene in the business of the states. In Furman, the Supreme Court justices were willing to abolish the death penalty as it existed. But the justices were not willing to forbid executions forever. They kicked the question of whether the death penalty was "cruel and unusual" back to the state legislatures. For nearly twenty years, the states—especially the southern states—had felt pounded by the Supreme Court. Rarely had they gotten the chance to answer. The Court had not asked what they thought about school desegregation, or voting rights, or the right to counsel. But Furman v. Georgia invited the states to answer a hostile Supreme Court decision.
Within days of the *Furman* decision, key members of the Florida legislature petitioned Governor Reubin Askew to call an immediate special session to write a new death penalty law. Askew resisted moving so hastily; given the sheer size of the *Furman* ruling, it was unlikely that more than a handful of people had even finished reading it yet. But the public backlash was so intense that the issue could not possibly wait for the legislature to resume its normal business the following January. Askew promised to call a special session to deal with the death penalty after the November elections, and in the meantime he appointed a blue-ribbon panel (chaired by Ray Marky's uncle, Harris Drew) to study the matter. Leaders of the state house of representatives, perhaps suspicious of Askew's liberal tendencies, appointed a study commission of their own. These commissions collected a hodgepodge of conflicting advice, reflecting the jumble of the *Furman* ruling.

Legal advisers to the governor's commission, drawn from the faculty of Florida's five law schools, unanimously predicted that no capital punishment law would ever satisfy the high court. The panel rejected that professional advice, however, and turned instead to a nugget from Justice Douglas's opinion. Douglas wrote that the problem with the pre-*Furman* laws was that they left "to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty." Douglas seemed to be saying that judges and juries needed rules to guide their sentencing. But how?

The governor's panel suggested a new law spelling out "aggravating" circumstances—such as a defendant's criminal record and the degree of violence involved in the crime—which, if proven, would make a guilty man eligible for the death penalty. The law should also spell out "mitigating" circumstances, such as a defendant's age or mental state, that might suggest a life sentence instead. The panel called for a team of three judges to weigh the "aggravating" circumstances against the "mitigating" circumstances and decide what sentence to impose. The jury would have no role in sentencing, under this proposal.

The House of Representatives Select Committee reached a different conclusion, simply by fastening on a different snippet from the

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Furman ruling. Figuring that Byron White was the most likely justice to change his position, they combed his opinion for clues. White had complained that “The legislature authorizes [but] does not mandate the penalty in any particular class or kind of case. . . .” That phrase seemed crucial: “authorizes [but] does not mandate.” Apparently, White would prefer to see death made mandatory for certain crimes. In hopes of winning his approval, the house panel proposed a bill that would automatically impose the death penalty for a specific set of crimes—including premeditated murder, sex with a person under thirteen, and setting off a bomb that kills someone.

*Furman* was as cryptic as the Gnostic gospels. The law professors read it and concluded that no law could pass muster. The governor’s commission read it and concluded that a complicated weighing mechanism was called for. The house panel read it and concluded that a flat set of mandatory penalties was the answer. Robert Shevin, the state’s attorney general at the time, was just as confused. He summoned George Georgieff and Ray Marky to explain *Furman*.

“I’ve been reading it since it came out,” Marky told his boss, “and I still have no idea what it means.”

None of the prosecutors liked the idea of mandatory death sentences—not even Georgieff, the ultimate hard-liner. “I mean, it’s just terrible,” Georgieff said long afterward. “Not everyone should be killed.” But as they pondered Byron White’s opinion, they reluctantly came to believe that this might be the only route available. Apparently, Chief Justice Burger had reached the same conclusion; in his dissenting opinion he lamented that *Furman* would lead to mandatory sentencing. And so the prosecutors began to lean in that direction. “I knew if we went to a mandatory death penalty we would fill the gallows in a year and a half,” Marky remembered. “But at that point, public opinion was really driving things. It was absolutely clear we were going to get a death penalty of some kind—the public demanded it. I figured if it was a piece of garbage, the U.S. Supreme Court would be to blame.”

But Governor Askew considered mandatory death sentences barbaric, and he vowed to make a stand against them. In his opening address to the special session of the legislature, on November 28, 1972, Askew insisted that Florida law make room for the quality of mercy.
SENATE president Louis Dellaparte sided with the governor: There was no way he would allow the house bill, with its mandatory sentences, to pass his chamber. "I would rather pass a good bill and have it declared unconstitutional than pass a bad bill just to be sustained," the senator declared.

Mandatory sentences were going nowhere, but what would take their place? While the rank-and-file lawmakers made interminable tough-on-crime speeches in the house and senate chambers, Florida's power brokers hatched out a deal behind closed doors. Edgar Dunn, Askew's general counsel, represented the governor. He quickly discovered that Askew's proposal for three-judge panels to weigh death sentences was not going to get through the senate. It was too costly, too cumbersome. But Furman seemed to say that the power of life and death could not be placed in the hands of a single judge.

Dellaparte, the senate president, proposed a modification: After a defendant was found guilty of a capital offense, the jury would hear evidence of aggravating and mitigating factors. Then, by majority vote, the jurors would recommend either life in prison or the death penalty. If they recommended life, it was final. If they recommended death, the judge would be required to reweigh the aggravating and mitigating factors. That plan, however, smacked too much of the old system to satisfy the house leadership. The jury would still have complete discretion to decide whether or not to set the machinery in motion toward a death sentence. "Hell," said Georgieff, who was present as an expert adviser, "if juries couldn't have discretion before Furman, they obviously can't have it now."

Edgar Dunn broke the logjam. What if the jury's recommendation was "advisory," and the judge imposed the final sentence? And what if the judge's decision was then automatically reviewed by the state supreme court? In this scheme, everyone would have a role: The legislature would guide the sentencing by defining aggravating and mitigating circumstances; the jury would consider these factors and advise the judge; the judge would impose the sentence, justifying it in writing; and then the sentence would be reviewed by the state's highest court. In this way, perhaps, they could thread the Furman needle: set-
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ting standards, limiting discretion, erasing caprice—all while avoiding mandatory sentences.

They were a few men in a back room, trading power and guessing about an incoherent U.S. Supreme Court document. It was not a particularly promising start. Nevertheless, their compromise passed overwhelmingly, giving America its first legislative answer to Furman. Immediately, officials from states across the country began calling Florida for advice and guidance. And very soon, lawyers and judges began to discover that the law drafted in confusion and passed in haste was going to be hell to administer.

Anthony Amsterdam recognized it immediately, and when Craig Barnard began his death penalty work a few years later, he saw it, too: Underneath the tidy, legalistic, polysyllabic, etched-in-marble tone of the new law was a lot of slippery mishmash. They believed the new law was flawed at its heart, in the weighing process, where the lists of aggravating and mitigating factors were toted up to determine whether death was the appropriate sentence. “Aggravating circumstances shall be limited to the following,” the law declared:

(a) The capital felony was committed by a person under sentence of imprisonment;
(b) The defendant was previously convicted of another capital felony involving the use or threat of violence to the person;
(c) The defendant knowingly created a great risk of death to many persons;
(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

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(f) The capital felony was committed for pecuniary gain;
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
(h) The capital felony was especially heinous, atrocious or cruel.

Some of the circumstances were simple matters of fact. For instance, if the defendant was in prison for armed robbery and murdered another inmate, the first aggravating circumstance plainly applied. In the case of a murder-for-hire, the sixth aggravator—"for pecuniary gain"—was obvious. Others on the list were awfully vague, however. "A great risk of death to many persons," for example. One judge might feel that described a drive-by killer who sprays a whole street with gunfire; another might apply it to a burglar who stabs a man to death while the victim's wife slumbers nearby. How much risk makes a "great" risk, and what number of persons constitutes "many"?

The last circumstance on the list was even harder to interpret—"especially heinous, atrocious or cruel." The idea was to identify only the worst of the hundreds of murders each year in Florida. But wasn't the act of murder itself "heinous, atrocious or cruel"? Again, this aggravating circumstance was very much in the eye of the beholder: To one judge, stabbing might seem more cruel than shooting, because it involved such close contact between the killer and the victim. Another judge, however, might think it crueler to place a cold gun barrel to a victim's head before squeezing the trigger. One jury might find it especially heinous for a victim to be killed by a stranger, while the next set of jurors might find it more atrocious for a victim to die at the hands of a trusted friend. And so forth. It was an attempt to define the undefinable.

The imprecision was even more obvious on the side of mitigation. "Mitigating circumstances shall be the following," the law read:

(a) The defendant has no significant history of prior criminal activity;
(b) The capital felony was committed while the defendant was
under the influence of extreme mental or emotional disturbance;
(c) The victim was a participant in the defendant’s conduct or consented in the act;
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;
(e) The defendant acted under extreme emotional duress or under the substantial domination of another person;
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(g) The age of the defendant at the time of the crime.

How much past criminal behavior was required to reach the level of “significant history”? What constituted “extreme mental or emotional disturbance”—given that any defendant who reached the sentencing phase had already been deemed sane to stand trial? What was “relatively minor” participation in a fatal crime? Driving the getaway car could be “minor” to one judge, while another could think it was major. Acting as a lookout—major or minor? And how could you measure “substantial domination” by another person? The law gave no guidance regarding “the age of the defendant.” One judge might think fifteen was old enough to face to the death penalty, while another might have qualms about executing a man who was “only” twenty. What about elderly criminals? Was there an age beyond which a man should qualify for mercy—and if so, what was it?

Clearly, a lot of discretion was left to the judge and jury. But remember: Too much discretion was banned by Furman. And the lists of aggravating and mitigating factors were not the only slippery spots. There was the matter of how these factors were supposed to be weighed.

According to the new law, the death penalty was appropriate if “sufficient aggravating circumstances” existed alongside “insufficient mitigating circumstances . . . to outweigh” them. Did that mean the judge and jury should simply count them up—for example, three ag-
gravitating circumstances versus two mitigating circumstances equals death? Or could a single really strong mitigating factor outweigh two rather weak aggravating circumstances?

And what were the rules for counting? Imagine that a criminal walks into a convenience store, cleans out the register, and kills the clerk. A classic candidate for the death penalty. But how would the court count the aggravating factors? The murder of the store clerk was a capital felony committed in the course of a robbery. That’s aggravating circumstance (d). A prosecutor could also argue that the murder was committed “for pecuniary gain.” That’s aggravating circumstance (f). Could one fact, stealing the money, be counted as two aggravating circumstances?

Or another case: A man driving a stolen car is pulled over by a police officer. Fearing jail, the thief shoots and kills the cop. That would be a capital felony committed to avoid a lawful arrest, aggravating circumstance (e). But the prosecutor could also argue that it hindered the enforcement of laws, aggravating circumstance (g). Should both aggravators apply? The law gave no guidance.

The same sort of thing could happen on the other side of the scales. If, for example, a man lost his job, went on a drinking binge, had a nervous breakdown, and shot his former boss, a good defense lawyer no doubt would argue that the defendant had suffered an “extreme emotional disturbance”: mitigating circumstance (b). The same lawyer might also argue that his client’s ability to conform his behavior to the law had been “substantially impaired”: mitigating circumstance (f). Could the same fact, the man’s nervous breakdown, count twice in his favor? And if it could count twice, would it be “sufficient” to outweigh one aggravating circumstance (for example, if the man shot his boss in the middle of a crowded office, thus endangering many persons)?

A step further: If the judge decided that shooting the boss was especially cruel, there would be two aggravating circumstances. If the nervous breakdown could count twice in the defendant’s favor, there would be two mitigating circumstances. Two in favor, two against—what then?

It was enough to make even the best lawyer’s head spin. But Amsterdam, and later Craig Barnard, saw still more riddles, and every
riddle was another way to attack the new law on appeal. Could a prosecutor present evidence of aggravating circumstances that weren’t listed in the law? Could a defense attorney present evidence in favor of a lighter sentence that didn’t fit the list of mitigating factors?

What, exactly, was the jury’s role in sentencing? The new law said that after the jury found a defendant guilty of a capital crime, it must hear evidence for and against a death sentence. Then, by majority vote, the jurors would render an “advisory sentence,” after which the judge would impose the actual sentence. The law never said how much weight the judge should give to the jury’s advice. How strong a reason did the judge need to overrule the jury? Did a 7-to-5 vote in favor of a death sentence carry less weight than a unanimous vote?

Under the new law, the state supreme court was to “review” each sentence. Did that mean the justices were supposed to reweigh the aggravating and mitigating factors? Or were they merely referees, making sure the proper steps were followed? Was the court supposed to compare death cases to similar cases where life sentences had been imposed—to be sure that equal crimes got equal justice? Or was the review restricted to the confines of each individual case?

These questions might have seemed tendentious and picayune, but for the fact that as soon as Governor Askew signed the new death penalty law, Florida’s prosecutors and judges got busy using it. Dozens, then scores, of capital cases made their way to the Florida Supreme Court, and these seemingly trivial questions became the crux of life-and-death litigation—much of it, in those first years after Furman, masterminded by Anthony Amsterdam and coordinated by the Inc. Fund. The law, shot through with question marks, became a lawyer’s playground. After all, their clients were going to be killed for breaking the law. It seemed only fair that they should ask what the law actually meant.

Amsterdam and the Inc. Fund had their eyes set on the inevitable return of the death penalty issue to the U.S. Supreme Court. The new state laws would have to pass muster with the high court before prisoners could be executed. In the meantime, there were battles to fight in
the state supreme courts. These were critical tests, because what was true in Florida was true everywhere: The legislatures had created a legal labyrinth with their new laws. Trying to find a clear path through the maze would be the job of the state high courts. Laws were supposed to be clear and fixed; they were supposed to mean the same thing from day to day, courtroom to courtroom, town to town. As the first death sentences moved to the Florida Supreme Court, lawyers on both sides watched, wondering if the slippery points could be pinned.

On their first official look at the new law, in 1973, most of Florida’s supreme court justices swooned. The case was called State v. Dixon. A man facing murder charges under the new law was challenging its constitutionality. While Dixon’s trial was delayed, the justices vaulted the case to the top of their docket and rendered an opinion scarcely four months after the law was signed.

“No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex,” the majority opinion enthused. Under the new law, death sentences would apply only in “the most aggravated and unmitigated of crimes.” The justices, except for two dissenters, were confident in their own ability to promise consistent results. “Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.”

The majority was certain, too, that the language of the new law was clear. “We feel the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what is intended,” they wrote. Still, the justices took their first stab at nailing down a few of the more elusive aspects of the law. For example, they explained that “heinous” means “extremely wicked and shockingly evil,” while “atrocious” means “outrageously wicked and vile.” Such crimes were “conscienceless . . . pitiless . . . unnecessarily tortuous.”

In retrospect, it was a bad omen that the court’s first step toward clarifying this difficult law was simply to substitute one set of vague
terms with another. The law was spongy at its core—and merely piling on the adjectives was not going to give it precision.

State v. Dixon was an entirely theoretical case; it did not involve an actual death sentence. When death sentences under the new law began arriving at the court, the grand promises expressed in Dixon immediately came up against harder realities. One of the earliest reviews was the case of Anthony Sawyer, argued during the 1974 term. Sawyer held up a liquor store. During a struggle with the owner, Sawyer’s gun went off and the son of the store owner was killed. Despite the jury’s recommendation of a life sentence, the judge imposed the death penalty.

This case gave the Florida Supreme Court some real problems to sink its teeth into. First was the question of whether the judge had given proper weight to the jury’s recommendation. Further, Sawyer’s case did not clearly satisfy the Dixon standard of singling out “only the most aggravated and unmitigated of crimes.” The firing of the gun might have been accidental. Beyond that, three of the four aggravating circumstances applied by the trial judge were not even listed in the new law. The three—Sawyer’s prior arrests, his drug abuse, and his violent temper—might seem sensible to many people, but the lawmakers had not included them. In this single case the justices found vagaries of procedure, of definitions, even of philosophy. And this was just one of what would soon be hundreds of cases stumbling over this same legal ground. In any event, the justices flinched. Instead of the meticulous review they had so recently promised in Dixon, they delivered only a brusque affirmation of Sawyer’s death sentence, scarcely touching on the broad issues raised.

Anthony Amsterdam and his colleagues were hopeful as they watched these struggles. Surely the U.S. Supreme Court would look at cases like Sawyer’s and see that the new laws were no more reliable than the old ones. Further cases only increased their confidence.

For example, in the 1975 case of Mack Reed Tedder, the Florida Supreme Court took on the question of judges overruling the advice of juries. Tedder shot and killed his mother-in-law. His jury recommended a life sentence, but the judge sentenced him to death. Tedder’s case was part of a trend that surprised and disturbed the justices. In Dixon, they had envisioned calm, experienced trial judges putting the
brakes on emotionally inflamed juries. Instead, many judges—who had to face the voters every four years—were using their authority to increase, rather than restrain, the use of the death penalty. Judge after judge was upping the ante from a life sentence to a death sentence. So the Florida Supreme Court reinstated the jury’s recommended sentence for Tedder, and set a rule for overruling juries in the future. “In order to sustain a sentence of death following a jury recommendation of life, the facts . . . should be so clear and convincing that virtually no reasonable person could differ,” the justices declared.

Here was a straightforward attempt to clear up one of the vague points of the law. Courts frequently use the “reasonable person” standard in a wide variety of legal situations. Any competent judge has some idea how to apply this standard. But it didn’t work. The trial judges of Florida continued to override jury recommendations with abandon: One-fourth of all death sentences in Florida were imposed despite jury recommendations of life. The trial judges were ignoring the state supreme court, but only because the justices themselves failed to stick to their own standard. For example, the year after the Tedder decision, the Florida Supreme Court upheld the death sentence of Howard Douglas, despite the jury’s unanimous recommendation for life. To convict Douglas, the jury had to conclude he was guilty “beyond and to the exclusion of any reasonable doubt.” The justices affirmed that reasonable decision. In the next breath, however, they upheld the judge’s death sentence, implying that none of the jurors met the test of a “reasonable person” able to see the “clear and convincing” need for the death penalty.

Amsterdam and his colleagues believed that confusion like this—there were many similar examples—would surely kill the law when it reached the U.S. Supreme Court.

By the time the U.S. Supreme Court returned to the question of capital punishment, in March 1976, some thirty-five states had passed new death penalty laws. In the wake of Furman, several justices had privately predicted that America would never see another execution. The rush of the state legislatures to restore the death penalty shocked

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them with its vehemence and delivered a loud, clear message: America loved its death penalty. The U.S. Supreme Court scrutinized five state laws—from Florida, Georgia, Texas, Louisiana, and North Carolina—covering the range of approaches throughout the country.

Of the nine justices, only the two most liberal—William Brennan and Thurgood Marshall—were willing to say, in spite of the public outpouring, that capital punishment was flatly unconstitutional. Four of the justices—Warren Burger, Byron White, William Rehnquist, and Harry Blackmun—believed all of the laws before the Court passed constitutional muster. (The furious efforts in Florida and elsewhere to figure out what White would approve of turned out to be wasted; he voted for every law proposed.) Once again, the issue would come down to the justices in the middle: Lewis Powell, who had voted against Furman; Potter Stewart, who had voted for Furman; and John Paul Stevens, who had replaced William O. Douglas on the Court. This troika of justices, led by Stewart, seized control of the cases and would define the contemporary parameters of capital punishment.

Unfortunately for the armies of lower-court judges who would have to apply the high court’s decision, the troika used more gut than reason. Quite simply, the three swing justices were appalled by the idea of mandatory death sentences, in which everyone found guilty of a capital crime is automatically sent to death row. This seemed to them a throwback to less enlightened times. And this feeling was only deepened by the facts in Woodson v. North Carolina, which tested a mandatory-death law.

The justices heard the appeal of James Woodson, one of a gang of men involved in a convenience store holdup. Anthony Amsterdam argued for Woodson; U.S. Solicitor General Robert Bork was among those arguing for the State. During the robbery, Woodson waited behind the wheel of a car as two accomplices went inside, rifled the cash register, killed the clerk, and wounded a customer. When police arrested the gang, one of the two accomplices inside the store—possibly the one who pulled the trigger—offered to testify in exchange for a reduced sentence. Woodson received no such deal. Convicted of felony murder for participating in a crime that led to a killing, he was automatically sentenced to die. The man who copped the plea got twenty
years, even though he clearly had more to do with the murder than Woodson did. This obvious disparity seemed eloquent proof that mandatory death sentences would not eliminate the caprice condemned in Furman.

But one flawed case scarcely justified finding all mandatory death sentences unconstitutional. What grounds could the troika apply? The clearest route would be to declare that mandatory sentences violated the "evolving standards" of decent society. It was a tough claim to make—the Court strongly believed that state legislatures should serve as the key measure of society's standards. But now various legislatures across the country had passed brand-new mandatory death sentences. The Court could hardly say these states were missing out on the evolution of standards.

Yet that was the foundation on which the troika built. Deftly, the three swing justices theorized that the legislatures would never have passed such barbaric laws if the Furman case had not pushed them to it. They were thinking, apparently, of those few words from Justice White's opinion in Furman—"authorizes [but] does not mandate"—which Ray Marky and George Georgieff found so troublingly persuasive. The three swing justices decided that laws passed under the influence of this phrase were not a fair measure of the nation's moral standards.

This argument was so obviously shaky that Justice Stewart went a step further to shore up the troika's position. He said the problem with the pre-Furman laws was that they had allowed similar cases to be treated differently—that is, one criminal could get a life sentence while a similar man got executed. The problem with mandatory laws, Stewart said, was precisely the opposite: They took different cases and treated them the same. James Woodson, a passive accomplice to murder, got the same death sentence as a serial killer. Whether similar cases were treated differently or differing cases the same, it was capricious—and therefore violated the spirit of the Furman decision. On these grounds, the troika voted, along with the two liberals, to strike down mandatory death sentences by a 5-to-4 majority.

This raised the stakes. In striking down mandatory sentences, the swing justices had apparently made constitutional doctrine out of the
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idea that death penalty laws must treat "same" cases the same and "different" cases differently. But the thousands of capital crimes committed each year in America raised a mountain of peculiarities—each criminal and crime was subtly unique. Somehow the law must penetrate this mountain to discern some conceptual key that would consistently identify cases that were the "same" and cull out ones that were "different."

Furthermore, in dealing with the mandatory death sentences, the swing justices declared that the Constitution required extraordinary reliability and consistency from capital punishment laws. "The penalty of death is qualitatively different from a sentence of imprisonment, however long," Stewart wrote for the troika. "Because of that qualitative difference, there is a corresponding difference in the need for reliability."

Each year, some twenty thousand homicides are committed in America, and the swing justices expected the death penalty laws to steer precisely and consistently through this carnage to find the relatively few criminals deserving execution. Somehow, using the black-and-white of the criminal code, the system must determine the very nature of evil. King Solomon himself might demur. It was like demanding a precise count from those medieval philosophers who asked how many angels can dance on the head of a pin.

This was the task the Court was setting, however, as the justices turned to the laws, like Florida's, that guided sentencing through the use of aggravating (and, in most cases, mitigating) circumstances. The case before the Court from Florida was a weak one. Ray Marky and George Georgieff had hoped for a torture-slayer or multiple murderer, but the order in which cases reach the high court is often a matter of chance. The case at hand, Proffitt v. Florida, cut a little too close to the slippery heart of the new law for the prosecutors' taste.

One night in July 1973, Charles Proffitt got drunk and decided to burglarize a house. As he gazed on the sleeping homeowners, an overwhelming urge came over him to commit murder, something he had never done before. He got a butcher knife from the kitchen and plunged it into the chest of Joel Medgebow, a high school wrestling
coach. The victim’s moan awakened his wife. Proffitt slugged her and ran from the house.

In pronouncing the death sentence, Proffitt’s trial judge had found four aggravating circumstances: The crime occurred during a burglary; Proffitt had a propensity to commit murder; the murder was especially heinous, atrocious, or cruel; and Proffitt had created a great risk to many persons. Here was an example of a trial judge relying on an aggravating circumstance outside the law. (“Propensity to commit murder” was not a part of the statute.) Here, too, was an example of mushy definitions. Was a single stab wound to a sleeping man “especially” heinous, atrocious, or cruel, compared to other murders? And since only one other person was in the room during the crime, was this really an example of “great risk to many persons”?

But the U.S. Supreme Court troika gave almost no attention to the facts of Proffitt’s case. Instead, they looked to the Florida Supreme Court’s enthusiastic promises in State v. Dixon. The Florida law would “guarantee” similar results in similar cases, Dixon had pledged. Each Florida death sentence would be compared alongside the others, to “determine whether or not the punishment is too great.” The state supreme court would assure that same was treated same and different was treated different.

Even as Justice Stewart quoted these passages, he knew that the Florida Supreme Court was not always so rigorous and reliable. He made reference in a footnote to the slapdash Sawyer decision and admitted that he wasn’t sure whether the state court would permit death sentences to be justified by aggravating circumstances outside the law. But he breezed by this question, saying merely, “It seems unlikely it would do so.” The troika was not interested in problems. For example, the Florida Supreme Court had decided that stabbing a man in his sleep met the same standard of “conscienceless . . . pitiless . . . unnecessarily torturous” murder as beating a man, slitting his throat, and suffocating him. Was this an example of treating different things differently? Stewart let this go in another footnote.

The swing justices were not concerned with specifics. They fixated on the Florida Supreme Court’s promise to turn out life-and-death decisions with the precision of diamond cutters. Proffitt’s case
was fine with them; the troika cast its votes to uphold Florida's death penalty, along with similar laws in Georgia and Texas.

Anthony Amsterdam and his colleagues had counted on victory. Now, despite the slippery quality of the new laws guiding discretion in death sentencing, the death penalty had been restored. But the U.S. Supreme Court, by speaking of "guaranteed" standards and the "need for reliability," had given the anti-death penalty lawyers plenty of room to continue fighting. Precision and consistency in death sentences had become a matter of constitutional dimension. "The main legal battle is over," declared The New York Times. But in fact the battles were only beginning.

Some battles were fought over questions affecting a single inmate, like the appeal of Jasper Mines, who murdered a woman on Florida's eastern coast in 1975. Mines's lawyer successfully argued to the Florida Supreme Court that his client's mental state at the time of the murder had not been properly weighed. At the same time, defense strategists searched for big issues. The Inc. Fund, through David Kendall, had raised two potential blockbusters in John Spenkelink's first round of appeals. Kendall had tried to prove racial bias in death sentences by showing that people who killed white victims got the death penalty more often than killers of black victims. If the courts had accepted that argument, Florida's new law might have fallen for one of the same reasons that the pre-Furman laws had been struck down. Kendall's second claim—that Florida's modern death penalty violated the Constitution by limiting the chance to present evidence in favor of mercy—might have sent every man on death row back for a new sentencing procedure. That would have meant years of delay.

Florida officials had poured everything into those issues, and they had succeeded. Future courts might change their minds—the Inc. Fund urged defense attorneys to keep raising the issues. But Craig Barnard knew in the meantime he had to look elsewhere for the next big issue. He found it in an issue Kendall had chosen not to raise.

On Monday, May 20, 1979, as the fight for Spenkelink's life was raging, two lawyers on the Inc. Fund team, Andrew Graham and Joel
Berger, were plotting strategy in the restaurant of the Tallahassee Holiday Inn. Into the restaurant walked a pair of attorneys from the local public defender’s office, Margaret Good and Louis Carres. Excitedly, they told the Spenkelink lawyers an intriguing story that had been brewing at their office for a year and a half. On an August day in 1977, Ted Mack—a colleague of Good and Carres at the public defender’s office—had received a call from a client on death row. The prisoner, Bobby Lewis, was angry. Prison officials had just told Lewis that the Florida Supreme Court had ordered a psychiatric evaluation of him. Lewis wanted to know what the hell was going on.

Mack had no idea what the prisoner was talking about. Lewis repeated his story, but it was just as mystifying the second time. In death penalty cases, the state supreme court’s job was to review the work of the judge, jury, and lawyers at the trial and sentencing. Any information beyond the trial and sentencing could be brought to the court’s attention only by a particular kind of appeal—and there had been no such appeal in Lewis’s case. The court had no business considering psychological reports years after the trial. Right or wrong, this was the law. So what was going on?

Baffled, Mack instructed his client to refuse the evaluation. Then he began trying to solve the mystery. A series of phone calls led him to the agency in charge of the state prisons, and there, in Lewis’s inmate file, Mack found a letter. “This is to request a copy of the latest psychiatric evaluation made on the above named defendant, who is on Death Row,” the letter said. Signed by the deputy clerk of the Florida Supreme Court, the letter was proof that the prisoner’s story was true. Mack kept searching, and over the next several days he found similar letters in the files of other condemned men. Apparently, there was a systematic process under way at the state supreme court to collect information outside the scope of the trial.

This discovery was tantalizing but incomplete. Mack had no way of knowing who was behind the orders, or where the reports were going, or whether any of the justices ever saw them. Something strange was going on, but Mack couldn’t be sure what it was. He filed the material away and waited for a time when it might be useful.

About eight months later, Margaret Good was arguing an appeal
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before the state supreme court on behalf of Paul Magill, another death row inmate. Magill had been a good student, a dedicated member of his high school band, but he’d gone inexplicably off the rails, robbed a convenience store, and raped and murdered the store clerk. Magill insisted he had no memory of his horrible deed. A good kid gone bad, the claimed loss of memory—naturally, those charged with deciding his fate were perplexed by the flawed mechanics of his mind. At the state supreme court hearing, Justice Ben Overton began questioning the prosecutor about Paul Magill’s psyche.

“We have a copy of the psychological screening report,” Overton said, “and that screening report says, in part, that he shows very limited control in stressful situations, and then also shows that he will become possibly suicidal.”

Margaret Good knew every page of Magill’s trial record, but she had no idea what Overton was talking about. Psychological screening report? When her turn came to speak, she said: “First of all, Your Honor, I’d like to request—Justice Overton—what you mean when you refer to a psychological screening report. I don’t know that I have had access to such a thing.”

Justice James Adkins spoke up helpfully. “Psychological screening report filed with us on June 6, 1978, a screening report from the Department of Offender Rehabilitation . . .”

“I have not received a copy of that, nor did I know it was in the record of this case,” Good answered.

And Justice Overton began backpedaling—because he knew what any good law student would know: The report was outside the record of the case, and it was wrong to include it in his deliberations. “Well, let me say this just so it’s clear,” Overton began. “We do not ask for this particular information. We ask for the information that the trial judge used in the sentencing process . . . We have not asked for this type of information, and I did not—I just saw ‘psychological screening report,’ and I . . .”

Margaret Good got the picture. The justices had been looking at material that had nothing to do with the trial. Moreover, they were looking at it without her knowledge, even though she was the lawyer
for the condemned inmate. She wanted to ask more, but Overton quickly steered his questions to another tack.

Not long after that exchange, Chief Justice Arthur England's law clerk began the tedious job of sorting through the files of every death penalty case before the court, weeding out the offending reports. The clerk collected the inappropriate documents, and when she had culled them all, she disposed of the whole pile. She wasn't sure, the clerk later said, but she believed she fed them through a paper shredder. She said she couldn't remember who told her to do this.

To Spenkelink's lawyers, sitting in the hotel restaurant, the implications of the story were immediately clear. A recent case, apparently similar, had mucked up a number of Florida death sentences. In early 1977, before the events Good and Carres had just described, the U.S. Supreme Court had reversed the death sentence of a Florida inmate named Daniel Gardner. Gardner had been convicted of beating his wife to death, and the jury had recommended a life sentence. The trial judge had overruled the jury and imposed the death penalty. Unbeknown to Gardner's lawyers, the trial judge had studied a psychological report on Gardner before deciding on the harsher sentence. When the defense discovered this, they appealed to the U.S. Supreme Court, arguing that a defendant has the right to confront all witnesses and all evidence against him, including reports from shrinks. Since the defense lawyers had had no chance to rebut the secret report, Gardner's sentence was unconstitutional, they argued. The high court agreed.

The Gardner case had sent at least one U.S. Supreme Court justice through the roof. Potter Stewart was a key vote in holding Florida's new death penalty constitutional, but he angrily declared that Gardner's experience was almost enough to change his mind. "This court upheld that statute on the representations of the state of Florida . . . that this was an open and above-board proceeding," Stewart intoned from the bench. "This case gets here and it's apparent that it isn't." The Gardner case shook the Florida death penalty down to its foundations.

Wouldn't the state supreme court's practice of reading undisclosed reports fall by the same reasoning? The question for the lawyers at the Holiday Inn was this: Had the state high court ordered a psychological evaluation of Spenkelink? If so, it might be the legal flaw that could

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save his life. Graham and Berger, the Spenkelink team lawyers, relayed the idea to David Kendall. He knew every page of the Spenkelink court file cold, and there wasn’t a hint of any secret psychological evaluation. He saw no grounds on which to raise the issue. (At the time, no one knew that the offending reports had been removed from the files and destroyed.) The matter was dropped, left to dangle from the fabric of the Spenkelink case. A loose thread, waiting to be pulled.

Soon after the Spenkelink execution, Craig Barnard learned of the secret reports in the files of the Florida Supreme Court. He called a meeting in Jacksonville of his most trusted anti–death penalty colleagues, followed by another in West Palm Beach a few months later and a third in Tallahassee early in 1980. The lawyers pondered the ramifications, and the more they contemplated the matter, the more excited Barnard became. He had consulted with Daniel Gardner’s attorneys in their attack on the use of secret reports by a trial judge. Their victory had swamped the Florida courts with death row inmates claiming that the same thing that had happened to Gardner had happened to them. Many of these inmates were winning new sentencing hearings, with the hope of life sentences rather than death.

If exposing the mistake of a single trial judge could cause that much damage to the death penalty machine, imagine the fallout that might come from showing that the state’s high court had committed the same error. And if Justice Potter Stewart, a swing vote in favor of capital punishment, could be moved to anger by the Gardner case, what effect might this larger case have? Barnard savored the possibilities. According to the U.S. Supreme Court, Florida’s death penalty law was constitutional in part because every death sentence had to be reviewed by the state’s highest court. No one could be executed without the state supreme court’s okay. This automatic review was a pillar of the entire enterprise; it had been copied into the laws of every state where the death penalty was legal.

Barnard could picture a row of dominoes waiting to fall. First, he and his colleagues, using the Gardner case as the precedent, would attack the state supreme court’s use of psychological reports without
the knowledge of the defense. Next domino: The revelation of these reports would shake the confidence of the U.S. Supreme Court in the reliability of automatic appellate review. Florida’s death penalty law would be invalidated—and because Florida was the pioneer state in these matters, its failure would shift the momentum toward abolishing capital punishment outright.

That was the most they could hope for. More realistically, the issue might be a roadblock to further executions while the courts worked to resolve it—a process that could take years. Buying time is the next best thing to total victory for opponents of the death penalty. Following the apparent breakthrough of the Spenkelink execution, Barnard wanted desperately to buy some time.

Barnard and his colleagues worked quietly to build their case. They gathered prison files and court records to show that the Florida Supreme Court was, in fact, using inappropriate information. As the work continued through the summer of 1980, special care was taken not to tip off George Georgieff and Ray Marky at the attorney general’s office. When, in the late summer of 1980, the St. Petersburg Times published a story documenting the secret psychological reports, Barnard moved into his endgame.

Bob Graham had signed death warrants on two prisoners, Carl Ray Songer and Lenson Hargrave. (Hargrave was known as “Minnesota” because—like the billiards legend—he was fat.) They were a couple of classic death-house cons: Songer killed a state trooper in the line of duty; Hargrave murdered a convenience store clerk during a botched robbery. Their deaths were scheduled for October 8, 1980. But instead of coming into court with straightforward appeals based on the facts of their trials, lawyers for the two men joined more than eighty other defense attorneys—including Anthony Amsterdam, David Kendall, Margaret Good, and Craig Barnard—in filing the class action petition Barnard had been masterminding. The suit listed as plaintiffs 123 of the men on death row, and it laid out the case against the secret reports.

According to procedure, they went first to the Florida Supreme Court, claiming that the court had violated the Fifth Amendment right to confront evidence, as expressed in the U.S. Supreme Court’s Gardner decision. “The capital sentencing process in Florida has been distorted
from the form in which it was approved by the Supreme Court of the United States and has become tainted at its highest and most important level," Barnard's group argued. The suit was a direct attack on the state supreme court's integrity. The group demanded that all records relating to death penalty cases be maintained—a pointed reference to the apparent shredding of documents. The suit further asked that a special magistrate be appointed to comb each case for possible taint by undisclosed psychological reports (implying that the state's loftiest judges could not be trusted to handle the task themselves). "When the court's decision is one involving the ultimate penalty of death, the Constitution cannot tolerate anything short of full notice and disclosure of any and all facts being fed into the life and death equation," the lawsuit declared.

The Florida Supreme Court, without comment, stayed the executions of Songer and Hargrave until it could consider this attack. A jubilant lawyer for one of the men on death row had a copy of the suit hand-delivered to the governor's office, along with the suggestion that Bob Graham "should be aware of this proceeding in considering whether any death warrants should be signed." Graham's death penalty aide, Betty Steffens, told the press that the governor would not be deterred by the pending lawsuit. "That is something that is between them and the supreme court," she said. Scharlette Holdman was more effusive. "Essentially," she said happily, "we've caught the state supreme court cheating."

The class action suit, which came to be known as Brown v. Wainwright—Joseph Green Brown was the first of the 123 plaintiffs in alphabetical order, and Louie Lee Wainwright was the head of the Florida prison system—struck at the integrity and honor of the seven Florida Supreme Court justices. Newspaper accounts of the suit focused on the secrecy, the shredding, the "cheating," as Holdman put it. No one seemed to understand the burden that the death penalty was placing on the justices—not just as human beings charged with life-and-death decisions, but as an institution operating at the fulcrum of a politically and emotionally potent issue.

Challenging the Florida Supreme Court's integrity was picking at 

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a scab. Several years before Brown v. Wainwright was filed, the court had been devastated by a shameful string of scandals, and the memory was still fresh in Tallahassee. Three of the seven justices of the state’s high court had been threatened with impeachment for varying offenses. Two resigned. (One of them was later arrested for dope smuggling. He skipped bail and died a federal fugitive.) The third—a man who liked to brag that his judicial qualifications consisted of serving as a judge in the Miss Hialeah beauty pageant—held his seat only after he agreed to a psychiatric evaluation. This yearlong debacle had left a backlog of nearly a thousand cases at the court, of which an ever-increasing number had been death penalty reviews.

Demoralized and overburdened, the Florida court struggled to catch up. Aided by law clerks, the justices pored over thousands of pages in each death penalty file. Each case was a new twist on the old confusions. Together, the cases pushed up a mountain of peculiarities. The justices debated and anguished in search of decisions. They drafted and redrafted opinions. When they approved the new death penalty in the 1973 Dixon case, the justices had spoken of the modern process as if it were a subtle, carefully constructed marvel of legal checks and balances. By the time Brown v. Wainwright was filed, seven years of experience had begun to teach them that it was, in many ways, a slapdash machine designed in confusion, built of spare parts and baling wire. They found themselves, again and again, devising bubblegum patches to hold it together. The Florida Supreme Court was devoting roughly 40 percent of its time and resources to the death penalty—40 percent, while the rest of the state’s legal business languished. And yet, for all that work, the justices could see little progress. One man had been executed, but Spenkelink’s death had not put an end to the flood of legal questions raised by the new death penalty.

New cases were constantly pouring into their chambers, and they were not getting any simpler to decide. The justices knew something scarcely imagined by the public—that despite the Spenkelink execution, the death penalty in Florida was teetering on the brink of chaos. By the end of 1980, Florida courts had handed out close to three hundred death sentences, and roughly half of the sentences had been reversed because judges or lawyers had misapplied the complex law.
The rest of the condemned men, minus Spenkelink, were still on death row; some were entering their eighth year.

Arthur England was a blue-chip lawyer from Miami, appointed to replace one of the disgraced justices. Scholarly, creative, impartial, England restored some respect to the court, but the challenge of the new death penalty defeated him utterly. "The workload imposed by the new capital statute was very heavy," he later explained. "Each case brought a very, very large record. The cases raised more points on appeal than any other class of cases. Nevertheless, we found ourselves faced with this new statute and a mandate from the U.S. Supreme Court that it was constitutional, so we felt an obligation to make it work.

"To me, this meant that the aggravating and mitigating circumstances should be given context and content, to find those cases in which death was truly the appropriate penalty," England said. "For example, 'heinous' must mean something more than just anything that is offensive. It must be something that truly goes beyond the pale. Of course, there was not always agreement on these definitions. But say we reached agreement in a particular case. The next case comes along and there is some small variation in the facts. What if a person shoots a man to death in the presence of his wife? Is that heinous? What if he shoots the person with some advance warning? What if he shoots a police officer but the victim never sees it coming?"

"What I found was that it was impossible to draw lines that were consistent. People do not all have the same sense of what constitutes a heinous or atrocious crime," England explained.

Was it any wonder that the justices in Tallahassee came to feel like Sisyphus, who spent eternity pushing a boulder up a mountain only to have the stone fall back each time he neared the summit? Or like Hercules, shoveling an endless supply of shit from the Augean stable? Nor was it any wonder that they might grasp at any shred that could help them in their task—even if it meant peeking at psychological evaluations that they were not, through some dainty point of law, supposed to see.

So they felt awfully damn insulted when Craig Barnard and the
rest of Florida’s death row defense lawyers attacked the court’s integrity and its diligence, in the megasuit known as *Brown v. Wainwright*.

At the secret strategy sessions where the lawsuit was hatched, a key question was who should present the arguments in court. Everyone turned to Craig Barnard. It only made sense: He was the guru, the mastermind; he had earned the right to deliver this potentially paralyzing blow to the death penalty. But Barnard declined. From the start, he realized that *Brown v. Wainwright* was going to be a prickly suit, challenging the very integrity of the Florida Supreme Court. Barnard had someone else in mind—Marvin Frankel, an esteemed New York lawyer. Frankel practiced in a faraway state, so he would not have to worry about crippling future cases by offending the justices. Moreover, Frankel was a former federal court judge. He had been on the bench, he knew the difficulties of a judge’s life. Barnard believed it could only help to have this assault on a panel of judges argued by a peer.

Barnard passed up the glory of a highly publicized case in pursuit of a wisp of strategic advantage. This was altogether typical of him. Lawyers aren’t the world’s most self-effacing bunch, but Barnard was an exception. Even as a boy growing up in Michigan, he had never mentioned to his parents the academic honors and awards he collected at school. Whatever drove him toward excellence, it was entirely within. He didn’t need applause.

Craig Barnard was raised in a comfortable middle-class home on the shore of a lake in Portage, Michigan. His father was a conservative Republican accountant, his uncle a Republican state senator. Barnard’s youth was a suburban idyll of ice skating in the winter, Detroit Lions games in the autumn, fishing and the Tigers in summer. Barnard was quiet—he preferred walking to school alone rather than taking the boisterous bus—but popular, playing on the high school football team until a shoulder injury left him on the sidelines. Unlike many of his colleagues in the crusade against the death penalty, he did not dream from boyhood of being a lawyer. His first steps toward a career, in fact, were taken with the McDonald’s hamburger empire. Even before he could get a driver’s license, Barnard finagled a job at the local McDon-
ald's, and worked his way up to assistant manager. That experience helped him earn a scholarship to study hotel and restaurant management at Michigan State. But he soon tired of cooking and bed making, and decided to become a computer programmer.

Then the sixties caught up with Craig Barnard. The dutiful young Republican grew his hair long, fell in love with Bob Dylan's music, and began protesting the war. (On his birthday in 1970, four antiwar protesters were killed at Kent State; Barnard never celebrated his birthday again.) He wanted to do something to change the system, so he switched majors again, this time to prelaw. By then, Barnard's father had moved to southwestern Florida, where he built a retirement village. Craig followed him south, enrolling at the University of Florida law school. When he graduated in 1974, Barnard joined the public defender's office in Palm Beach County. The man who hired him was the county's elected public defender, Richard Jorandby.

In every judicial district of Florida, an elected prosecutor, called the state attorney, supervises the government lawyers trying to put people into jail. And an elected public defender supervises the government lawyers trying to keep these same people out of jail. Typically, the state attorneys are the conservatives and the public defenders are the liberals, but this was not so in Palm Beach County. Dick Jorandby was a true-blue conservative, a rock-bottom Republican who quoted Barry Goldwater as a prophet and solemnly assured his young employees that someday Richard Nixon would be vindicated. All Jorandby's stands—anti-Communist, pro-free enterprise, low tax, small government—derived from his faith in individual freedom under a government of laws. Where he parted company with most of his fellow conservatives, however, was when the tenets of his faith were pushed into the field of criminal law.

To Jorandby, the most ominous danger of government incursion on personal freedom was not in the area of taxes or business regulation. It was in the government's authority to strip a man of his rights as a citizen and lock him up in prison. This awesome prerogative of the state had to be checked and balanced with vigor, so that it would never be abused. And when the penalty went beyond prison to death . . . well, the need to keep a rein on the government's actions was even
more acute. There is no government power greater than the power of life and death; no government intrusion is more invasive. And so, more than any other public defender in Florida—in fact, more than any of his peers across in the country—Dick Jorandby fought the death penalty. Craig Barnard was, very quickly, Jorandby’s star assistant; naturally, Jorandby gave him authority over the region’s death row cases. Barnard, with his studious bent and modest personality, was drawn to the detail-oriented, conceptual world of appeals. He never missed the hurly-burly of criminal trials.

Barnard was also a fine manager, and soon Jorandby entrusted him with the day-to-day operations of the entire office. In this role, Barnard recruited a cadre of death penalty specialists to work with him. Over time, the Palm Beach public defender’s office became one of the most important centers of capital appeals in the nation. Running the office was no simple task. Dick Jorandby was great when it came to vision and philosophy—he was a pioneer in such areas as alternative sentencing, for example. And he was good at squeezing money from even the most reluctant sources. But he was less effective with internal operations. Fact was, most of his employees found their boss a little strange: Jorandby replaced the sturdy armchairs in his office with rocking chairs, and whenever someone came in with a problem or a complaint, he required them to sit and rock awhile. At the beginning and end of each day, Jorandby cleared his schedule, told his secretary to hold all calls, closed his office door, and meditated. He was not an organization man.

Craig Barnard did the work of at least three men. As the leader of the death penalty team in Palm Beach, he was chief strategist and often lead litigator on more than a dozen capital cases in his own jurisdiction. Beyond his jurisdiction, he consulted frequently with lawyers for other death row inmates. If there was any coordinated strategy for fighting executions in Florida, Barnard was the strategist. And as Jorandby’s chief assistant, he supervised the daily office drudgery, from drafting budgets to purchasing supplies, from hiring new lawyers to counseling old ones, from the lowliest prostitution case to the most complicated murder trial.

As a result, Barnard worked constantly. At his desk by 6:30 or 7 A.M., he labored steadily until eight or nine at night—then lugged a
pile of papers home with him. He was the first one into the office and the last one out. A lawyer, under pressure from a big case, might show up bright and early on a Saturday morning, fully expecting to be alone. But the aroma of Barnard’s pipe would be wafting down the corridor. On Sundays, Barnard worked to the sound of the Miami Dolphins games on the radio.

His abiding loves were cars—he owned a succession of nifty sportscars—and work. He worked a lot and slept just a little. He ate (plenty, judging from his build, a round face on a round body), but he cared not a whit about food. His glove compartment was always jammed with fast-food coupons, and the freezer compartment of his refrigerator was packed with frozen dinners. He took his lunch at his desk; only once a year, on Secretaries Day, did he eat lunch at a restaurant.

And most years, he took just one brief vacation, always the same: a week at The Island House on Mackinac Island, at the northern tip of Michigan. Barnard loved the white-columned, historic hotel for the happy memories it evoked of boyhood holidays, and for the peace and quiet of a place with no cars and few telephones. Even there, however, he felt the urge to read law review articles, and to call the office several times a day. By week’s end he was jumpy from lack of work.

But for all his intensity, Barnard was never brusque, much less arrogant. The greenest young attorneys, handling the smallest misdemeanors, felt welcome to poke their heads into his office for advice. Barnard would calmly stop his work, puff his pipe as he listened intently to the question, then patiently offer an answer. Or perhaps a lawyer across the state would call in a panic over an arcane death penalty issue. Barnard would quietly soothe the caller and steer through the problem—and if the question required some legal research, Barnard would drop what he was doing and pore over law books until he found the answer. Or a colleague would call from the public defender’s office in another county, frantic at the prospect of preparing an annual budget. Barnard would take fifteen, twenty minutes, maybe half an hour—whatever time it took—to commiserate and offer advice.

Frequently, the emergencies came from Tallahassee, where friends of Scharlette Holdman kept Barnard apprised of her troubles. Her elec-
tricity had been shut off again. She was late with her rent. Life was always a crisis with Scharlette. Every time, Barnard would put his own work aside long enough to get Holdman straightened out. Often this involved sending a check drawn on his personal account. Barnard spent hours soothing, counseling, talking people through their problems, but he remained a very private man. He gave help, never asked for it; he was opaque as obsidian. No one really knew him. His parents were sure he was a Republican; his colleagues were just as sure he was a Democrat. Even some of his closest friends had no idea if he had any romantic life. On the rare occasions that Barnard could be roped into attending a party, he spent his time in the corner and left as early as possible. Quite by accident, one associate discovered that Barnard had a passion for kitschy souvenirs, the sort of junk sold in shops at the exit ramps along Florida’s interstate highways. Word spread, and soon Barnard boasted perhaps the state’s finest collection of cheap plastic flamingos, all tokens of esteem and affection.

He kept the more substantive facts of his personal life almost entirely to himself. His epilepsy, for instance. The disease had revealed itself only after Barnard was grown. One night, during a convention in Texas, he woke with a searing pain and a mouth full of blood. He had apparently bitten his tongue half off in his sleep. Barnard went to see a doctor, but the doctor was dismissive: Probably just a little too much to drink, he diagnosed. Not long afterward, Barnard was standing at his bathroom mirror, razor in hand, when suddenly—nothingness. He came to in the bathtub, writhing with pain from a dislocated shoulder.

This time the doctors took him more seriously. They ran CAT scans, searching for a brain tumor. The tests came up clean. More tests were run, and eventually the doctors concluded that Barnard was suffering dangerous epileptic seizures. With medication, the seizures were brought under control. (Barnard never had to surrender his precious driver’s license.) Still, he lived with the knowledge that the day might come when he would black out and never awaken. Grand mal seizures can be fatal. So it was that Craig Barnard shared something very personal with his death row clients. Like them, he knew the sense of something powerful waiting to snuff you out.

The Florida Supreme Court set oral arguments in the case of
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Brown v. Wainwright for October 27, 1980, less than a month after the case was filed. Barnard worked even harder than usual, though such a thing seemed scarcely possible, to assure that Marvin Frankel's crucial oral argument would go well.

It is best for a death row defense attorney when the world mostly forgets about your clients. The prisoners of death row have done hideous things, and when the bloody details are fresh the public cries out for punishment, the harsher the better. A Craig Barnard, an Anthony Amsterdam, a Millard Farmer, typically works best when the crimes have faded and passions are cool. The fight becomes legal or philosophical rather than emotional. For the defense attorneys, the weeks leading up to oral arguments in Brown v. Wainwright would have been a good time for anonymous quiet on death row. Instead, there came a shocking reminder of the sort of man the lawsuit was designed to save.

The danger of death row could easily be forgotten in the mind-numbing routine of the place. As a rule, the inmates understood the value of docile anonymity; their lives hung on favorable treatment from the courts or the governor. Furthermore, the design of death row—with each inmate locked in a solitary confinement cell and few occasions when prisoners were gathered in groups—increased the relative safety. Many guards found work among the prison's general population far more threatening than work on death row. General population at the state prison was the end of the line for Florida's bad guys. To get there, inmates had to prove themselves too mean, too crafty, too crazy for lesser prisons. They slashed and killed one another with near impunity. Compared to that, death row was an oasis.

Or so it might have seemed to Richard Burke, a retired naval petty officer, father of two adopted kids, newly hired as a death row guard at Florida State Prison. He always seemed relaxed and jovial. He enjoyed bantering with the prisoners, calling out "It's time for your douche!" in a singsong voice whenever he led a man to the shower room. He tried to be pleasant even with Thomas Knight, one of the meanest men on the row.

On a July morning in 1974, Knight had kidnapped a Miami busi-
nessman, Sydney Gans, as Gans arrived at work. Knight forced Gans to drive home, where he took Gans’s wife, Lillian, as a second hostage. They proceeded to a local bank. While Knight held Mrs. Gans at gunpoint in the car, Mr. Gans went into the bank and withdrew $50,000 from his account. During the transaction, Gans told the bank president what was happening. But rather than wait for police to arrive, Gans bravely returned to the car, hopeful that handing over the money would save his wife. It didn’t. Police and FBI agents soon found the car abandoned in a field; inside were the bodies of Stanley and Lillian Gans, each shot to death through the throat. Knight was found hiding in some weeds about a quarter of a mile away, his rifle and the money buried beneath him.

On death row, Knight was a surly and uncooperative prisoner. He spent many hours under his headphones, dancing and singing to soul music; his remaining time was largely devoted to confrontations with the prison authorities. When Knight announced that his name was now Askari Abdullah Muhammad, that he had joined the Ansarul Allah Community of Islam, and that his religion required him to wear a beard, the warden and the guards concluded that he was pulling another scheme to piss them off. They had a hard-and-fast rule requiring all inmates to shave, and when Knight, or Askari, refused, an order came down that he should be locked up and stripped of visiting and canteen privileges until he complied.

One morning in October 1980, Knight got word that his mother had arrived at the prison for a visit. This was big news, because she hadn’t been to see him since he got to death row. Knight called to the guard on the wing, Richard Burke, the new man with three months under his belt guarding the prisoners of R-wing. And Burke said, Sorry, man, but you can’t have visitors because you won’t shave.

Look, Knight answered. We pass by the barbershop on the way to the visitor’s park. We’ll stop in there and I’ll get a shave.

Can’t do it, Burke answered.

My mom visits me once in five years. You’re gonna stop me from seeing her? Knight asked. And Burke said, Those are my orders. Someone on the row heard Knight say: “Man, when I get angry I go to stickin’.” And Burke’s reply: “Do what you gotta do.”
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That seemed to be the end of it. About 4:30 p.m. on Sunday, October 12, Burke walked confidently down the corridor toward Knight’s cell. “C’mon, Knight,” he called. “Time for your douche!” To the guard in the control room, Burke shouted: “Pop number nine!” Knight’s cell door opened. The prisoner charged out, brandishing a soup ladle, its handle filed down to a point. He thrust the shank into Burke’s chest.

The guard did not resist. As the other inmates rushed to the bars of their cells, holding out mirrors to see what was happening, Burke threw up his hands and cried, “What have I done? Let’s talk it out.” Knight jabbed again.

“My god, he’s killing him!” a prisoner shouted. “What do you think?” someone answered. Knight slipped to the floor, grabbed Burke’s shirt, and pulled the guard down with him. He straddled his victim, kneeling on Burke’s arms, and stabbed repeatedly, clutching the shank in both hands. “Please, please, please,” Burke gasped. “Don’t hurt me.”

By now the officer at the end of the corridor had called a “Signal 24”—the code for trouble on death row. The supervising officer, Sergeant Harry Owen, rushed into the corridor, followed by several other guards. “Knight, that’s enough!” he shouted. “You’ve done what you wanted to do. You’ve hurt him. Let me have the knife. Let me see if I can help him.”

Dripping blood, Knight staggered to his feet and charged Owen, raising the knife for another attack. But the force of his assault on Burke had wrapped the blade around his hand, like brass knuckles. He flung the weapon away, and it clattered into a nearby cell. Inmate Ronald Straight kicked the knife back into the corridor. “Not in my house, man!” Straight shouted.

Owen picked up the mangled knife as the other guards tackled Knight and shackled him swiftly. Burke lay on the bloody floor, moaning and gasping as the life drained out of him. Medics arrived from the prison hospital, and as they lifted Burke on a stretcher, Ronald Straight and another prisoner—his partner in crime, Timothy Palmes—began singing: “Another one bites the dust.” For the first time in Florida’s history, a guard had been murdered on death row.
Dave Brierton had by this time been promoted to the post of inspector general for the state prison system, and his assistant Richard Dugger was now warden. Dugger ordered an immediate crackdown. The cell of every death row prisoner was raided for illegal weapons. Every item of “contraband”—including Doug McCray’s library of about eighty books—was seized, along with Bob Sullivan’s legal papers, a pile of homemade fans and waterbugs, even stashes of candy bars. Dugger further ordered that death row prisoners not be allowed out of their cells without handcuffs.

The orders sparked an uprising on the row. Inmate Gary Trawick somehow got his hands on a piece of welding rod, which he sharpened and strapped to a broom handle. Two days after the Burke murder, Trawick thrust the weapon at a passing guard, wounding the man in his side. Stephen Booker got the makings of a new waterbug, heated a cup of water, and flung the boiling liquid into a passing guard’s face. Warden Dugger responded with tear gas, and an uneasy calm was restored.

Thomas Knight got his shave—in handcuffs, leg irons, and a headlock. He also got a second death sentence. And no death row guard was ever again quite so jovial as poor Richard Burke.

Two weeks later, Marvin Frankel rose to face the seven black-robed justices of the Florida Supreme Court, and began one of the toughest arguments any lawyer could make. He asked the justices to admit that their actions had tainted justice. He wanted the judges to judge themselves. Frankel, who had worn the black robe himself, stepped gingerly on the feelings of his fellow jurists, but he might as well have been wearing hobnailed boots.

“Our best understanding of how the situation arose is that it was probably because of a commendable desire by a court saddled with a grim responsibility to leave no stone unturned,” Frankel ventured. Nevertheless, “along comes this revelation that the Supreme Court of Florida, in administering this statute, has been led to this very fundamental kind of what we respectfully call ‘misbehavior.’”

In even the smallest civil cases, defendants had a right to confront any material that might be used against them, Frankel reminded the
justices. The U.S. Supreme Court’s decision in Gardner v. Florida had
underlined this right for condemned inmates. Frankel continued: Now
that the secret psychological reports had been expunged from the Flor-
ida high court’s files, there was no solution to the lawsuit except to
have a special magistrate examine every case—even if that meant put-
ting the justices themselves under oath and cross-examining them. The
dead penalty had been compromised, Frankel said. “The practice of
which these petitioners complain, however it evolved, discloses defects
so pervasive and so fatal in the capital sentencing system of this state as
to invalidate that system and to invalidate the statute under which these
sentences were imposed.”

Arguing the case for the State of Florida was George Georgieff. As
always, he was blunt, and spoke off the monogrammed cuff. Some
individual inmates might have a bona fide beef, Georgieff allowed. But
that didn’t justify a blanket ruling in favor of 123 prisoners. “You don’t
burn the barn to get rid of the rats,” he said. As for the defense’s claim
that it couldn’t prove misconduct in every case because the court files
had been purged—that was just an excuse for laziness. “Are you telling
me they can’t discover more than what they have in that lousy peti-
tion?” he asked rhetorically. “I don’t believe that!” Georgieff was
joined at the podium by his boss, Jim Smith, who put the case more
formally. No prisoner had proven that his case was tainted by the
reports, Smith argued. The problem should be handled on a case-by-
case basis. “Violations which might have occurred against a few cannot
be said to have permeated every petitioner’s case. There are no allega-
tions of fact by any particular petitioner to show his constitutional
rights were violated.”

The justices tried to listen impartially to each side, but it wasn’t
easy. Frankel’s argument for the prisoners was like a kick to their kid-
neys. Justice Arthur England, for one, reminded himself again and again
that Frankel was just doing his job. Still, it hurt like hell to listen to it.
The pain was compounded by extensive reports in the press, some of
which strongly implied chicanery on the part of the justices—a power-
ful charge, given the state supreme court’s recent record of scandal. “It
seemed that everything we were trying so hard to do was being ques-
tioned, over a simple error,” England later recalled.
AMONG THE LOWEST OF THE DEAD

In chambers, the justices quickly found that they were unanimous in rejecting the lawsuit. Several maintained they had never seen the reports in question; others insisted that, though they had read the reports, they had not been swayed by them. Even Joseph Boyd, the court's lone wolf, agreed that it was impossible to believe that the court had been biased by a few psychological reports. There was no debate. However, none of the justices wanted to write the decision; they all preferred to remain, as much as possible, removed from this attack on their integrity. At last, England agreed to take on the job. Professorial, perhaps even imperious at times, England prided himself on his command of the law and his mastery of logic over emotion. But even he could not keep the anger and defensiveness out of his writing in this case.

"We cannot pass this opportunity to put this case in a more rational perspective that it has been accorded by counsel and the media," he wrote, acid welling up in his pen. "This case emerges from society's continuing wrangling over the moral and social justification for capital punishment. Regrettably, the thunderous emanations of this great debate . . . [have] cast a pall on the integrity of the painful process by which this court attempts to deal with the responsibility it has been assigned." England was wounded, and it showed. "It seems to us both unwarranted and unseemly to vilify those who endeavor to follow the Constitution; we are, after all, the messengers and not the message," he wrote.

Clearly, Craig Barnard's choice of a former judge to argue the prickly case had done no good. To England, Marvin Frankel's gentle approach was "unseemly" vilification. And so England lashed back. He branded the case "singularly unpersuasive." He promised that any more class action appeals "will be rejected summarily."

None of this went to the legal issue at stake, however. England had to find some distinction between a trial judge weighing a secret report—which the U.S. Supreme Court had declared unconstitutional—and the reading of undisclosed reports by the state supreme court. England executed a dainty dance along some fine conceptual lines. First of all, he wrote, there is a difference between imposing a sentence and reviewing a sentence. Trial judges imposed; the supreme court re-
viewed. This was true, he postulated, even though sometimes the supreme court’s “review” resulted directly in a lesser sentence. England did not explain these slippery terms so much as simply assert them: “It is evident,” he wrote, “once our dual roles in the capital punishment scheme are fully appreciated, that nonrecord information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence ‘review.’ ”

It was not one of England’s finest efforts. The supporting cases he cited did not really support his conclusions and his hurt was poorly masked. He was inconsistent, first claiming that the court had the right to consider the secret reports, then doubling back to announce that the reports had never been considered. England proposed that his opinion be published anonymously, as the voice of all seven justices. In the face of such a direct attack, the court should answer as one.

But the loner, Joe Boyd, refused to go along with England’s strong rhetoric. On January 15, 1981, Brown v. Wainwright was dismissed by the Florida Supreme Court with England’s ringing denunciation signed by six justices and a terse note from Boyd: “I am convinced that no member of this court was influenced by any extraneous material. Although I don’t agree with all the language in the majority opinion, I concur in the result.”

The lawyers for the inmates immediately announced that they would appeal to the U.S. Supreme Court.

Bob Graham was a pioneer, blazing a trail for contemporary American governors into a realm of power unpracticed for most of a generation. Dealing with the environment, with education, with immigration and social services, Graham was a forward-looking man, one of the promising new faces of the Democratic Party. Dealing with the death penalty, however, he led the way back, not forward—back to a time before the social upheaval of the 1960s and 1970s, back to the days when governors had to spend long hours weighing questions of mercy, of justice, of life, and of death. For the generation of governors before his, the death penalty was little more than something to talk about. It

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wasn’t real. Bob Graham was the first American governor in many years for whom the death penalty became a matter of routine business.

It consumed many hours of his time. Though Brown v. Wainwright had turned the courts into a roadblock, Graham regularly held clemency hearings, signed death warrants, and—every now and then—exercised his sovereign authority to extend mercy to a condemned man. This power of mercy was not entirely the power of a Roman emperor; Graham couldn’t save a man with a simple thumbs-up. Technically, he needed the approval of half the state’s elected cabinet to commute a sentence from death to life. But in practice, his power was nearly Cae-sarean. Whenever he recommended life, he always got the votes.

The governor’s grant of mercy was a time-honored tradition in Florida. All Graham’s predecessors, at least back to 1925, had used it, with varying frequency. Some had been more merciful than others, but they had all spared the lives of between 10 and 40 percent of the prisoners who beseeched them.

Soon after his election, Graham got his hands on a law review article tracing a governor’s right to commute death sentences back to the divine right of kings. He pored over the article, discussed it with friends, took it to heart. Clemency was an act of sublime grace—in ways it outshone any other authority of the office, this power over life and death. Graham hired a savvy lawyer, Betty Steffens, to advise him on clemency, and encouraged her always to make the strongest possible case in favor of mercy. At their frequent meetings, he quizzed Steffens intently on the details of each case, and after Steffens resigned to pursue private practice, Graham kept up the quizzing with her replacement, Art Weidinger.

He believed in the power of clemency, and for a time he exercised it as his predecessors had. His first grant of mercy was a leftover from the Askew years (just as his first death warrant was inherited from Askew).

Clifford Hallman was an ex-con with a record of accosting young women in parking lots and threatening to cut their throats. He threatened, but he never cut. One night in April 1973, Hallman was drinking, as he often did, at the North Town Tavern in Tampa, and he said
something to the barmaid, Eleanor Jean Groves. Whatever he said, she didn’t like it.

Groves slapped Hallman and knocked his drink to the floor. Hallman snatched up a shard of the broken glass and slashed at her throat. Panicked, Hallman then rifled the cash register to make it look like a robbery had taken place. He fled, and the barmaid managed to get herself to the hospital. After about an hour of wandering, Hallman turned himself in to police.

Four days later, Eleanor Groves died, and Hallman was charged with first-degree murder. On October 12, 1973, he became the first man in Florida sentenced to death under the state’s new law. After the trial, however, an employee of Tampa General Hospital charged that Groves’s death had resulted not from her wounds, but instead from hospital malpractice. Groves was sent home from the emergency room despite internal bleeding, and she was suffocated by the blood. The hospital hired a doctor to investigate the case, and—to the hospital’s chagrin—the expert concluded that the wound Hallman inflicted shouldn’t have been fatal. The hospital paid a substantial settlement to Groves’s survivors.

Askew had considered Hallman’s case for clemency but left the matter to Graham. On June 26, 1979—a month and a day after John Spenkelink was executed—Graham quietly commuted Hallman’s sentence to life in prison. The same day, Graham recommended clemency in another case. Learie Leo Alford had been sentenced to death row four days after Hallman. On January 7, 1973, a thirteen-year-old girl was kidnapped in West Palm Beach on her way to the ocean. Her body was later found on a trash heap, raped, blindfolded, and shot four times. Alford was sentenced to death on the recommendation of an all-white jury. After the trial, though, defense attorneys discovered witnesses who said that a car spotted at the crime scene belonged to another man, not Alford. This hint of mistaken identity unsettled Graham, and he decided to reduce Alford’s sentence to life in prison.

Graham offset any suggestion that he was going soft on criminals by signing eight death warrants before his next grant of clemency. (All eight were stayed.) The next lucky man was Richard Henry Gibson, a thug from the Jacksonville seaport. Gibson and a friend, Tom Calvin,
were at a bar one night when they noticed two sailors on shore leave from a Brazilian freighter. The sailors, with their fat pay packets, looked like easy marks. Gibson and Calvin recruited their girlfriends to seduce the sailors, but instead of sex, the sailors got a ride to a nearby alley. There, Gibson and Calvin pulled guns and demanded their money; when the sailors resisted, they were shot. One of them died. Gibson got the death penalty; Calvin was sentenced to life in prison.

Gibson’s appellate attorney, Baya Harrison, was a big man around Tallahassee, a former deputy attorney general. He dug into the court transcripts and discovered conflicting theories of the crime. In the trial of Tom Calvin, the prosecutor had claimed Calvin did the shooting. At Gibson’s trial, the same prosecutor had said Gibson was the triggerman. Harrison took the two conflicting transcripts to his friend Betty Steffens, the governor’s clemency aide. Wasn’t it unfair, he asked, to let one of these guys live while the other died, given that the state was uncertain who did the killing? Steffens made the case to Graham, and apparently the governor agreed.

“Apparently” Graham agreed: The governor made a point of never saying publicly why he chose to commute a man’s sentence. This was in keeping with his tight-lipped approach to all death penalty matters; Graham worried that if he spelled out his reasons for granting mercy, clemency would become just another quasi-judicial proceeding. He preferred the idea of ineffable grace. But by spring 1980, Graham’s silence on matters of mercy was beginning to cause him political trouble. Learie Leo Alford’s case had infuriated many citizens in Palm Beach County. Petitions were circulated, angry letters dispatched—some charged that Alford had gotten mercy as a political favor, because Alford’s father was a minister with sway in the local Democratic Party. James Watt, a Republican legislator from West Palm Beach, introduced a bill that would require the governor to list his reasons whenever he commuted a death sentence. Graham’s aides had to lobby furiously to block the bill.

The experience taught a lesson: Clemency could have a political price. And when Graham reduced the sentence of Darrell Edwin Hoy, in June 1980, the backlash was even fiercer. Hoy was big, burly, and “dumb as a box of rocks,” in the words of his attorney; he passed his
time in the company of Jesse Lamar Hall, who was smaller, smarter, and meaner. On an August day in 1975, Hall and Hoy were hanging out at Dunedin Beach, where they spied an attractive teenage couple, David Sawyer and Susan Routt. They approached the couple. Hall brandished a gun and announced that Hoy would like to have sex with Routt. They went to a secluded stretch of beach; once there, Hoy grabbed Routt and forced her to the sand. David Sawyer broke free from Hall and tried, heroically, to help his girlfriend—but Jesse Hall shot him dead. After Hoy finished, Hall raped Routt savagely, then shot her in the head. Hoy raped her again as she died.

This evil tragedy gripped and sickened the people of Tampa Bay like few other cases of its time. The trials of Hall and Hoy took place in a blaze of publicity, and their death sentences were widely welcomed. But the Florida Supreme Court, reviewing Hall’s sentence, ruled that his attorney had been denied the chance to cross-examine Hoy. Faced with a second trial, prosecutors allowed Hall to plead guilty in exchange for a life sentence. This twist meant that Hall, the instigator and shooter, would avoid the death penalty while Hoy would face execution. Graham reduced Hoy’s sentence to match Jesse Hall’s.

No doubt the governor saw Hoy’s case as a matter of equity, but people around Tampa tended to see only the end result. Instead of two executions to avenge the ghastly crime on Dunedin Beach, there would be none. And so the angry citizens signed petitions, even more than had been signed in West Palm Beach after the Alford clemency. They flooded Graham’s office with mail. They held meetings and staged protests and poured out their fury on the evening news. Suddenly, Graham—the only governor in America who had dispatched an unwilling man to death—was catching heat for being too merciful. Because of this heat, or maybe for some other reason, the governor became more sparing in his exercise of clemency and signed another eight death warrants before he reduced another sentence.

Again, this one was apparently for reasons of disparate sentencing. There had been a falling-out among thieves in Miami; three of the crooks conspired to murder the fourth. One thief got a ten-year sentence, another got life . . . and the third, Michael Salvatore, was sent to the death house. When Graham reduced Salvatore’s sentence, no
one protested, because in this case there were no good guys. That was the last time Bob Graham pushed for mercy in a capital case, though he did agree to one more clemency—for Jesse Ray Rutledge, nearly a year, and nine death warrants, after Salvatore. Mercy for Rutledge came at the instigation of the state insurance commissioner, a member of the elected cabinet. The commissioner was not sure Rutledge was guilty.

Jesse Rutledge had been sent to death row for a murderous attack on a neighbor and her three children. Two children survived, and one of them testified against Rutledge. But defense attorneys later discovered another suspect—a man who had had a violent affair with the murdered woman. This man had been overheard threatening to kill her and her children. And the lawyers found a police report in which one surviving child described the attacker as having a mustache and missing a front tooth. This description fit the second suspect, not Rutledge. Graham was persuaded to spare Jesse Rutledge. Then, for reasons known only to Graham, official mercy dried up in Florida. Though he continued to hold formal meetings of the clemency board, though he listened patiently to the pleadings of defense attorneys, though he met routinely with his clemency aides—and though there were men on death row with cases at least as strong as Darrell Hoy’s and Jesse Rutledge’s—Graham never again exercised his power of grace. During the first three years of his term, Graham balanced death warrants with clemency in a ratio consistent with his predecessors’ By the time he left office, he had shown less mercy than any Florida governor for whom records were available.

Graham later explained that he had come to count on the courts to weed out injustices. And it’s true that the extensive appellate review of modern death cases did much culling that used to fall to the governors. But Graham’s critics couldn’t help noticing the governor stopped granting mercy at about the same time he began running for reelection.

Clearly, experience had taught Graham that mercy could be politically volatile. And the truth is that Graham did not actually stop sparing lives on death row—he merely developed a low-profile, private way

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of doing it. Graham continued to take great interest in the details of troubling cases, and when he was sufficiently troubled, he simply declined to sign the necessary death warrants. If it was too politically risky to save men by action, Graham nevertheless did so by inaction. In some twenty cases through the rest of his tenure, Graham prevented executions by quietly declining to sign death warrants. These men went into limbo: they were not permanently assured of living (another governor could someday sign a death warrant), but neither were they dead. It was a political masterstroke, the ultimate pocket veto.

Graham was Florida’s ablest politician—opponents of the death penalty couldn’t lay a glove on him. Everything they did seemed to play into his hands. Their protests seemed only to improve his standing. As Graham traveled around the state and across the country, hecklers often met him with banners denouncing “Bloody Bob!” or “Gov. Death!” Yet all along, Florida’s murder rate was soaring, carrying support for the death penalty into the ionosphere. Linking Graham to executions did nothing to hurt him.

But death penalty opponents continued to attack him. Protesting was morally invigorating, and it was fun. When death penalty opponents learned that Graham was scheduled to deliver the nominating speech for President Jimmy Carter at the 1980 Democratic National Convention, they decided to dog him to New York. They wanted to disrupt the young governor’s national political debut, poison his moment before the network television cameras. “Operation Besmirchment” was hatched in Scharlette Holdman’s smoky office in the FOG Building in Tallahassee; the idea of getting in Graham’s face appealed to Holdman’s barefoot Yippie soul. But though she blessed the project, she kept her distance—Holdman realized that it could hurt her standing with mainstream Florida lawyers if she was seen as harassing the governor. Instead, Jimmy Lohman, Holdman’s assistant (and sometime boyfriend), was dispatched to Manhattan to ruin Bob Graham’s big day.

Lohman and a handful of conspirators worked quietly amid the madness of convention week. It was no easy thing to get protestors onto the floor of a convention, but Lohman had one thing going for him: 1980 was an unhappy year for the Democrats. As the Carter presidency foundered, Senator Edward Kennedy of Massachusetts had
tried to claim the nomination for the party’s liberal wing. And though
Kennedy had failed, his delegates remained disaffected. Lohman began
picking at this wound. He worked the phones in search of disgruntled
Kennedy delegates who might donate their floor passes to outside dem-
onstractors. He appealed to leaders of the black caucus, asking for vol-
unteers to join the protest. He pitched his scheme to gay delegates,
antinuke delegates—anyone who might have a beef with the party.
Whenever he found a friendly reception, Lohman dispatched a packet
of protest materials: photos of John Spenkelink, anti–death penalty edi-
torials, even black executioner’s hoods to be worn during Graham’s
speech.

When his idea began to catch on, Lohman moved his plot out of
the shadows. He began buttonholing journalists, from the piddliest
Florida newspaper reporter to the biggest newsman of them all, Walter
Cronkite. At first, Lohman was met mostly by yawns. A hundred or so
protesters in a field of more than three thousand delegates? Big deal.
But the yawns turned to interest when Lohman mentioned his coup de
grace: Lois Spenkelink—mother of the man Bob Graham had ordered
executed—would be on the convention floor for Graham’s speech.
What journalist could resist? It would be an overwhelming image, a
sorrowful, white-haired woman facing the man who had killed her
boy. When the moment of Graham’s speech arrived, Walter Cronkite
introduced CBS viewers to Florida’s little-known governor with a
lengthy account of Graham’s death penalty activities. Then cameras
from all three networks fastened on the broad, sad face of Lois Spenke-
link. Lohman had begged a seat for her among the New York delega-
tion, front and center. She sat beneath a banner bearing a photograph
of her Johnny, a sketch of an electric chair, and the hand-lettered
message: BOB GRAHAM KILLED MY SON.

As protests go, Operation Besmirchment was a huge success; the
morning after Graham’s disappointing speech, the face on the front
pages of many Florida newspapers was not the governor’s. It was Lois
Spenkelink’s. As political action, though, it was another failure. Amer-
cans everywhere supported the death penalty and admired politicians
willing to carry it out.
Nationwide, support for capital punishment ran above 70 percent in most polls. In Florida, the number approached 90 percent. Americans rarely showed that level of agreement on anything. Judges and juries were dispatching criminals to death row in greater numbers than at any other time in American history. On the political battlefield, the issue was a rout. And yet the death penalty was stymied. Virtually no one was being executed. More important than the political battleground was the legal battleground—and there the defense was still ahead. The only men being executed in America were those who gave up on their appeals and demanded death. On October 22, 1979, in Nevada, Jesse Bishop went willingly to the executioner. No one was executed in 1980. In Indiana, Steven Judy was voluntarily executed on March 9, 1981. Then there was another hiatus of seventeen months before the next volunteer came along—Frank Brooks in Virginia.

The Spinkelink execution had turned out to be a fluke. Across the country, state and federal courts were finding that their new laws, with the promise of almost scientific reliability, were in fact riddled with glitches. The death row population in America was greater than it had ever been, bumping up toward a thousand. Of all those cases, not one could be steered through the confusions and inconsistencies and legal conundrums of the modern death penalty. Florida was the national leader, ready to execute dozens—but Brown v. Wainwright still stood in the way. As promised, Craig Barnard and his colleagues had appealed the Florida Supreme Court's angry denunciation of their megasuit to the U.S. Supreme Court. Most of 1981 went by without an answer. At last, in early November of that year, by a vote of 7 to 2, the high court declined to hear the case.

Finally, the logjam might be broken. In Tallahassee, Attorney General Jim Smith said he would advise Governor Graham to start cranking out death warrants at a swifter pace. Turn up the heat. Within forty-eight hours of the U.S. Supreme Court's vote, Graham ordered the executions of two men. They were apparently strong candidates for the electric chair—Alvin Ford had killed a police officer in Fort Lau-
derdale; Amos Lee King had raped and murdered an elderly woman while on work release from prison.

But Craig Barnard was not finished with the secret psychological reports. When reporters called for his reaction to the Supreme Court setback, he puffed his pipe and said calmly that the fight would go on. True, his class action suit—lumping the claims of 123 condemned men together—was dead, but each man could still raise the appeal individually. Even the prosecution had acknowledged that some prisoners might have valid claims; Barnard planned to let the courts sort them out one by one. "The case is still as viable as the first day we filed it," he said.

Barnard and his assistants handled Alvin Ford's case, and they rushed to challenge the secret psychological reports in federal court. Seventeen hours before Ford was scheduled to die, the circuit court of appeals in Atlanta agreed to hear the case, and his execution was stayed. Amos King also got a reprieve. The logjam remained.

This is the way a good death penalty defense lawyer works: Run all the traps, fight every issue, hit every court. Go to the state supreme court, to the federal district court, the federal appeals court, the Supreme Court of the United States. Fight an issue on broad terms, and if you lose, fight it again on narrow terms. Turn every stone, poke into every mushy spot in the law. Read every opinion rendered by every court, and when some other death row inmate wins his case, shoehorn his issue into your own client's appeal. Make the law do what it promises. Make it be perfect.

Unfortunately for Craig Barnard, the Alvin Ford case was a weak one for testing the issue of the undisclosed psychological reports. His case had been considered by the Florida Supreme Court while the reports were being collected, but there was no clear evidence that any inappropriate documents had ever been part of his file. Barnard's team could only maintain that, since the files had been purged, there was no way to be certain that offending papers had not been plucked from Ford's file and shredded.

In this respect, the Ford appeal raised the touchiest aspect of the
whole debacle, because the only way to find out if any of the justices had ever seen a secret report on Ford would be to put the justices on the witness stand. This would involve subpoenas, swearing oaths, and cross-examination: The highest officials of the Florida judicial system would be treated like common riffraff. It was an ugly prospect to any judge with a sense of legal decorum, and it would strike at the dignity of Florida justice. Florida justice was a powerful concept for the judges of the newly created Eleventh Circuit Court of Appeals, because Florida was the biggest state in the circuit, and thus a number of them were Floridians. One, in fact, was a former member of the Florida Supreme Court: Judge Joseph Hatchett. If Craig Barnard was allowed to subpoena Florida justices, some of those documents would have Hatchett’s name on them.

This is not to say that the case was an obvious lost cause. Some of the appeals court judges were shocked that the reports had been collected and then shredded. Among them was John Minor Wisdom of Louisiana, perhaps the court’s most distinguished jurist; Wisdom found it “incredible” that the Florida Supreme Court claimed it had not been influenced by the documents. Judge Phyllis A. Kravitch of Atlanta bristled at the suggestion that no harm had been done by collecting the reports, calling this notion “illogical.”

Ford’s case was assigned to a panel of three judges, in accordance with customary practice. (There were twelve judges on the court of appeals.) One was a Floridian, Judge Paul Roney of Saint Petersburg; Phyllis Kravitch was the second; and the third was Virgil Pittman, a federal district judge from Alabama doing substitute duty on the court. Roney, the Floridian, sided with the Florida Supreme Court and wrote a blistering opinion against Ford’s appeal.

There was “not an iota of evidence,” Roney wrote, to suggest that the Florida Supreme Court had mishandled Ford’s case. Moreover, defense attorneys should not be allowed to go on “a fishing expedition” for evidence of misbehavior. And in a ringing defense of his home state’s sovereignty, Roney concluded that if the Florida court said it was right, then it was right. “As the highest court in the state, the Florida Supreme Court’s interpretation of its procedural role is the law of the state, and we do not question it,” he wrote. Judge Pittman
joined Roney, and Ford’s appeal was denied by a vote of 2 to 1. Judge Kravitch, dissenting, said she found the decision “disturbing.”

That was not the end of the controversial reports, however. Other inmates had been raising the same issue when Bob Graham signed their death warrants, and their cases were scheduled to be heard by other three-judge panels. Those panels might rule differently. To avoid such a circus, the court of appeals decided to reconsider Ford’s case with the entire membership participating. They would settle this question once and for all. (Judge Hatchett declined to participate, citing his service on the Florida Supreme Court as a conflict of interest.)

While the question remained unresolved, the appeals court instructed federal judges in Florida to block all death warrants. Their decision in the Ford case could affect almost everyone on death row.

The Eleventh Circuit Court of Appeals, minus Judge Hatchett, heard the case of Ford v. Strickland on June 15, 1982. The stakes were enormous. On his way into the hearing, a prosecutor paused to tell reporters: “If they rule against us, it could just destroy Florida’s death penalty statute.”

Marvin Frankel, the former federal judge from New York, once again handled the oral presentation. Again, Frankel tried to step lightly on the dignity of the judges he was attacking. “I don’t think the Supreme Court of Florida did anything purposefully evil or consciously wrong,” he offered gently. “It just made a grave mistake.” But, Frankel continued, the fact remained that the justices of the Florida Supreme Court had material in their files that defense attorneys did not know about. This violated the right to confront evidence—and for men facing the ultimate penalty, such rights are especially precious.

Frankel asked for a full-blown proceeding where he could call witnesses, subpoena documents, and cross-examine anyone who might know if tainted material had reached Alvin Ford’s file. By implication, he was also asking for similar proceedings on behalf of more than a hundred death row inmates. That raised the question of decorum. “Isn’t the ultimate thrust of your argument that justices of the [Florida]
DANCING ON THE HEAD OF A PIN

Supreme Court must testify under oath and specify what they did?” demanded Chief Judge John Godbold.

Frankel demurred. “We’d use that as a last resort, not a first resort,” he said. “But it might come to that.” Judge Gerald Tjoflat was not satisfied. Since the files had been purged, what other way was there to get to the truth? “How could you make your case without asking them to testify?” he demanded. This time Frankel tried to minimize the significance of such a request. “If the court needs to testify through its justices, well, it won’t be the first time a judge has testified,” he said.

Arguing for the State of Florida was Assistant Attorney General Charles Corces, who began by acknowledging that “non-record” material had indeed gotten into the files of an unknown number of death row inmates. However, he insisted that the material had not been “secret”; the fact that defense attorneys had not been “notified” was simply “a bureaucratic mess.” Some court clerk had misunderstood what, exactly, was supposed to go into the files. Besides, Corces said, echoing Arthur England’s passionate opinion on behalf of the Florida Supreme Court, even if some of the justices had “read” or “reviewed” the offending material, they certainly had not “considered” it in reaching their decisions.

Judge Robert Vance was obviously unsatisfied by these verbal distinctions. “I’m trying desperately to understand you,” he interjected. “I just want one plausible explanation.” Judge Tjoflat hammered away repeatedly at Corces, demanding to know why the records had been purged. “How can [an inmate] be expected to prove what the information was when it is no longer in existence?”

Under attack, Corces fell back on his gut-level argument—the dignity of the state supreme court. “We are not dealing with a lawsuit with private citizens. We are talking about judges. Judges who have almost absolute immunity,” he said. Corces appealed to the court’s sense of itself, of the station and integrity of their office as judges. An institution as lofty as the Florida Supreme Court must be given the benefit of the doubt, he insisted. “When they say they did not consider it, we have to accept it.”

The hearing went about as well as it could have for the anti-death penalty lawyers. They had always known the problem with their case: A
victory for them would mean havoc for the Florida Supreme Court. Federal judges were inevitably wary of that. Still, the judges had put some very tough questions to the prosecution, which suggested that the court had an open mind. A victory seemed possible—but even a protracted debate among the judges would be nice. Delay is the next-best thing to victory for a death penalty defense lawyer.

Weeks turned to months without a decision from the appeals court. The population on Florida’s death row rose toward two hundred—still the largest in the nation. Bob Graham knew there would be no executions until the Ford case was decided; federal judges were complying with their appellate court’s instruction and entering automatic stays of execution. Still, Graham churned out death warrants at an unprecedented rate. In the first three years of his term, he had signed a total of nineteen death orders. Now, in his fourth year alone, he signed twenty-six. That was the year he ran for reelection.

What was going on? Scharlette Holdman and her circle believed that Graham was plainly playing politics, and some federal judges seemed to share that view. U.S. District Judge Lynn Higby, of Panama City, took the unusual step of scolding Graham publicly. In light of the Ford case, Higby said, the signing of death warrants “ranges between legally unsound and futile.” But Attorney General Jim Smith made no apologies for the governor’s prolific pen. The problem, he said, was that the Eleventh Circuit Court of Appeals lacked the “intestinal fortitude” to deal with the death penalty. Smith was the government’s public pit bull on the death penalty. He traveled widely, making speeches in which he said the lack of executions could be blamed on a few weak and meddlesome judges. To Smith, the problem wasn’t confusion about the law, or undisclosed documents: It was a simple matter of us versus them. “If we show any sign that they’re whipping us down,” he said, “we’re giving in.”

Graham said little as he cranked out warrants he knew would be blocked. Whatever his reasons, the public approved. One newspaper poll shortly before the 1982 election found that Graham got higher marks for his handling of the death penalty than for any other issue. In conservative Florida, the death penalty shielded Graham against attacks from the Right—as his Republican opponent quickly discovered. “If
there's anything that Graham has going for him with people who ordi-
narily would vote for a conservative Republican like me, it's that he's
signed so many death warrants," said former Congressman Skip Bafalis.
"I hear that over and over and over."

Graham clearly understood this himself. "This is an issue on
which deeds speak louder than words," was all that he said. He was
reelected in a landslide.

Scharlette Holdman was having nightmares—or rather, the same
nightmare, over and over. She was in a room, surrounded by her death
row clients. Suddenly, the concrete walls began to crumble. So she
hustled her clients into the next room . . . but those walls, too, began
to give way. Panicked, she rushed her flock through another door—
hurry up, hurry up! From room to room they ran, as rubble rained
down around them. Now she could see her way to safety—hurry up,
follow me! But looming in her path was a huge prison warden. "You're
not taking those guys past me!" the warden thundered. "If you
try . . ."

And then the nightmare took one of those freaky turns that night-
mares take. The warden raised his giant hand and brandished . . . a
mouse. "If you try, I'll bite this mouse's head off!" Holdman would
awaken in a sweat and wonder: Who's the mouse?

For Holdman, Graham's accelerated schedule of death warrants
was crushing. It ruined her life and played havoc on her mind. More
death warrants meant more hours on the telephone; more urgent
pleadings with more reluctant lawyers; more cigarettes chain-smoked
as she paced nervously, barefoot, at the end of her phone-cord leash;
more cups of coffee; more buckets of greasy fast-food chicken; more
bursts of profanity and wild, angry laughter. More warrants meant even
less time with her children; she began to fret that her work might be
damaging them. Tad, her son, sketched electric chairs in his idle time.
Maybe she wasn't cut out to be a parent, Holdman nervously confided
to friends. She went ballistic over the smallest things, like the time
Summer, her daughter, asked for a pretty dress and some lipstick. Was
this rebellion? Holdman’s friends began to worry that she was drinking too much.

And daily her flock worked their desperate paths through the ten steps toward death in her handwritten ledger. Every one of them needed a lawyer. It was true that stays were coming easily—but that might end any day. Anyway, to get a stay someone had to file an appeal, and if the lawyers didn’t get every available issue, large and small, into the first appeal, they might not get a second chance. Each death warrant required a full-scale legal response. So many cases, so few lawyers.

When Amos Lee King’s death warrant was signed, Holdman scanned her ledger and discovered that King had no lawyer. The execution date was five days away. Holdman picked up the phone and began dialing. How many ways can people find to say no? Holdman had heard them all. Eventually, she tracked Baya Harrison to a hospital where his wife was giving birth to a daughter. Harrison had come through for Holdman once before, winning clemency for Richard Henry Gibson. Now she was pleading with him to take King’s appeal.

Baya Harrison III was not typical of the lawyers in Holdman’s index card file. He wasn’t a rabble-rousing criminal defense attorney or a liberal law professor or even a blue-chip corporate lawyer with a conscience and a pro bono budget. Harrison was the idiosyncratic scion of one of Florida’s most influential legal families, the son of a bold figure on the Florida stage, Baya Harrison Jr.: A full colonel and war hero at the age of twenty-nine (Van Johnson played him in a World War II movie called Go for Broke), chairman of the state Board of Regents, president of the Florida Bar, reigning partner at one of the Tampa Bay area’s most important law firms.

The younger Baya Harrison eschewed the family firm for a small private practice, but he never went so far as to embrace the subversive activism of Scharlette Holdman and her set. Harrison would represent bad guys, but he would not love them; he would force the system to work precisely by the rules, but he wouldn’t reject the system as irretrievably flawed. He gave his time to Scharlette Holdman, but he also hosted political fundraisers for her enemy, the attorney general, Jim Smith.
Harrison had sworn after the Gibson case that he was finished with death row. The work was too exhausting; the stakes were too high. But now Holdman was on the phone, pleading with him to represent Amos King. Harrison protested that he was sick. “I just threw up,” he said. Holdman kept at him. “My wife just had a baby,” Harrison attempted. Holdman wouldn’t give up. She gave him the full Scharlette treatment—a mile a minute in her profane drawl. “She was a con artist in the best sense of the word,” Harrison later recalled. “She knew how to deal with a lawyer’s ego, and she’d talk you—against your better judgment—into taking these cases. She told me what a marvelous lawyer I was, how eloquent I was, how wonderful I was. She told me no one else could save this guy. He’d die if I didn’t take his case. She was just brilliant, convincing me that I had to take it, that there was no other answer. She tricked me into doing it.”

At last Harrison relented. Holdman arranged to send him a copy of King’s trial transcript. He skimmed the record and was immediately struck by the poor job King’s trial attorney had done in defending him. Even the best lawyer in the world might not have been able to save King, who had escaped from a prison work-release program, broken into a woman’s home, raped her, stabbed her forty times, and burned down the house. Nevertheless, Harrison concluded that his strongest argument would be ineffectiveness of counsel.

This claim—that an inmate’s lawyer had failed to represent him competently—had become a mainstay of the anti-death penalty attorneys. (Millard Farmer had used it, with brief success, in the last hours of Spenkelink’s life.) Sometimes the argument was pretty strong. On death row there were men whose court-appointed lawyers had never handled a capital case, and men whose lawyers made no effort to find evidence in their favor, and men whose lawyers were later disbarred. One man’s defense attorney was such a notorious drunk that the judge asked the prosecutor to smell the guy’s breath each morning before trial.

Other times, the case for incompetence was far weaker, based on little more than the notion that any lawyer whose client is sent to death row must have screwed up somewhere. King’s case was somewhere in between; his lawyer had perhaps been too soft on some cross-examinations, and had appeared ill prepared for the sentencing phase of
the trial. At one point, in the jury’s presence, he said something along the lines of: “I’m an assistant public defender, I have to defend this guy.” That couldn’t have helped matters any.

On two days’ preparation, Harrison went into federal court for Amos Lee King. The hearing was a shambles. He called Pat Doherty, another stalwart from Holdman’s card file, as his expert witness. “I didn’t know anything about this case,” Harrison later recalled. “I put Pat on the stand and started asking him questions. The prosecutor objected, and cited some case I’d never read. It turned out to be the controlling case on the question of competent counsel. That’s how unprepared I was.”

This sort of thing was almost routine for Holdman’s lawyers—defending a man’s life on a couple of days’ notice, arguing a cause without time to master the case law, rushing into some of the nation’s loftiest courts armed with little more than strut, passion, quick wits, and audacity. Maybe they had gotten a crash course from Craig Barnard or Millard Farmer. “This was the crazy way we handled those cases,” Baya Harrison said later. “We were like barnstorming pilots in the old days. We weren’t sure how to fly the plane, but we were just dumb enough to get up there and try.”

The story repeated itself over and over. In March 1982, Graham signed the death warrant of Doug McCray, who had been represented at his clemency hearing by a state-appointed lawyer who candidly admitted that he had never read the trial record. Shortly afterward, the lawyer’s license was suspended on grounds of mental instability and theft from clients’ trust accounts, and the lawyer had disappeared, a fugitive from federal authorities. “Can you imagine what it is like to be told that your death warrant has been signed and you don’t have a lawyer and no means to contact one?” McCray asked a reporter.

Scharlette Holdman made nearly fifty calls to lawyers, begging someone to take McCray’s case. At last she found a young man in Saint Petersburg, Bob Dillinger, who had just left the public defender’s office to start a private practice. Dillinger protested. This was no time for him to be taking on pro bono projects. But Holdman pushed. She was “frantic, almost desperate,” Dillinger recalled. And he relented.

McCray’s trial record ran to more than fifteen hundred pages.
Dillinger had less than two weeks to digest the material and prepare an appeal. With six days left before McCray’s execution, the Florida Supreme Court—despite having affirmed McCray’s death sentence in its first review—agreed to consider a request for a new trial, and issued a stay.

Baya Harrison was preparing for a hearing in the Amos Lee King case when, in June 1982, Holdman begged him to save Timothy Palmes, a Jacksonville murderer whose scheduled execution was just two weeks away. Twenty-five lawyers had already turned the case down. “They are running us ragged,” Harrison complained to a reporter. “They are beating us to meat.” It was nuts. Laurin Wollan, a Tallahassee lawyer and professor, estimated he had lost twenty pounds while trying to win a single stay. Ray Makowski was hospitalized for exhaustion after winning a last-minute stay for Ronald Straight. Lawyers June Rice and Steve Stitt, a husband-and-wife team from Key West, said their defense of Ray Meeks had cost them “thousands of hours and thousands of dollars and we’ve never been paid anything at all.” Holdman found Bob Gerber at a prestigious law firm in New York City and cajoled him into taking the case of Eligaah Jacobs. Gerber prepared for Jacobs’s clemency hearing the way he might prepare for a multi-million-dollar corporate lawsuit. When it was over, he said the same work would’ve cost a corporate client a hundred and fifty thousand dollars.

There simply weren’t enough people willing to take on such burdens. We’re gonna start losing people, Holdman warned the Inc. Fund and the ACLU, and these titans put the arm on wealthy firms in New York, Boston, and Washington. Several firms agreed to take on some cases. Still, Holdman’s boat was leaking. The nightmares kept coming. Who was the mouse?

On the other side of the battlefield, prosecutors saw none of the panic; only the unbroken string of stays. Jim Smith refused even to speak Scharlette Holdman’s name after she ruined his birthday with a cake decorated with black crosses, but he spoke often of her enterprise. To him, Holdman’s lawyers were a well-oiled machine, light-years ahead of the state, fiendishly clever, richly endowed. “Governor Graham and I have been in office forty-four months and he’s signed
forty-three warrants, and we’ve had one execution,” Smith told an interviewer in the autumn of 1982. “I think that speaks for itself. I think the defense lawyers, frankly, have been a step ahead of the State. They’re certainly winning the delay battle going away.”

Holdman found such remarks darkly comical, as she dialed her telephone and lit up another Benson & Hedges. She was sending volunteers to the library at Florida State University to root through wastebaskets for usable typing paper. Her budget wouldn’t even cover the cost of the paper an appeal was printed on. This was her well-oiled machine? Sometimes, in frustration, she’d call Pat Doherty, one of her stalwart attorneys, a man who shared her mordant sense of humor, and she’d confess her fears in a patter of joking profanity. All this time working with murderers was skewing her sense of the world, she once told Doherty. “I’ve given up hoping that the kids grow up to be doctors,” she said. “I just hope they don’t kill the fucking neighbors.”

And in return Doherty regaled her with stories from his colorful practice and his bottomless supply of jokes. One day, he told Holdman about a recent death threat—he received them frequently, because he defended some of the Tampa Bay area’s most notorious killers. “Some nut calls and says he’s gonna kill me,” Doherty told her. “A few minutes later, I hear shots outside. I figure he’s come for me.”

One of Doherty’s clients had been ordered to surrender his gun collection, so Doherty happened to have a small arsenal sitting in the office. Doherty grabbed one of the guns and began trying to load it. “Shells were flying everywhere,” he said. “Clips were jamming. Hell, I don’t know anything about guns. Finally, I take the gun, creep over to the window and look out. Some guy’s standing on the street with his pants around his ankles and a Clearwater cop is shooting at him! No flashing in Clearwater, man!”

Doherty shared Holdman’s view that Jim Smith was being ridiculous. There he was, the top law enforcement officer of one of the biggest states in the country, head of a battalion of lawyers with all the resources of government behind them . . . complaining about the advantages enjoyed by Scharlette Holdman and her little band of volunteers. “Reminds me of a joke,” Doherty said one day.

“There’s an Arab army encamped in the desert, a whole huge
army. They're sitting there, and this Israeli comes right up to the camp. Challenges the whole army to a fight.

"'All right,' says the Arab general, and his army gets its gear ready—guns, grenades, mortars, tanks. They go marching toward the Israeli. Suddenly, the general yells: 'Retreat—it's a fucking trap! There's two of them!'"

On January 7, 1983, the Eleventh Circuit Court of Appeals—by a single-vote margin of 6 to 5—closed the book on the question of the Florida Supreme Court's collection of psychological reports. Ultimately, the judges took the word of the Florida justices that their deliberations had not been affected by the reports. In a barrage of conditional language, the majority declared: "Even if the members of the court solicited the material with the thought that it should, would, or might be used, the decision of the Florida court that it should not be so used, the statement that it was not used and the rejection of the notion that it affected the judgment of the reviewing judges . . . ends the matter." A shift of a single vote and Craig Barnard might have had his big issue. The death penalty in Florida could have been knocked off the rails for perhaps a decade.

As it was, Barnard's lawsuit had stalled executions for nearly two and a half years, and that alone was a victory for him. In death penalty defense work, a lawyer had won as long as his client was still breathing. Anything short of death was a success. The challenge to the secret reports had kept more than a hundred men alive at precisely the point when the Spenkelink execution had seemed to put them in danger.

But now the issue was gone; there was no serious hope that the U.S. Supreme Court would overrule the appellate court. The high court was becoming a very cold place for death row inmates, and 1983 turned out to be the worst year for them since the new death penalty had been affirmed in 1976. The U.S. Supreme Court decided four major capital appeals in 1983, from Florida, California, Texas, and Georgia. The appeals raised various issues—in Barclay v. Florida, for example, the justices considered a question that had troubled Florida for a decade: If a trial judge, while sentencing a man to death, used
Among the Lowest of the Dead: The Culture of Capital Punishment by David Von Drehle

aggravating circumstances that weren’t spelled out in the law, was the sentence automatically invalid?

On July 6, 1983, the U.S. Supreme Court upheld Elwood Barclay’s sentence—one of a flurry of opinions striking down impediments to executions. Four big cases, four victories for the prosecution. Four years after the Spenkelink execution, the Court’s message seemed clear: Time to get on with it. In Florida, the message was heard. The ground had shifted away from the endless stall tactics. Prosecutors and defense attorneys alike agreed that someone was likely to die by year’s end. The smart money was betting on Bob Sullivan.

Most people support capital punishment. They give a lot of reasons, but ultimately, these boil down to three basic positions:

The deterrence argument says that an effective death penalty will deter crime. Common sense seems to support this argument. Criminals will see the horrible fate awaiting them and they will decide not to commit aggravated murder. George Georgieff, the cocky prosecutor at the Florida attorney general’s office, was big on deterrence. He often regaled his pals with a story about a time he had been deterred from murdering his wife. Georgieff even told the story to reporters: “I was having a fight with one of my ex−wives, and I found myself choking her, and I saw her eyes start to pop out, and suddenly off to the left or the right I saw the electric chair. It deterred me.”

The problem with deterrence is that there is no way to prove it exists. Even Georgieff’s crude anecdote doesn’t prove anything. After all, he of all people—a death penalty professional—knew that men are almost never executed for killing their wives in a fit of anger. Purely domestic murders rarely end in the death penalty. If Georgieff’s story was true, if he’d actually considered killing his wife, the thing that had stopped him was surely a moral barrier, not a legal barrier. Some shred of decency prevented him, not the electric chair. He certainly knew he wouldn’t get anywhere near Old Sparky.

It makes sense that the death penalty should stop people from killing. It also makes sense that a boulder should fall to the ground faster than a wad of paper. But in both cases, common sense is wrong.

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DANCING ON THE HEAD OF A PIN

Some states with no death penalty have very low murder rates; others with vigorous death penalties have astronomical murder rates (Florida, for example). There are cases of sons who watched their fathers hang—a pretty stern deterrent message—who went on to commit capital offenses themselves. There are even cases of hangmen who were later hanged.

Experts have been studying the question of deterrence for decades, with little success. In 1975, a University of Chicago economist claimed to have proven, by a statistical method known as regression analysis, that the death penalty deters murders. A war of the eggheads ensued. Ever more complicated mathematical models were devised; computers spewed out enough dense math to navigate the space shuttle. Eventually, the prestigious National Academy of Sciences announced that the economist’s “proof” was flawed. Some scientists claim, in fact, to have found evidence that executions actually provoke more violence.

In a sense, the whole exercise is fundamentally ridiculous, because it rests on the notion that the hyperrational tools of mathematics can measure the irrational brain of a murderer. The problem with deterrence, as applied to aggravated murder, is that it assumes killers calculate risk and reward. The reality, with few exceptions, is that murderers are not clear-thinking people. They are impulsive, self-centered, often warped; overwhelmingly they are products of violent homes; frequently they are addled by booze or drugs; and most of them are deeply anti-social. The values and sanctions of society don’t concern them. They kill out of mental illness, or sexual perversion, for instant gratification or sheer bloody-mindedness. Some murderers actually seem drawn toward the death house. Hubert Goddard, who raped and killed a teenager in Miami, had but one request after his confession: “Now I want the electric chair.” On January 29, 1940, he got it.

Another broad justification for the death penalty is retribution. Vengeance. Eye for eye, tooth for tooth, life for life. This way of thinking has a plain, if harsh, beauty to it, a symmetry, balance. And yet, most people shy away from the idea of retribution. It seems uncivilized, atavistic, base. Qualities that ennoble society—mercy, restraint, judgment—are lost; society merely reacts spasmodically to the mur-
derer’s action. A man does something bad, so the society does the same bad thing to him. Retribution is tainted by dragging the community down to mirror the criminal.

The third basic argument for the death penalty rests neither on the fallacy that murderers are rational, nor on the debasing spirit of retribution. This view holds that any society worth living in must cherish goodness and exalt the human capacity to restrain evil. Crimes in such a society are more than offenses by one person against another; they are attacks on the society itself. Society has a right—indeed, a duty—to condemn these attacks, and the graver the attack, the graver the condemnation ought to be. The most egregiously evil acts demand utter condemnation.

As the philosopher Walter Berns put it in his book For Capital Punishment: “Capital punishment . . . serves to remind us of the majesty of the moral order that is embodied in our law and of the terrible consequences of its breach. . . . The criminal law must possess a dignity far beyond that possessed by mere statutory enactment or utilitarian or self-interested calculations; the most powerful means we have to give it that dignity is to authorize it to impose the ultimate penalty. The criminal law must be made awful, by which I mean awe-inspiring, or commanding ‘profound respect or reverential fear.’ It must remind us of the moral order by which alone we can live as human beings.”

In other words, some crimes are so evil that the criminals who commit them cannot be permitted to remain a part of society—not even on the very margin of society, locked away in a maximum-security prison. To continue to make a place for such criminals erodes the moral order of the community. In long-ago times, banishment might have served the same purpose, but banishment is no longer a possibility. The whole world is inhabited, and who would accept our killers? There must be a way for society to say: This person is beyond our tolerance.

However, what the Supreme Court of Florida—and courts around the country—were learning by 1983 was that this grand philosophical construct is difficult to apply. Who, precisely, is beyond the pale? Walter Berns mentions Lee Harvey Oswald and James Earl Ray, the assassins of John F. Kennedy and Martin Luther King Jr. But these
are easy cases, when you think about them. Their offenses against society were immense, and, thank God, unusual. What about the more ordinary murderer, given that the U.S. Supreme Court had outlawed the mandatory death sentences that would simply kill them all? The modern death penalty demands that distinctions be drawn among murderers. Who is irrevocably cut off from society?

Robert Austin Sullivan, the adopted son of a Harvard-educated doctor, posed such questions by his very existence. He wasn’t John Spenkelink, whose execution was so plainly a fluke—the man who failed to plead guilty to second-degree murder and wound up in a riptide of history flooding toward death. Sullivan’s crime was dastardly: In April 1973, the body of Donald Schmidt, assistant manager of the Howard Johnson’s in Homestead, was found facedown in the Everglades muck. Schmidt’s restaurant had been robbed shortly after closing time; he had been driven into the wilderness west of Miami. His hands bound behind him with adhesive tape, Schmidt was ordered out of the car. He stumbled, and his abductor beat him over the head with a tire iron. Then the killer fired four shotgun blasts into Schmidt’s skull.

About a week later, Sullivan and a boyfriend, Reid McLaughlin, were arrested in New Hampshire. Sullivan knew all about the Homestead HoJo’s; he had been fired from his job there after he was caught embezzling. And detectives had established an even more damning link: Sullivan had been using Schmidt’s credit cards—his handwriting matched the signatures on the card receipts. In the motel room where the fugitives were arrested, police found twelve hundred dollars—in HoJo’s ice cream containers. In the trunk of Sullivan’s Cadillac was a shotgun, a tire iron, and a roll of adhesive tape. Under interrogation, Sullivan gave a detailed confession. Reid McLaughlin testified that he had been with Sullivan during the crime and that the details of the confession were correct. McLaughlin remembered Sullivan’s words after the murder: “I don’t feel any different.” In the words of the trial judge, Sullivan showed not “one scintilla of remorse.”

And yet, Bob Sullivan was not cut off from, or cast away by, society. Sullivan was a singular man, perhaps the most resourceful inmate in the history of Florida’s death row. He was a fat man who stammered under pressure, a college dropout with a C average, a liar, a
thief, and a killer. In the death house, though, Sullivan blossomed as a leader, an entrepreneur, and a first-rate jailhouse lawyer. From his little cell on S-wing of a remote prison in the middle of the Florida nowhere, Sullivan presided over a thriving network of decent people, global in scope, diversified in its enterprises, whose business was to save his neck.

He grandly called it the Robert A. Sullivan Legal Defense Fund, but—possessed of a bureaucratic turn of mind—he generally referred to the operation as RASLDF. His enterprise included hundreds of supporters across the country and around the world, and he kept these backers energized by writing at least a dozen letters a day in his looping, feminine script. Sullivan generated hundreds of memos scrutinizing the fine points of his defense, and numbered them for easy filing: “R.A.S. Memorandum 130-A,” for example. RASLDF produced multipage newsletters and dispensed them in mass mailings; he once complained that 750 mailing labels would not be enough for his latest newsletter. Society had not, entirely, rejected him.

The director of RASLDF was a man named Ralph Jacobs, an engineer from Boston with a wife and two children he worked hard to support. He knew Bob Sullivan as a boy; they grew up around the corner from one another in the prosperous Boston suburb of Belmont. They played football on the playground: Sully threw the passes and Jacobs caught them. Sully went to the Catholic church in Belmont’s town center; Jacobs attended the Congregationalist church nearby. They lived and died with the Red Sox—’67 was heaven, when Yaz won the Triple Crown—and they shot pool in Jacobs’s basement. As much as possible, Jacobs steered clear of Sully’s bitter, oppressive mom.

Jacobs lost touch with his friend when Sullivan went to Miami for college. Then, in 1976, he got a letter with Sullivan’s death row address in the corner of the envelope. “I looked at those numbers after his name, and I just couldn’t figure it out. I thought maybe he was in the service,” Jacobs remembered. “Well, in this letter he said that he was in some kind of situation down in Florida, and would I like to correspond with him. I wrote back and said sure, and the next letter that came he explained what had happened.”

“Explained” is perhaps not the best word. Sullivan’s letters to his
network of supporters were masterpieces of omission and deceit. He spun out a captivating case for his innocence, scarcely mentioning the evidence against him—let alone his own confessions. Sullivan talked about the weather, volunteered his predictions for the coming baseball season, speculated on trades the New England Patriots might make, praised the Bruins, handicapped presidential primaries. He regularly inquired after the health of Jacobs’s mother. “Greetings once again,” he wrote in a typical letter to Jacobs,

A few things have come up so I thought I’d write you today. I remain generally well, however, I am a bit tenser than I like to be wondering when and how my 11th Circuit panel will rule on my appeal. I am trying hard to keep busy in the hope of worrying less. As I had felt, the pro football strike has not been resolved swiftly. . . . In contrast, I am enjoying college football and the baseball playoffs more than other years. . . .

In short, Sullivan’s demeanor, in his letters and in person, was calm, literate, mundane, and occasionally banal. He spiced his correspondence with factoids from his diligent reading. (His magazine subscription list included Time, Business Week, and the journal of Cornell’s hotel and restaurant management school.) He was meticulous in his instructions regarding gift packages from friends. (Two-pound bags of M&Ms were a favorite gift—plain, never peanut.) Sullivan’s writings were so palpably letters from a respectable, middle-class man, a man of normalcy. A man within society. For the hundreds of people on his mailing list, it was almost impossible to think of Sullivan as a menace to the moral order. This was especially true of his friends in Massachusetts, who remembered the gentle Bob Sullivan, ever solicitous of the feelings of younger kids; the polite Bob Sullivan, shyly stammering his y-y-yes ma’ams and n-n-no sirs; the diligent Bob Sullivan, who kept the lawns cut and the snow shoveled on Belmont’s Richmond Street.

Through Sullivan’s letters, Jacobs became intimately familiar with the alibi defense the prisoner insisted would prove his innocence. A rising star of the Miami defense bar, Roy Black, was handling the appeal, arguing that Sullivan’s trial lawyers had failed to develop an
adequate defense. With the help of Virginia Snyder, a private investigator, Black had shown what a better lawyer might have been able to accomplish. Snyder located several witnesses who said they remembered Sullivan being with them at a gay bar at the very moment that Donald Schmidt was murdered. When, in 1980, Black won a hearing in federal court, Ralph Jacobs paid his own way to Fort Lauderdale, eager to see his friend exonerated.

But the two-day hearing was not what Jacobs had hoped for. When Sullivan’s trial lawyers saw their competence being attacked, they fought back. The first lawyer, Ray Windsor, had quit Sullivan’s case, explaining simply that there had been a “communications breakdown” with his client. Now, in federal court, Windsor explained what the “breakdown” had been: Sullivan had confessed the crime to him in writing—Windsor produced the letter—but despite the confession, Sullivan had demanded that an alibi be manufactured. Windsor had refused to do it. Attorney Dennis Dean replaced Windsor. Dean told the federal court that he had sent Sullivan to take a lie detector test. As Ralph Jacobs sat shaken in the federal courtroom, the lie detector operator took the stand to say that Sullivan had confessed to him, too. Anyone who knew the record of Warren Holmes, the lie detector operator, knew this testimony was overwhelming. Holmes was regarded as one of the best in his business, but, more important, he was known in Florida legal circles for going to heroic lengths to free innocent people from prison. Four people falsely convicted of murder were free in large part because of the efforts of Warren Holmes. It was unthinkable that he would invent a story that might lead to the execution of an innocent man. Added to a confession at the police station, and the written confession to Windsor, this made three times that Sullivan had admitted he had killed Donald Schmidt.

Ralph Jacobs was even more troubled by the fact that when Sullivan took the stand, he repeatedly invoked the Fifth Amendment to avoid answering tough questions. Still, he couldn’t square the Sully he knew with the cold-blooded killer of Donald Schmidt. Anguished, Jacobs questioned Sullivan himself, and Sullivan tried to console him with an explanation for every alleged confession. The police threatened him. Windsor tricked him. Holmes was lying. Sullivan had an answer
for everything, and what the answers lacked in plausibility he made up for with sheer volume. He reminded Jacobs of the alibi witnesses. He alluded to a grand conspiracy in which he had been framed to cover up the crimes of a Boston-based gay mafia. "Dear Ralph," he wrote from prison a few weeks after the hearing,

I am eager to see your reaction to the answers to your questions. I am deeply concerned by your being upset by parts of the hearing. In retrospect, the strategy of taking the 5th may not have been the wisest move. I wasn't 100% in favor of it, but I bowed to Roy's opinion. Since we had explained everything once, we felt there was too [much] risk to rehash the same territory over and over again. Only time will tell if we were right or wrong.

Jacobs swallowed his doubts. Everything he knew about his friend made it impossible to believe that Bob Sullivan was a killer. He knew that Sullivan was a model prisoner, taking college courses by mail, dutifully preparing his homework while sitting on the cold concrete floor, using his bunk for a desk. Sullivan spent hours teaching a retarded inmate in the next cell how to read and write. He patiently explained the court system to the guys on his tier. Once, he even talked a man out of committing suicide. Sullivan was a patriot, too, a conservative supporter of Ronald Reagan, and he decorated his cell with a homemade American flag in support of the invasion of Grenada. "No one could say 100 percent certain that Bob was innocent—only Bob knew that—but it was clear to me that the State had not been fair to him," Jacobs later explained.

He redoubled his efforts to save Bob Sullivan. He organized RASLDF raffles each year to raise money; first prize was a donated TV, second prize was a mess of lobsters Jacobs had trapped himself. Along with other Sully supporters, he sold the raffle tickets from a card table in front of the First National grocery store in Belmont's town center. One year, he even organized a fundraising dance, an enormous endeavor, hiring a hall and a band and an off-duty cop, enduring the hassle of securing a liquor permit. Eventually, Jacobs was spending his entire lunch hour, a couple of days a week, endorsing checks and filling
out deposit slips and standing in line at the bank in Waltham. The money went right back out to Roy Black and Virginia Snyder, who continued to build the unlikely case for Sullivan’s innocence. Soon there were three alibi witnesses, then four, then (after Snyder tracked a man all the way to Hawaii) five. And the new leads required more newsletters, which in turn generated more contributions, which sent Jacobs trudging back to the bank. The checks came from Canada, England, Australia, and states across the country. Ralph Jacobs was the chief drone on the project. Bob Sullivan was the mastermind. “Dear Ralph,” he wrote in a typical letter,

I have proofread a second draft of the RASLDF Report and yesterday returned the corrected copy to Ralph Walker. I have written all the necessary letters to respond to letters sent to you, that you forwarded to me (copies of two of these letters enclosed). Lastly, I have written and mailed to Richard Carr the next RASLDF Newsletter for typing. I should get it back within 7–10 days at which time I’ll mail it to you for printing (copy included here for your reference). In addition to getting the newsletter printed, as a reminder, let me list a few matters that will need YOUR attention.

1) get raffle tickets printed.
2) get labels made for second mailing—if you want me to write them please send me 750 blank labels ASAP, plus a list of all returned mailings, a Xerox of that last mailing, and all letters giving names of people who may assist us.
3) advise me if you’ve spoken to Linda and the results thereof.

Sullivan was a field marshal, an executive vice president, not a pariah—not in the eyes of Jacobs; nor in the eyes of Father Robert Boyle, his boyhood priest; nor to the seven Roman Catholic bishops of Florida, who pleaded with Bob Graham for mercy.
DANCING ON THE HEAD OF A PIN

By autumn 1983, experts on both sides of the death penalty issue believed they were hearing the squeak and grind of floodgates opening. On December 7, 1982, Texas had carried out its first involuntary execution under its modern law, a killer named Charlie Brooks. Brooks was the first black man executed since Furman. Four months later, on April 22, 1983, Alabama electrocuted John Evans against his will—although it took three tries to do it. They kept zapping him and zapping him and he wouldn’t die. Another four months passed, during which the U.S. Supreme Court decided those four key appeals against death row inmates. On September 2, 1983, Mississippi got started, executing Jimmy Lee Gray.

Bob Sullivan by then had been on death row longer than any man in the United States. (He was the third to arrive on Florida’s death row, and the two before him had both received clemency.) He was the obvious choice for Bob Graham’s next death warrant, and on November 8, 1983, it came. The execution was scheduled for November 29. Sullivan was moved to his death-watch cell, where he sat on the bunk and cried. On Sunday, November 13, he asked the sergeant outside his cell to tune the television to NBC. Sullivan’s beloved New England Patriots were playing the Miami Dolphins—Miami, the hometown of Bob Graham; Miami, the city where Sullivan had ruined his life and the lives of Donald Schmidt and his family. Sullivan was in a desperate, mystical mood, and prayed to God for a sign that he would be saved. Please, God, please. Let the Patriots represent me. Let the Dolphins represent Graham and all the powers bent on my death. As he settled down to watch the game, Sullivan noticed that the name of the Patriots’ stadium had been changed that year to Sullivan Stadium. A happy omen! So he prayed again, this time offering God a point spread. If the Patriots won by ten or more, it would be like lamb’s blood splashed on the lintels of the Israelites: Bob Sullivan would be spared. Sullivan cheered and groaned; he sweated in spite of the prison cold. The game ended as twilight faded from the North Florida sky . . . and New England had won by eleven. He prayed again: God, let this truly be a sign!

But the Almighty does not gamble on point spreads. By Monday, November 28, one day before his scheduled execution, no force had

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intervened to save him. He devoted that morning to an attempt to do good, giving a sworn statement on behalf of James Hill. Hill was a more typical death row inmate. Where Sullivan was middle-class and college-educated, Hill was poor, illiterate, and retarded. His attorneys were preparing an appeal based on the proposition that their client lacked the capacity to assist his defense—or, for that matter, even to understand completely the charges against him. "James's whole thought process," Sullivan testified, "which I think is very important, is very child-like. . . . He had no idea about the death penalty or death row until he arrived here."

"Do you—" Hill's lawyer interjected.

"If I may add one more thing," Sullivan continued, "something I have learned from direct experience with James. James, you can explain something to him, but many times he will acknowledge that he understands it, but when you try to probe into it, he has zero understanding of it. . . . Basic simple things that I have tried to explain to him, one has to go over them time after time after time before he even gets a basic understanding of it. Therefore, based upon that experience, I just find it incomprehensible that he could possibly have understood what was going on because nobody ever explained it to him."

It was one last example of the mystery at Bob Sullivan's heart: Preparing to die for the pitiless murder he had committed, Sullivan made a kindly gesture on behalf of a less fortunate friend. It wasn't easy—Sullivan broke down crying near the end of the session—but this gesture added one more person to the ranks of Sullivan's supporters; one more citizen concluded that he didn't need to be killed. As the doomed man sobbed, the stenographer who was transcribing the statement tore a narrow slip of paper from her machine and jotted a quick note.

Robert
Good luck
I'll be sending
lots of prayers
Your way!
Tess

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DANCING ON THE HEAD OF A PIN

It had been four and a half years since the execution of John Spenkelink. After so long, Sullivan became a new milestone. There were protests at the governor’s mansion, vigils at the prison, a candlelight prayer service at the Catholic church in Starke. In Boston, Ralph Jacobs marched alongside several dozen Sullivan supporters at the Massachusetts statehouse. Pope John Paul II issued a plea to Graham to rescind the death warrant.

The frantic, desperate maneuverings of exhausted lawyers were the same as they had been for Spenkelink. The lawyers won a brief, last-minute reprieve—two days, just like Spenkelink’s. But as it had been for Spenkelink, the reprieve was lifted, and Bob Sullivan’s huge, flabby body was strapped into Old Sparky at 10 A.M. on November 30, 1983. Warden Richard Dugger had learned the lesson of earlier experience: The venetian blinds in the execution chamber were kept open throughout the process; the chin strap was not fastened until Sullivan had read his final statement. Sullivan recited the Sixty-second Psalm. Then Sullivan was banished from human society via electricity. Many years and many executions later, Warden Dugger summed up the experience by saying, “It was hard to despise Bob Sullivan.”

Two weeks after Sullivan’s death, America saw executions on consecutive days, for the first time in decades: Robert Wayne Williams in Louisiana on December 14, and John Eldon Smith in Georgia on December 15. Thus, by the end of 1983, every state in the Death Belt had weighed in. (The “Death Belt” runs across the South from Florida to Texas, embracing Georgia, Alabama, Mississippi, and Louisiana. In the modern era, these states have invariably been the headquarters of the capital punishment business.) The wheels appeared to be turning at last: Within a year, six executions had been carried out, and none of them had been volunteers. Bob Sullivan’s death devastated Scharlette Holdman’s anti-death penalty crusaders. They had, naively, expected to save him, especially after the Pope had asked for mercy. (Holdman laughingly called this her “habeas Popeus” appeal.) In the month following the Sullivan execution, Bob Graham signed no death warrants—he never signed warrants around Christmastime—and Holdman’s circle
spent December mourning for Sullivan and for themselves. They were
catched a little flat-footed when, fresh from the New Year’s holiday, the
governor signed the death warrant of Anthony Antone.

If the idea was to choose only the most irredeemable, unmiti-
gated, bloodthirsty killers for the electric chair, Florida was still having
a hard time. Anthony Antone was a crook, no doubt about it, but there
were plenty worse on death row. For one thing, Antone had never
killed anyone.

On October 23, 1975, a swashbuckling Tampa cop named Dick
Cloud had climbed out of bed to answer the doorbell. “Can you tell
me where R. V. Turner lives?” asked the man at the door. “R. V.
Turner? No, I don’t think so,” Cloud had answered. The man at the
door had opened fire. Police believed it was a Mafia hit; Detective
Cloud had been planning to give damaging testimony to a grand jury.

After a four-month investigation, police concluded that a mobster
named Victor Acosta had ordered the murder, and that Anthony An-
tone, as Acosta’s lackey, had hired the two gunmen. Acosta and the
man who pulled the trigger both wound up dead in their cells, appar-
ently suicides. The second hitman turned state’s evidence. That left
Antone—who had neither planned the murder nor pulled the trigger—
as the odd man out, the last bad guy vulnerable to prosecution. Cutting
deals with the prosecution is like musical chairs: The slowest man loses.
Antone went to death row.

Other facts added to the sense that Antone was a strange choice
for the electric chair. He was crazy as a loon, wandering the prison yard
talking about astral projection and UFOs and roaches eating his brain.
And he was an elderly man, sixty-six years old, sickly, frail, certain to
die in prison long before any possible parole date. To Governor Gra-
ham, however, Antone represented “the most calculated and premed-
itated form of murder, a contract for the deliberate assassination of a
law-enforcement officer.” The courts apparently agreed. One of
Scharlette Holdman’s loyal trouperers, Tom McCoun, had spent two
years trying to convince judges that Anthony Antone was on death row
only because of poor legal representation. The trial attorney, McCoun
maintained, should have done more to show the jury that Antone was
brain-damaged and delusional.
DANCING ON THE HEAD OF A PIN

Now, racing a death warrant, McCoun had little choice but to try again. He imported a Harvard psychiatrist named Ward Casscells to buttress his case. Casscells examined the prisoner a week after the warrant was signed. It was an interesting conversation. "His thoughts were generally well connected," Casscells reported, "but as the interview went on he expressed more and more unusual beliefs." Antone warned the doctor that their conversation was being recorded by cosmic beings; they were interested in him because of his detailed knowledge of UFO bases. He also explained how he learned to escape the pull of gravity by contemplating the flight of bumblebees. Antone told Casscells the story of a fascinating journey he had recently taken in the company of a Tibetan astral guide: Antone had left his body in his death row cell and floated across the continent to the Pacific Ocean. He and his astral guide had plunged into the salty water, down, down to the ocean floor. In those dark depths Antone discovered that California was about to fall into the sea. When he got back to his body, he dashed off a letter to his sister, warning her to move away from Florida, which would be inundated by a tidal wave when California sank.

Clearly he was nuts, but was that grounds for an appeal? The U.S. Supreme Court had never considered the question of whether a state could lawfully execute a crazy person, much less how a state should determine whether a condemned man was sane. "Just don't confront him," Dr. Casscells advised Scharlette Holdman. "Be there for him. That's all you can do."

But no one could tell Holdman "that's all you can do." She didn't have a single passive fiber in her body. She cursed, she shouted, she cried. She racked her brain. A few hours before the scheduled execution, she came up with an idea. What about the Mafia? After all, they had gotten Antone into this mess; why couldn't they get him out of it? She decided to call the godfather. She would ask him to contact the governor and explain that Antone was just a pathetic pawn.

Maybe Antone's delusions were contagious, or maybe Holdman was just being Holdman, never giving up, turning every stone, fighting to the end. Anyway, she asked Pat Doherty to tell her the name of the man who ran Florida's mob. It seemed the sort of thing Doherty would know, and he did not disappoint: Santo Trafficante, he said. Holdman
asked if he could get Trafficante on the phone, and Doherty, always
game, offered to try.

Some people believe that Santo Trafficante had a part in the crime
of the century, the assassination of John F. Kennedy. In any case, it was
certainly true that the don had racked up the better part of a century's
worth of crimes. He was an old and powerful criminal, a man other
thugs killed for and died for—not a man to trifle with. But Holdman
had moxie to burn, and when Doherty pulled a few shady strings,
found Trafficante's number, and rang him up, Holdman took the
phone.

"Uh, Mr. Antone is going to be killed," she said, in a quavering
drawl. "I understand he used to, uh, work for you. And I was wonder-
ing, is there anything you can say or do to help him?"

There was a pause, and then Holdman heard a raspy whisper
exactly like Marlon Brando's in The Godfather. "Tony was a good boy,
Trafficante gasped. "Give him my regards."

After a thirty-six-hour stay of execution, during which the U.S.
Supreme Court decided not to hear an appeal, Anthony Antone was

Three hundred people had jammed into the governor's office to
protest the Spenkelink execution. About seventy-five attended a vigil in
the capitol to protest Sullivan's death. For Anthony Antone, the num-
ber dwindled to fewer than fifty. United Press International asked: "Are
executions now so frequent that they have become routine?" Not
quite, but that's the way things appeared to be headed.

On the other hand, nothing involving Scharlette Holdman would
ever be routine. She lived in a house of mirrors where bad guys were
the heroes and the law was the enemy, and strange and funny things
were always happening to her. For example: Two days after the Antone
execution, Holdman’s secretary, Gail Rowland, went to the front door
of the FOG Building to pick up the mail. A long white limousine
pulled up to the curb. Who would show up at their cruddy little office
in a limousine with tinted windows? "My God!" Rowland screamed.
"The Mafia's here!" Trafficante was after them.
But the man who got out of the long white car was not the godfather, nor one of the don’s muscle-bound thugs. He was a swinging dude in a polyester suit, collar open, gold chain dangling in his chest hair. “Hey, baby!” he called out. “Lookin’ for the Clearing-house.” Rowland led him inside to Scharlette’s office.

The dude introduced himself as Glen. He said he was a Hollywood producer and he was making a movie of a novel called *Deathwork*. Published in 1977, *Deathwork* was the story of a fictional Florida governor named Morgan J. Kingsly, who fueled his political ambitions by ordering the executions of four murderers on a single day. (Bob Graham had a copy on his bookshelf.) Glen the producer had a lot of questions about death row. Hey, what’s it like? Tell me about some of the inmates. How do they fry ’em? Holdman regaled him with stories, and Glen was ecstatic. “That’s gold, baby!” he cried after each anecdote. “Baby, that’s gold!”

The limo driver was a huge, hulking man, and he, too, was fascinated by the stories. Most of the time, he stood quietly, but occasionally he interjected a question, then nodded solemnly at the answer. At last he said: “You know, I like you girls. I blew my stepfather’s head off when I was twelve. So I really like you girls.”

“I’m gonna give you girls the thrill of a lifetime,” Glen announced, after several hours of discussion. “Huh? Huh? Glen’s gonna give you a ride home in the limo. How do you like that?” Holdman and Rowland had never been in a limousine. They bounded outside and into the long white car, where they found a well-stocked bar and helped themselves. There was a phone, too. Rowland snatched it up and dialed her husband. “I’m coming home in a limo!” she said gleefully. And when the awesome vehicle rolled up to the apartment complex where Rowland lived, a crowd of neighbors awaited her arrival. It was glorious.

The big car pulled away, and that was the last they ever saw of Glen. He never made the movie.

Because Antone’s mental problems had not been the focus of his appeals, his death had not settled the question of whether an insane
man can be executed. This was a good example of an increasingly apparent problem across the Death Belt: Though executions were beginning to come at a steady rate, they were not bringing much definition to the law. Each execution seemed to mean little more than the bad luck of a particular inmate. The larger questions lived on.

As it happened, the sanity issue resurfaced almost immediately. Two months after Antone, Graham signed a death order for Arthur Frederick Goode III.

Freddy Goode was as miserable a character as ever walked—homely, stupid, weak, and warped. Almost from the day he was born, in a working-class neighborhood outside Washington, D.C., his parents knew they had a defective model on their hands, and they shuttled among school counselors and child psychiatrists in search of repairs. But things only got worse, and when Freddy entered adolescence, he began molesting boys.

Bud Goode, Freddy’s father, tried beating the boy, but Freddy just looked back at him, hurt and uncomprehending, like a dog. “He had no understanding,” Bud said. Later, Bud encouraged Freddy to sleep with a mildly retarded girl who lived nearby, suggesting he take her to a motel room, thinking his son might forget boys if he had sex with a woman. That didn’t work, either. Admittedly, these are not textbook treatments for pedophilia; they aren’t discussed during seminars of the American Psychiatric Association. Bud and Mildred Goode were ordinary people faced with an extraordinary curse; they tried everything they could think of. Mildred prayed, and Bud urged his son to start drinking, on the theory that a sluggish alcoholic is at least harmless. But Freddy didn’t like the taste of booze. He liked ice cream.

Finally, by 1976, Freddy had tormented enough boys that Bud and Mildred Goode were able to get him admitted to a Maryland psychiatric hospital. There, Freddy was treated with Depo-Provera, a drug that quenches the sex drive. The doctors considered recommending that Goode be committed to a hospital for the criminally insane, a step that would have been a blessing to Bud and Mildred, to Freddy himself, and to countless third- and fourth-graders. But before that step could be taken, Freddy left the facility and took the bus to Cape Coral, Florida, where his parents had recently retired.
DANCING ON THE HEAD OF A PIN

It has been suggested that some vast force must pick up the United States every now and then, giving the country a hard shake that sends all the loose bits and garbage drifting down to Florida. Freddy Goode was one of the loosest bits imaginable; untethered from the hospital, he rattled south. Soon after he got to Cape Coral, a nine-year-old boy was found raped and strangled to death. Goode climbed back on the bus.

He returned to the Maryland hospital and tried to check himself in, but the receptionist was busy and asked him to take a seat. Instead, Goode left again, kidnapped another boy, and—in the company of that child—raped and strangled an eleven-year-old in Virginia. Now he commuted back to Florida, where he was promptly arrested. In an appalling spectacle, he was permitted to conduct most of his own defense; he was, of course, convicted. Goode begged the judge for the death penalty and got it.

He was a monster in the guise of an overgrown child. His brown hair hung straight on his head in a sad echo of a Prince Valiant cut; his face was pasty and pocked with acne; his flesh hung on his bones like sacks of gelatin; his dark eyes darted when he talked. And lord, could he talk! Endlessly, horribly—a breathless stream of filth and paranoia and childish blather. Goode talked nonstop about his fear of prison, his passion for ice cream and television, his hunger for little boys. Sometimes he delivered separate monologues on each of these topics. Sometimes he jumbled them together. For example, when people told him sex with children was wrong, Freddy Goode would say, "It's like ice cream. You don't know if you like it until you try."

Goode churned out letters, too, endless stacks of hysterical, often revolting letters, written in an unmistakable scrawl of block letters, chicken-scratch, exclamation points, and multicolored inks. He wrote letters to grade school principals, asking if they let their male students wrestle naked. He mailed perverted notes to kids who advertised for pen pals in children's magazines. Worst of all, Goode sent obscene letters to the parents of his victims, in which he savored each moment of his crimes. It was a curse to have your address fall into the hands of Freddy Goode, and the curse befell everyone from the president to the governor to the attorney general to lawyers and journalists from coast to coast. Goode might write you a letter at noon, and then write you

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Again at five o’clock, angrily demanding to know why you hadn’t answered yet. His letters were raving, paranoid, and grossly obsessed with the perversion that had landed him on death row—a lethal desire for prepubescent boys.

Just one from the thousands of letters he generated is enough to get the idea. This one was addressed to a lawyer in New York:

I hope you have received my two letters by now! I want to meet you as soon as possible here! My parents gave me your address and I understand you are on my case too! “URGENT”! → → Im in a bad situation here again! As I told you in my last two letters, they keep “MOVING” the inmates around here! Right now they got a guy beside me who looks like a “MAD-MAN”!

And im all “UPSET” and “WORRIED” that he will try “KILL-ING” me or ect.!!!! . . .

I am just so “WORRIED” and “MISERABLE” all the time, that I “CAN’T” ever think about working on my death sentence!, and I “DON’T” even sleep well at night either! You “CAN’T” imagine how “UPSET” and AFRAID I really am here! Everybody “HATES” me due to their atrocious feelings they have “AGAINST” the horrible crimes I committed on all them little “BOYS” and ect.!!!! I am trying to “COOPERATE” here, but im just so “UPSET” and in extreme “FEAR” most of the time!

I talk to my only friend Jesus our “LORD”! I know “JESUS” understands my terrible desires and ect. I have tords little boys! And I have “GOOD-REASON” for every bit of it! And the main reason I murdered them little “BOY’S”, is because our society is so “AGAINST” the fact of “CHILDREN-DOING-SEX” together or with anybody! I believe children should be “ABLE” to do sex! And I can “ARGUE” that all the way to the U.S. Supreme Court! “SEX” is a great “GIFT” that Jesus gave us all!!!! I'll be happy to explain this in great detail to you when you come “VISIT” me!

He would do anything for attention. As a boy, Goode took snapshotsof family vacations and organized them into slide shows, which he
insisted on showing to the whole neighborhood. The neighbors suffered through his long-winded narrations, and Goode was in his glory. When his parents bought him a telescope, it wasn’t enough simply to gaze at the stars. Goode had to deliver pedantic lectures on astronomy. He bordered on being mentally retarded, could barely read and write, but he was dogged. When he latched onto a hobby, he could master enough jargon and gibberish to speak about it relentlessly. Goode idolized TV weathermen—they were the luckiest people on Earth, the way they got to lecture the masses night after night with their maps and pointers. “Any attention was good attention,” his father summed up.

This devouring need for attention had terrible consequences. In prison, Goode discovered that television crews and newspaper reporters would travel miles, sit rapt for hours, to hear him discourse on his crimes. And he would say anything to keep them coming, to keep the cameras rolling. He would complain because he couldn’t have a little boy live with him in his cell. He would proclaim that if he ever got out of prison he’d head straight for the nearest child. He would describe the feel of a child’s mouth on his body, discuss the death throes of a strangled boy. These were not proud moments for the Florida press, turning over ink and airtime to a lunatic. But Goode’s interviews virtually guaranteed that he would one day sit in Old Sparky. They were like bloody shirts waved before a mob.

People with a clearer view of Goode found him less menacing than pathetic. He was sick. Betty Steffens, clemency aide to the governor, knew more about the men on death row than virtually anyone. “He didn’t have the capacity to form criminal intent,” Steffens said years later. “He was a captured butterfly, and we should’ve preserved him and studied him.” She tried to make this case to Bob Graham, without success, because any politician could see that commuting Goode’s sentence was out of the question. On the southern Gulf Coast, where Goode had committed the first of his two murders, thousands of citizens had signed petitions demanding his prompt execution. In the headlines, he was simply “Child-Killer Goode.” And when it was discovered that he had sent obscene letters to the parents of his victim—well, that was the last straw.

He was a pariah; he sickened even the most understanding people.
Scharlette Holdman searched the state for a lawyer to handle Goode’s appeal. At last she persuaded Sandy Bohrer, an attorney at a distinguished Miami firm. Immediately, Bohrer learned what a disastrous case he’d taken. First came a long note from one of his partners, which, boiled down, declared: I can’t believe you’re squandering the firm’s good name and resources on that animal. Then the wife of a prominent local newspaper editor—Bohrer had represented the paper in libel cases—announced that she wasn’t sure she could ever speak to him again. An awful lot of people wanted Freddy Goode dead. Bohrer, however, believed that “the thing that distinguishes our system of justice is its tremendous emphasis on procedural fairness. If the system works for a despicable person, it will also work for me.” He threw himself into a whirlwind effort to save his despicable client.

He decided to argue that it is unconstitutional to execute someone who is insane. Bohrer learned that Florida had a policy for determining sanity before an execution, but when he examined the policy, he concluded that it was a farce. In cases where a prisoner’s sanity was questioned, the governor was to appoint a panel of three psychiatrists. They would consider two questions: Did the prisoner understand what an execution was, and did he understand why it was happening to him? There was no provision for the defense to present its own evidence. In Goode’s case, the examination had lasted about thirty minutes. Bohrer argued that this proceeding violated the constitutional promise of due process. Three doctors, appointed and paid by the governor, examining a man for thirty minutes—that was a sham, the lawyer maintained. Justice required a proper hearing, fair to the defense as well as the state.

Like most Florida lawyers handling death penalty appeals, Bohrer consulted with Craig Barnard in West Palm Beach. At the time, Barnard and a colleague named Dick Burr were working on a similar appeal for a client of theirs—Alvin Ford, the same man whose case had tested the secret psychological reports. Having lost with that issue, they were expecting a new death warrant, and when it came they planned to argue that Ford was insane.

By death row standards, Alvin Ford was a fairly bright guy—he could read and discuss books—and he was unusually honest. Ford admitted that he had killed a policeman in Fort Lauderdale, a crime he
blamed on cocaine. To be smart and honest is not necessarily a blessing in the death house, though. When Ford came within hours of being executed in 1981, he thought so long and so clearly about his predicament that it drove him mad. Or so it appeared to Gail Rowland, Scharlette Holdman’s secretary. She visited Ford regularly on death row, and she watched him fall apart. “The first sign,” she recalled, “was just a complete obsession with the Klan, which I thought was pretty reasonable coming from a black man in the South. The papers had run some stories about Klan activity around Jacksonville. But then Alvin began writing letters to people all over the place, claiming to explain various ‘codes’ he had discovered in the dictionary. Then he started complaining that certain radio disc jockeys were playing songs aimed directly at him. Eventually, it got to the point where he thought he was the Pope.”

Ford had always been rather vain, considering himself quite a ladies’ man; he always spruced himself up for Rowland’s visits. But as his decline accelerated, he stopped eating or showering, and as his flesh starved away his face came to resemble a death’s-head. Ford became convinced that Rowland—and Margaret Vandiver, another frequent visitor to death row—were prowling the ventilation ducts behind his cell. “He wrote tons of letters to Ronald Reagan and Edwin Meese complaining about the fact that I was hiding in the pipe alley singing and playing the piano all night,” Rowland said. “He told them that I was causing all sorts of natural disasters, a bad flood somewhere in America, a big earthquake over in China. One time Margaret and I were visiting him, and he suddenly started yelling, ‘I can’t hear you! Your vaginas are shouting too loud!’ ” For a time, prison authorities thought Ford was faking it. They suggested that Rowland and Vandiver were coaching him. But the “act” continued for years, and even some skeptics began to believe that Ford had in fact lost his mind.

Barnard and Burr shared some ideas with Bohrer over the telephone, but they were careful not to get their case too closely linked to Goode’s; he was such a liability. Sandy Bohrer plunged ahead with the appeal, and in little more than two weeks produced a masterpiece of constitutional law. He reasoned well, he wrote clearly, he drew on sources ranging from antique British common law to the latest U.S.
Supreme Court opinions, from academic treatises to the grand dissents of Felix Frankfurter. The richest corporation could not have asked for a better piece of legal work.

The men who ran the prison agreed that Goode was mad. "I saw Arthur every month," warden Dave Brierton said. "He would come in for a talk, and it was always the same: He couldn't understand why society didn't allow him to have sex with boys. I tried explaining the historical development of sexual taboos, but it never sank in. He would start crying and asking why he couldn't have a boy in his cell. He was one of a kind, impossible. 'So-and-so didn't go to sleep last night,' he'd say. Or, 'Your officer only checked the cell block four times, not five.' Or, 'I couldn't get Channel Six last night. I got snow on my TV set.' One time he comes in and says, 'I don't want to live here anymore.'"

He didn't want to live there anymore. Goode didn't get the picture, he missed the point of punishment—as his father put it, "He had no understanding." That was the State's own test of sufficient sanity to be executed. A prisoner had to understand what was happening to him and why. "I don't think Arthur ever understood that when you're executed, we can't come back the next day and talk about it," said Richard Dugger, Brierton's successor as warden. "It was like dealing with a child. He could make a rational appearance. He could answer your questions and appear to carry on a conversation. But he just didn't understand what you were saying."

Only one person ever got through to Freddy Goode. She was Margaret Vandiver, an ineffably sweet, shockingly smart graduate student from Florida State University. Like many of her friends in the anti–death penalty camp, Vandiver saw capital punishment as essentially a civil rights issue. It was the strong killing the weak, and from girlhood Vandiver's heart had always been on the side of the weak. She was an angel of death row, spending thousands of hours visiting inmates and assisting their lawyers; a saint among the vilest sinners. But even she found Goode repulsive. "If there was ever an execution that I would not care about, that was going to be it," she said much later.

He was already under a death warrant when Vandiver first met
him. As always, Goode sat with his back wedged in the corner of the visiting room—he feared enemies coming through the walls. He looked "awful in every way," Vandiver recalled. When she went to shake his hand, Goode pulled away, reached into his pocket, and produced a newspaper photo of Ricky Schroder, the cherubic boy actor. Goode was in love with Ricky.

Then he started his loathsome talking. Vandiver trembled as he spoke. At first, she tried interrupting him, patiently explaining all the reasons why it is wrong to sodomize children. But she soon saw it was hopeless. Midway through the excruciating meeting, Vandiver excused herself, rushed to the bathroom, and ran cold water on her wrists to calm herself. You're out of your mind! she scolded herself as the water flowed over her burning skin. Arguing morals with a plainly deranged man. But she returned and finished the ordeal, and the next day she saw Goode again, and ultimately Vandiver met with him every day for the next two weeks. She discovered a trick: When Goode began ranting, she fastened him eyeball to eyeball, gazed intently, and said, "No, Arthur," in a strong, calm voice. "We are not going to talk about little boys." Like a nanny talking to a three-year-old. Goode's reaction surprised her. He seemed relieved. Finally he had met someone who was not interested in a freak show. "Arthur desperately needed attention," Vandiver said later, "so desperately that it was better for him to have center stage as a murderous pedophile than to be ignored."

Vandiver was the first person who could make Freddy Goode shut up, if only for a moment. Gazing steadily, she would latch onto his restless eyes, and when she had them she could feel the change come over him. He would relax, his shoulders would drop slightly, and a sense of calm would take hold. But the calm lasted only as long as she held his gaze. "I felt like a water pitcher. Everything inside of me, all the peace and strength, was just pouring into him. His gaze was like a newborn baby's: totally unwavering, unfiltered, direct, and unbelievably intense," Vandiver explained.

Then he would go back to chattering. Goode loved to send Vandiver to the canteen for food. She jotted his orders in a quivering hand. "Two ice cream sandwiches / two milks—one chocolate, one
white / steak & cheese sandwich / V-8,” she wrote one afternoon. When Vandiver returned with the food, Goode would become apoplectic: “If I eat the ice cream first the milk will get warm so maybe I should drink my milk first but if I drink the milk then the ice cream will melt and what about the sandwich? Maybe I should eat the sandwich with the milk and save the ice cream except the ice cream will melt if I try to save it. . . .” Until at last Vandiver fastened his gaze and said, “Arthur, eat your food!”

Goode was frightened of the electric chair, but the way a child is frightened of the dentist. “Will it hurt?” he demanded over and over. His only solace was the fact that Richard Dugger, the warden, would shepherd him. “Will Mister Dugger be there?” he asked, pathetically missing the point. Yes, Dugger would be there. Dugger would strap him in. Dugger would signal the executioner.

Margaret Vandiver slumped into Dugger’s office one day shortly before the execution. “He wants you to go down there and stay with him,” she said gently. “All night and all day. He says he wants you to take a sleeping bag down there and stay with him.”

Dugger stared, then said quietly, “I don’t think that’s something I can do.”

Perhaps his death would bring some solace to the families of the boys he murdered. His mother, Mildred, prayed nightly for those poor families, even as she neared the day she would join them in that grief-stricken wasteland where parents mourn children violently dead. She wrote poetry, contemplated suicide, clung to God. She felt guilt and failure. When she went to Starke to visit her son, she always told the desk clerk at the Dixie Motel that she was there to see a nephew. The shame. The horror. One of her poems:

My son is on Death Row;
dear God, how can it be!

He was always a troubled child,
always a bit behind.
DANCING ON THE HEAD OF A PIN

I go to bed at night and toss 'til 3,
or I wake up at 5, and roll the years back;
roll the years back like reflections in a mirror.

He always was a troubled child;
always looking for a friend who was not there.
He loved animals, he had a black dog.
And a Siamese cat, he wouldn’t hurt a fly.

Dear God, he’s on Death Row;
How can this be!

It’s 10 years now, it seems like forever.
When I see him, he’s 28, but he looks 15;
you see, he was always a little behind.
Mothers always know.

Dear God, how could this have happened?
I loved children, I tried to be a good mother.
My heart almost bursts with grief of what he did,
with what happened.
I pray every night for those left behind.

Dear God, I love my son;
it’s in your hands now
Dear God, how can this be!

Goode called a press conference the day before his scheduled execution. "I’m proud of the fact that I murdered those children, because society is prejudiced against me because I’m a child molester," he announced. "My execution is the only thing I want because I’ll never have sex with young boys again unless I escape, which is impossible.” Between answers, Goode asked the reporters which stations they represented. The interview was a tawdry affair, and ludicrous: grave reporters questioning Goode as if he was some expert on deviant psychology from Columbia or Johns Hopkins. “Pay your penny and see the freak,” Margaret Vandiver said bitterly.
Among the Lowest of the Dead: The Culture of Capital Punishment by David Von Drehle

Judge after judge rejected Bohrer's appeal. As the end neared, Vandiver and Dugger each pleaded with Goode to show some shred of decency before he died. "I told him he should say something about how he appreciated his parents sticking by him," the warden later recalled. Vandiver remembered saying, "This will be the last chance you will have to say something nice, Arthur," and suggesting that he should say he was sorry.

"Will it hurt?" Goode asked Vandiver.
"You'll feel an impact, and then nothing," she answered, unsure.
"Mister Dugger will be there?"
"Yes."
"Who'll scratch my nose if it itches?"

He went to Old Sparky the morning of April 5, 1984. Freddy Goode could scarcely walk the short distance from his cell to the death chamber; guards supported him under each arm. His spindly biceps were like mush in their hands, thin bags of aspic wrapped around flaccid bones. The appalling mop of hair was gone; his soft, bald head was gooey with Electro-creme. As he had hoped, Mr. Dugger was there.

The warden's small jaw was tight as he cinched the wide leather straps. The trousers of Goode's death suit flapped at his scarecrow ankles. He hadn't taken a single hour of exercise in nine years. His funeral shirt hung from his pasty form.

The executioner was behind him, in the corner. It was just as Goode had always feared. Death was coming from behind him, from the corner.

Goode's eyes darted over the beefy hands swarming around his body, as the execution squad tightened the straps on his wrists and arms and chest and legs. They laced the cuff tightly around his calf and he flinched. Normally, he would have complained about a thing like that. The BAD ONES are HURTING! my LEGS!!! But something about this proceeding—something about the shaved head and the leather straps and the hooded man in the corner—some shard of reality grabbed his attention.

Dugger's voice echoed in the little room: "Arthur Goode, do you have any last words before sentence is carried out?"

"I'm very upset," he rasped into the microphone held in the

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WARDEN’S OUTSTRETCHED HAND. GOODE’S DARK EYES SEARCHED THE ROOM. “I DON’T KNOW WHAT TO SAY, REALLY.” HE GULPED FOR AIR. “HOW MUCH TIME DO WE HAVE?”

AS HE SAID IT, GOODE FASTENED HIS INFANT GAZE ON THE MAN WITH THE MICROPHONE. IT WAS THE SAME CONSTANT, NEEDY STARE THAT HAD LEECHED THE STRENGTH FROM MARGARET VANDIVER. NOW IT SETTLED ON THE MAN HE NAÎvely HOPED WOULD KEEP HIM SAFE. DUGGER STARED BACK BLANKLY.

“How much time do I have?” the prisoner asked again.

The warden simply dipped his head, almost imperceptibly, and Goode remembered what Mr. Dugger wanted him to do. “I want to apologize to my parents,” Goode blurted.

Dugger was relieved. His fears of an obscene outburst dissolved with this welcome declaration, and when Goode then paused, the warden began to stow the microphone for the final act. Goode’s eyes began jumping around the room again. Would it hurt? How long would it hurt? How long? Would it hurt?

He fought off the confusion and the rising panic. There was something else he was supposed to say. Something for Margaret. “I have remorse,” he croaked. The words were almost inaudible as Dugger tugged the microphone back toward the prisoner. “I have remorse,” Goode said again, “for the two boys I murdered. But it’s hard”—and here his voice broke—“for me to show it.”

That was more than all he had within him. Freddy Goode sagged against the chest strap and sobbed. As Dugger put the microphone away, strong hands drew the chin strap tight against Goode’s fuzzy cheeks. The electrician affixed the death helmet with a hard twist. The thick smell of leather closed in on Goode as the hood fell over his face.

Then the circuit breaker clapped, and the switches were turned, pop! pop! Freddy Goode’s pale, weak fingers turned baby-pink, then darkened. Behind the hood, his brown eyes froze forever in the familiar empty stare.

“Arthur Goode was the hardest,” Richard Dugger later said. “I had some real reservations about that one. Let’s face it—he was a nut. Geez, he didn’t trust anybody but me. And I was the one who was gonna make sure he was gonna die. He was sure I would take care of him.”
Among the Lowest of the Dead: The Culture of Capital Punishment by David Von Drehle

Three weeks later, Governor Graham signed a death warrant on Alvin Ford. Craig Barnard’s colleague, Dick Burr, filed an appeal virtually identical to the one Sandy Bohrer had filed for Freddy Goode. The courts had found no merit in the arguments when Bohrer had raised them, but now a federal judge decided they were important enough to order a stay of execution. The next year, the U.S. Supreme Court agreed to consider Ford’s case.

Another year passed before oral arguments were scheduled. On June 26, 1986, the high court published its decision. Two questions were decided. The first was a broad constitutional question: Could an insane prisoner be lawfully executed? By a vote of 5 to 4, the Court ruled that the Constitution prohibited killing the insane. The second question was narrower: Did Florida’s procedure for determining the sanity of a condemned prisoner violate the right to due process? On this, a larger majority of 7 to 2 voted in favor of Ford. Dick Burr and Craig Barnard had won on both counts. Reading the opinion, Sandy Bohrer felt like Julius Caesar: a laurel on his brow and a knife in his chest. The U.S. Supreme Court’s opinion read like a synopsis of his work for Freddy Goode.

Bohrer, arguing for Goode, had set out a history of court opinions to support his appeal, including *Solem v. Helm*, *Farman v. Georgia*, *Gregg v. Georgia*, and Felix Frankfurter’s dissent in *Solesbee v. Balkcom*. The Supreme Court, finding in favor of Ford, cited the same four cases.

Bohrer, for Goode, had traced a long tradition of legal theory against executing the insane, drawing on such erudite sources as *Hawles’s Remarks on the Trial of Mr. Charles Bateman, Blackstone’s Commentaries*, and J. Chitty’s book on criminal law. The Supreme Court cited the same tradition, using the same sources.

Bohrer had mentioned a footnote in an article in the *Stanford Law Review*. The Supreme Court mentioned the same article, same footnote. Bohrer had cited a case called *Greenholtz v. Morrissey* to support the right to due process before the governor. The Court agreed, based on the same case.

"Petitioner had no notice [of his sanity examination], no opportu-

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nity to be heard," Bohrer had written, summing up his case. The Supreme Court now agreed: "If there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'"

Justice is represented by a lady in a blindfold, but in Goode's case a lottery ticket might have been more apt. Bohrer remembered being scolded for his appeal when he appeared before U.S. District Judge Terrell Hodges. The appeal, Hodges had declared, was "frivolous and . . . an abuse" of the law. Two years later, Bohrer's appeal was the law.

Goode was dead, Ford was alive. Either the law varied from one person to the next—a blatantly unconstitutional, un-American concept—or the courts still weren't sure what they were doing with regard to the death penalty. There was some truth to both explanations. Plainly, the law had varied: Florida's procedures regarding insanity were legal one day and illegal the next. Bohrer's theories were frivolous one day and in the law libraries the next. But this was not entirely the fault of the courts; the modern death penalty was a labyrinthine legal edifice, pages and pages of arcane language, constructed by lawmakers working too quickly under intense political pressures. And it was built on sand; its theoretical foundation was the notion that degrees of evil and depravity and menace can be reliably distinguished and fixed into print by legislative draftsmen and consistently applied by judges of a thousand worldviews and temperaments.

In reality, the nature of the criminal soul is the terrain of a Dostoevsky, a Dante, a Camus. It defies the grasp of legal definition as a blob of mercury defies a tweezers. Modern death penalty laws try to get their arms around a cloud—a dark cloud, but nonetheless evanescent—and as a result, the laws are complicated and ornate but ultimately hollow; hollow in the sense that their language is utterly open to new and shifting interpretation. What judges might not see in the law as applied to Freddy Goode, for example, they suddenly saw when they looked again for Alvin Ford.

Like most lawyers on both sides of the death penalty battles, Craig
Barnard was maddened by this failure of the law to hold still. He had seen Daniel Gardner and many others win new sentencing hearings because their judges had considered undisclosed reports. And he had seen a different result when secret records were found in the files of the Florida Supreme Court. When he won a stay of execution for Alvin Ford while the insanity questions were decided—so soon after Goode had lost on the same issues—Barnard rightly believed that another judicial flip-flop was coming. But this inconsistency could also be a consolation to Barnard, especially in 1984, when the machinery seemed to be moving toward frequent executions. He needed another roadblock, a new logjam, and because the law was a changeling, he could search among arguments rejected one day for issues that might save a client the next.

As he puffed pensively on his pipe, or waited for another frozen dinner to heat, Barnard focused his hopes that year on two arguments in particular. The first was national in scope, potentially the biggest of the big issues. Scientists were finding more and more data to suggest that death sentences in America were being skewed by racial bias. In study after study, killers of white victims were more likely to be sentenced to death than killers of black victims. Did the death penalty somehow abet a racist remnant of the American psyche, holding that the loss of a white life was a greater outrage than the loss of a black life? This question was enticing to Barnard and to the rest of the nation’s anti-death penalty strategists. Anthony Amsterdam had won Furman v. Georgia in part by showing racial bias: Blacks in the old days were more often executed than whites. Now Amsterdam was working on this new evidence of bias, which was more subtle but perhaps just as powerful from a legal standpoint. Barnard talked often with the master.

Barnard’s second hope was more limited because it applied only to Florida. But it, too, had powerful implications, because if he won on this issue, dozens of inmates would likely get new sentencing hearings. It would be the biggest Florida case since the secret psychological reports. It was a terribly arcane point, having to do with one of those bubblegum patches devised by the state supreme court. Florida’s capital punishment law contained lists of “aggravating” and “mitigating” factors to be weighed in deciding whether to impose the death penalty.
Racing against the political clock, harried bill writers in the Florida legislature had written that aggravating circumstances "shall be limited to" the list in the law. Mitigating circumstances, they had written, "shall be" the ones listed. Trial lawyers, juries, and judges drew on these words as they performed the weighing process.

But what, exactly, did they mean? We have already seen that some judges applied aggravating factors not listed in the law. These were always struck down on review, for the law plainly said, "Shall be limited to." In 1976, the Florida Supreme Court had turned to the question of mitigating factors outside the legal list. The case was that of Vernon Cooper—the poetry-quoting cracker of Florida's death row. From the start, Cooper maintained that his dead accomplice, Steve Ellis, fired the shot that killed a sheriff's deputy on a darkened road outside Pensacola. Nevertheless, he was found guilty of murder.

Hoping to mitigate the sentence in favor of life, Cooper's trial lawyer had produced evidence that Ellis had a reputation for violence but Cooper did not. The lawyer presented evidence that Cooper had often tried to avoid Ellis, and that Cooper had a decent employment record, suggesting he was not irredeemable. But the trial judge would not to allow this evidence into consideration because it did not fit any of the mitigating factors listed in the law. Mitigating factors "shall be" the ones listed, the judge noted. And in 1976 the state supreme court agreed with the trial judge. "The Legislature chose to list the mitigating circumstances . . . and we are not free to expand the list," the justices declared.

But two years later, the U.S. Supreme Court ruled that states could not limit the evidence introduced in favor of mercy. Anything that might weigh against a sentence of death should be considered—whether or not it was listed in the law. This ruling directly refuted the Cooper opinion, and Craig Barnard exulted when he heard the news. "This could be the end of the death penalty in Florida!" he gushed. David Kendall had rushed to add the issue to his appeal for John Spenkelink. But the Florida Supreme Court instead patched over the problem. The justices simply looked at the law again, in the case of an inmate named Carl Songer, and announced a verdict precisely the opposite of the decision they had reached in Cooper's case. Clearly, the
court pronounced, "shall be" is different from "shall be limited to." Florida's law did not limit mitigating factors, the justices wrote, and they denied that they had ever said it did. People must have misunderstood the Cooper ruling.

It was an audacious step. "We are not free to expand the list," the justices had written in their Cooper decision. Legal language doesn't get much straighter than that. What was to misunderstand? If one law says "The name of your dog shall be Rex, Spot, or Fido," and another law says "The name of your dog shall be limited to Rex, Spot, or Fido," it would be clear that both laws limited the choice of pet names. Of course, the law limited favorable evidence. Few jurors who were instructed by the judge that mitigating factors "shall be" the ones listed by the law would think they could consider other ones. And a judge who knew that the law said mitigating circumstances "shall be" the ones listed would be unlikely to permit lawyers to present evidence of other factors. It would be a waste of time. The same with defense attorneys. They would be unlikely to take the trouble to present evidence beyond the list in the law.

But the justices of the Florida Supreme Court had a very slippery law on their hands and scores of capital cases piling up for review, and every few years they had to face the voters. Their job was to make the thing work, not toss it out. So, abracadabra! They stuffed the problem up their own sleeve. Despite the clear language to the contrary, they denied that their Cooper opinion had had anything to do with the list of mitigating factors itself. They had merely meant to say that Cooper's lawyer had not provided adequate proof of any factors beyond the list. Florida courts were welcome to consider any relevant information in favor of mercy, the justices said in their Songer ruling, and always had been.

An increasing number of federal judges believed that the death penalty should be the province of state courts—this attitude had carried John Spenkelink to Old Sparky, and it had carried the day in the matter of the secret reports. In the matter of mitigating factors, this attitude had led the federal courts to defer to the Florida Supreme Court's sleight of hand. The law in Florida meant whatever the state supreme
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court said it did, even if those pronouncements were wildly inconsistent.

Both issues—racial disparities and limitations on mitigating evidence—had been raised and rejected in the Spenkelink appeals. But Craig Barnard could not believe that they would not eventually be winners. Throughout 1984, as the tide shifted against the death row inmates and one after another they marched to the executioner, Barnard urged defense attorneys to keep raising these issues wherever they could. The racial issue had been renewed and rejected in Bob Sullivan’s case. The question of mitigation had been thrown out in Anthony Antone’s appeal. Barnard kept trying. It wasn’t pleasant—judges saw these failed arguments appearing over and over, and many of them grew hostile. They blasted the appeals as “frivolous,” “abusive,” “without merit.” Barnard was not cowed. That was what they had said about the Goode insanity appeal, and if Barnard had paid attention then, Alvin Ford would be dead. In the chaos of the death penalty, he knew today’s loser can be tomorrow’s victor.

But while he continued to raise these large questions, Barnard knew that he and his colleagues had to start doing a better job with the small issues unique to each case. What looked to him like a bloodbath was under way: Across the country, seven men had been executed in the first four months of 1984, which was as many as in the previous sixteen years combined. Florida was leading the way. The defenders needed every tool, large and small, to save their clients; they needed to exploit every possible advantage, from the tiniest detail to the loftiest constitutional principle. On the client roster at his own West Palm Beach public defender’s office, Barnard had a case that he hoped would set a new standard for comprehensive capital appeals: the case of James Adams, whose death warrant had been signed a week after the execution of Freddy Goode.

On November 12, 1973, a prominent rancher in St. Lucie County named Edgar Brown had come home to find a burglar in his house. Moments later, Brown was dying, his head caved in by a fireplace poker. James Adams’s car, an old Rambler, was seen careering from the crime scene, and later some items stolen from the rancher’s house were discovered in the trunk of a car belonging to Adams’s wife.
Police had no difficulty believing that Adams was the killer. He was a fugitive from the Tennessee prisons, having escaped while serving a ninety-nine-year sentence for rape, and he had convictions on his record for assault and larceny. On this strong circumstantial evidence, Adams was convicted and sentenced to die.

Even before Adams's death warrant was signed, Barnard and his associates had recognized how little they had to go on in the bare facts of the case. An escaped violent criminal had been closely tied to the aggravated murder of a leading citizen. They decided that to win they would have to dig deeper than the trial record, deeper than even the best death penalty defense lawyers had gone before—into the costly and tedious tasks of reinvestigating the case from the ground up, attacking every shred of evidence, discrediting each witnesses, unearthing police files, profiling their client's life from the womb to the present.

This approach—going back to square one with every death case, unearthing a man's childhood demons, crawling inside his head—consumed enormous resources, but Barnard got everything he needed. His boss, Dick Jorandby, saw to that. Somehow, Jorandby always found the money to send an investigator across the country to dig up an ancient file or long-lost relative. More important, perhaps, Jorandby found the money to hire more lawyers. By spring of 1984, Barnard had three skilled attorneys working full time on the death penalty. No other public defender in America was doing as much in defense of death row clients as Dick Jorandby, the staunch Reagan Republican.

Many colleagues have said that Craig Barnard got more work done than any lawyer they ever knew. Part of it was certainly his own tireless labor; but another part of it was his knack for hiring complimentary talents and delegating projects efficiently. The lawyers he hired were not like him and they were not like each other. Their strengths were unique. Richard Burr was the poet on Barnard's team, a soft-spoken man who wore his heart on his sleeve and a beard to mask his baby face. Burr's brief career had been focused entirely on the death penalty. When he graduated from the University of Kentucky's law school in 1979, he immediately joined the Southern Prisoners Defense Committee to represent death row inmates. Work for the SPDC required constant travel across the South; by 1982, Burr was ready to
settle down, preferably back home in Florida. He knew Scharlette Holdman—she knew every lawyer on the continent willing to defend a condemned prisoner—and she fixed him up with Barnard. Where Barnard was circumspect, Burr was emotional; where Barnard was monkish in his devotion to work, Burr insisted on a good family life. He rushed home every evening for dinner with his family. Many a night, after the kids were in bed, Burr went back to work and pulled an all-nighter.

Richard Greene had a head for politics. As a law student at the University of Texas, Greene organized campus activities against the death penalty, and he always saw capital punishment as more of a political issue than a legal one. It was natural, then, that he would end up working with Millard Farmer. Greene spent a summer at Team Defense, marveling as Farmer transformed the Dawson Five cop-killing case into an autopsy of racism in rural Georgia. And again, it was Holdman who eventually matched him up with Barnard; she loved Greene’s sardonic sense of humor.

The youngest of the team was Michael Mello, a smart kid from a top law school—the University of Virginia—who sometimes struck the others as just a little uppity. Mello knew he wanted to be a lawyer from the day he discovered Clarence Darrow in high school. After law school, he won the considerable honor of clerking for Judge Robert Vance on the Eleventh Circuit Court of Appeals. The court covered cases in Florida, Georgia, and Alabama; as a result, it was swamped with death penalty appeals. To keep up with the glut, each judge assigned a “death clerk” to work exclusively on capital cases. Mello was Vance’s death clerk. His job was to summarize each appeal in two or three pages, but when Mello started plowing into the pile he was appalled by the shoddiness of the legal work he found. His case summaries grew longer and longer as he tried to repair the work of second-rate defense attorneys. By the time his term was up, Mello’s “briefs” were running twenty-five pages, and he was convinced he was needed as a fighter in the trenches. Craig Barnard’s shop, he knew, was “the center of the universe” in death penalty matters. He begged for a job, pestered and badgered, and eventually Barnard relented.

They made an excellent team, and Barnard assigned work de-
pending on the talents required. If he needed to tug heartstrings, he called on Burr. If he needed to strike political chords, Greene. If he needed a legal egghead, he had Mello. Barnard was the chief, the coach, and the star of the team.

Barnard and company figured that James Adams had gotten the death penalty in large part because of his past—the criminal record and the prison escape. Perhaps they could knock a few holes in the prosecution’s picture of their client; to find out, they dissected his past all the way back to the cradle.

Adams was one of fourteen children of a dirt-poor sharecropper in rural Tennessee, born in the depths of the Depression. He had grown up with nothing, not even an education, in times that were hard for everyone but especially for blacks. By the time the Barnard team went looking for old jail records, many had been lost forever, but they discovered that the larceny charge that stained his record was for the theft of a pig to feed Adams’s hungry family. And they learned that in both his larceny and assault cases, Adams had faced trial without benefit of a lawyer. Barnard’s team could thus argue that both convictions were rendered unconstitutional by the Supreme Court’s landmark 1963 decision in Gideon v. Wainwright.

They turned to the 1962 rape conviction. Again, the files had disappeared. The lawyers searched courts and office buildings all over Tennessee. Nothing. Finally, almost by chance, Dick Burr unearthed the documents in a long-forgotten archive in Atlanta. The trial transcript told a strange story. Adams was convicted of raping a white woman whom he had asked for work. Her testimony was harrowing and racially charged: A “nigger male” had violently attacked her, beating her so ferociously that she lost consciousness several times. Oddly, though, the doctor who examined the woman testified that he found no bruises, nor any semen or other signs of a violent sexual assault. The case came down to a question of a white woman’s word against the word of the “nigger male.” The jury believed the woman.

Barnard’s team next excavated the sociology of juries in Dyer County, Tennessee, circa 1962. They pored over old statute books and
found that all citizens over the age of twenty-one "of good character and judgment" had been eligible for jury service. They dug up the master list of Dyer County jurors for 1962, and went painstakingly through the 500 names, trying to ascertain the race of each. Of the 490 they could identify, every one was white. Then the lawyers went one step further, scrutinizing old census records to find the racial breakdown of the county. Fourteen percent of residents twenty-one and older were black; the jury rolls told them that, at most, only 2 percent of prospective jurors had been black. Obviously it was no accident that Adams's jury was all white—blacks had been excluded from the pool. The Barnard team now could argue that the rape conviction was unconstitutional, too, because a defendant has a right to be tried by juries free of racial discrimination.

They dug still deeper. What about the prison escape? From musty files at the Tennessee parole board, Barnard's team learned that Adams had compiled a sterling record during a decade in prison. In fact, the board had recommended parole. "Mr. Adams' institutional record has been exemplary," the board had advised the Tennessee governor. "Due to the circumstances surrounding the crime and his conviction . . . he has served an adequate number of years." Adams had done so well in prison that he was assigned to work as a trusty at a low-security jail in Nashville. (It was a facility for teenage girls; apparently his jailers did not consider Adams a dangerous rapist.) He had been on the brink of freedom, but the custom in Tennessee was to defer to a prosecutor's wishes in such matters, and the prosecutor objected to Adams's release. Something along the lines of "over my dead body." Adams concluded he would never get out of prison as long as the district attorney was alive.

As a trusty, Adams was allowed to drive prison vehicles on errands; one day he climbed into a truck and simply drove away. That was the predator's great escape.

Uncovering all this information was costly and time-consuming work, but when it came together it seemed to put James Adams into a different light. The three-time felon portrayed at trial was now a man who, Barnard could argue, had never been constitutionally convicted of a crime. The brutal rapist had quite possibly never raped anyone.
The treacherous fugitive was, in fact, an exemplary inmate who had quietly driven away from jail when he learned that good behavior might never earn him his freedom. In this new light, Adams looked less like a perfect candidate for the electric chair.

Barnard did not stop there. He assigned an investigator to redo all the police work in the Adams case. Leon Wright took the job with no great enthusiasm. As a veteran detective from the Philadelphia police force, Wright had plenty of street-level experience with bad guys. He supported the death penalty and figured Adams was as guilty as sin. But when he plunged into the murder of Edgar Brown, he began to have doubts. The murder had occurred about 10:30 A.M. When police had interrogated Adams, he had said that he arrived at the home of a woman named Vivian Nickerson before ten-thirty on the morning in question and remained there all day, playing cards. He recalled that Nickerson borrowed his car shortly after he arrived and, along with a man named Kenneth Crowell, went off to buy a deck of cards.

Nickerson's testimony regarding this alibi was crucial—and at trial she blew the defense apart by swearing that Adams did not arrive at her home until after 11 A.M. After the crime, in other words. But as Leon Wright worked through his investigation, he noted that in an earlier sworn statement Nickerson said that Adams arrived before ten-thirty, and that she had his car during the time when the murder was taking place.

That car was seen by an employee of Edgar Brown's in the drive-way of the rancher's home. The same employee, a man named Foy Hortman, saw someone rush from the house immediately after the murder, climb into the car, and speed away. Hortman testified at trial that the person he saw could have been James Adams. Wright retraced the work of the sheriff's detectives who interviewed Hortman the day after the murder and came across a handwritten note describing Hortman's examination of a photo lineup. A picture of Adams had been included in the lineup, but the detective noting Hortman's response had written: "No I/D of any man in lineup . . . positive no of these men involved." Hortman told police he saw a man with a thin, clean-shaven face and very black skin. Adams had broad cheekbones, a
mustache, and medium-dark skin. When events were freshest in his
mind, Hortman “positive” Adams was not the person he saw.

Leon Wright next tracked down a witness who testified that he
saw Adams driving wildly from the scene of the crime. Willie Orange
gave the only positive identification of Adams at trial, and his testimony
was vivid: He said he had been driving a huge truck loaded with
fertilizer up the road toward Edgar Brown’s ranch. A brown Rambler
came roaring toward him, forcing him to swerve onto the shoulder. He
said the man behind the wheel of the Rambler was James Adams.
Wright poked into this damming testimony—and he learned that Willie
Orange nursed a powerful grudge against Adams. Orange believed Ad-
ams was sleeping with his estranged wife, Cleo.

Cleo Orange told Wright this story: “He came over to my house
and told me he had heard that I was messing around with James Adams.
He asked me if I was messing around with James Adams, and I said no.
My husband said, ‘Well, he’ll get what he deserves anyway.’ ” Wright
combed St. Lucie County for others to confirm what Cleo had told
him. He found a coworker who recalled Orange talking about the
alleged affair between Adams and Cleo Orange. More significant,
Wright located another witness in the Adams trial, a man named Ward
Lesine, who swore he heard Willie Orange threaten Adams. “Willie
Orange said to me, ‘I’m going to send him because he’s been going
with my wife. . . . He’ll never walk on land again.’ ”

Wright went back to Willie Orange and talked him into taking a
lie detector test. Such tests are not flawless, but Orange flunked badly.
Thus Barnard’s investigator chipped away at the case, raising doubts
about the witnesses who put Adams at the crime scene. He chipped
away also at the physical evidence: Wright noted, for example, that the
items stolen from the Brown ranch—later found in the trunk of a car at
Adams’s house—were never tested for fingerprints. If, as Wright was
coming to believe, Adams had been set up, fingerprints on these items
might have pointed to another suspect. And then there was the strange
matter of a strand of hair that a deputy claimed to have recovered from
Edgar Brown’s grasp. The hair belonged to an African-American per-
son, presumably to Brown’s assailant. Several days after the trial was
over, the state crime lab released the results of its analysis: The hair was not Adams’s.

Lawyers for the State of Florida argued that the deputy had fabricated the hair evidence. That did nothing to placate Leon Wright. If the hair was faked, how could any of the evidence against Adams be trusted?

None of this was clear-cut proof that Adams was innocent, of course. The facts remained: Brown was dead, and a lot of circumstances tied James Adams to the murder. But by the time Bob Graham signed Adams’s death warrant, Wright had put some serious dents in the case. Police had conducted “a lousy, incompetent investigation,” he said. In fact, the tough Philly detective held his thumb and forefinger about a half inch apart, and told his friends he was “this close” to proving James Adams was framed.

Barnard poured still more resources into the appeal, arranging for a psychiatric evaluation of his client. Quite by chance, he had come across the theories of Dr. Dorothy Otnow Lewis, a professor at New York University and Yale, who had found intriguing correlations between head injuries and later violent behavior. Lewis had also documented the fact that violent adults were very often the product of violent childhoods. One morning, as Barnard was dressing for work, he happened to hear Lewis being interviewed on the CBS morning show. Riveted by her brief appearance, he rushed to the office and began tracking her down. Soon Lewis was part of Barnard’s growing arsenal of expert consultants.

After several hours with James Adams in an office at the Florida State Prison, Lewis concluded that the prisoner likely suffered from a “psychomotor seizure disorder” that caused rages, dizziness, blackouts, and amnesia. She theorized that the disorder was the result of a beating Adams endured at the age of seventeen, when a guard in a Tennessee jail bashed his head with a baseball bat. Dr. Lewis noted a dent in Adams’s skull, still there after some thirty years.

When James Adams had been convicted of murder and was facing death, his lawyer had come up with precious little to say on his client’s
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behalf. He presented no favorable evidence, instead offering only a brief speech. "Ladies and gentlemen, you have all heard the evidence and you have found James Adams to be guilty of first-degree murder," he said. "I understand how Mrs. Brown felt during her testimony . . . in which she saw her husband lying there in the condition he was. I understand Mr. Brown's reputation in the community. I think you understand the situation. . . . Yet I find it necessary to ask for you to consider that you save his life in spite of all this and let this man live, for no other reason than that he is a man. Thank you."

Now, some ten years later, after thousands of hours of strenuous and costly effort, Craig Barnard's team had reams of material to present on Adams's behalf, material that cast new light on the man's past, on his mental condition, even the very question of his guilt. Unsatisfied with the trial record, they had rebuilt the case from the ground up. For good measure, they renewed Barnard's favorite constitutional issues. They had found fresh statistics, from a study by two Stanford researchers, indicating racial disparities in Florida's death penalty. The study found that between 1976 and 1980, killers of white victims in Florida were eight times more likely to get the death penalty than killers of black victims. Blacks who killed whites were the most likely of all to go to death row. They also raised the problem of mitigating evidence. Maybe if Adams's trial lawyer had realized that there were no limits on favorable evidence, he would have made a better case for mercy than simply that Adams "is a man."

Their appeal did set a new standard for thoroughness, just as Barnard had intended, attacking the death sentence on constitutional grounds, on grounds of new evidence, on grounds of justice, on scientific grounds, on grounds excavated from old census records and dusty archives. Though people frequently complained of appeals based on "technicalities" and "loopholes," this was no mere technicality. The heart of the death penalty was in the belief that courts could take the full measure of a man, his past and his future, down to the center of his soul. Barnard was arguing that the courts had no idea who James Adams was.

Beneath the surface, there was something ominous about the extent of this appeal: If it became, as Barnard hoped it would, the state of

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the art, the result would be huge additional demands on the lawyers and judges already swamped by the volume of death penalty reviews. How many cases of that intensity and scope could the system handle? One a month? A new man was being sentenced to death row nearly every week in Florida. The last thing the system seemed ready to handle was a quantum leap in the complexity and depth of each appeal. But that was where Barnard was headed, because he believed that was what the law had promised. Death sentences would take into consideration the individual circumstances of each criminal and crime.

For James Adams, though, this breakthrough came too late. His appeals had already been up the entire ladder of state and federal courts before Barnard's team completed its exhaustive work. Judges from Fort Lauderdale to Tallahassee to Atlanta to Washington ruled that the new appeal was either repetitive of the earlier appeals, or—where the courts acknowledged new facts—that the material should have been discovered the first time up the ladder.

Adams's last hope was the racial bias issue. A researcher named David Baldus had been studying the question of racial disparities in Georgia's death penalty, and his work had taken the effort to a new plane. The Baldus project was more rigorous, more thorough, more scientific than any previous undertaking, including the study of Florida done by the Stanford researchers. Like the earlier researchers, Baldus had found marked differences in sentencing depending upon the race of the victim. But the quality of his work gave it special authority. In the months leading up to the scheduled execution of James Adams, the Eleventh Circuit Court of Appeals in Atlanta had blocked two Georgia death warrants because of the bias issue and had scheduled an in-depth hearing on Baldus's statistics.

Surely, Barnard thought, the same court would see the similar data from the Stanford researchers that he had included in the James Adams appeal, and the judges would give him a similar stay of execution. On May 8, 1984, the eve of the Adams execution, it happened.

At the Florida attorney general's office, the stay of execution for Adams hit like a thunderbolt. Everyone knew the implications. This question of racial fairness cut to the heart of the death penalty, and if it was enough to block the Adams execution, it might block every execu-
tion in the pipeline. It would likely take at least two years before the matter could be resolved. Capital punishment had been moving in Florida, after so much effort by the prosecutors and lawmakers and many judges—but this would stop it cold again. Prosecutors flew immediately to Washington and asked the U.S. Supreme Court to reverse the appellate panel’s ruling. This was a long shot. The high court had already agreed to block executions in Georgia while the racial fairness issue was resolved.

But the lawyers from Tallahassee had a lever on the high court. Florida had executed four men, and in all four cases the racial bias issue had been raised (it had been especially prominent in the appeals of John Spenkelink and Bob Sullivan). The high court had not seen the merit of the issue in those challenges. Were the justices now going to change their minds?

Justice Byron White made the decision. He had cast the deciding vote to block the Georgia executions; now he shifted and voted to remove the roadblock in Florida. White never explained why Florida was different from Georgia. His vote was mysterious, but powerful: All the work of Craig Barnard and his team of lawyers and detectives, their state-of-the-art appeal...all of it went down the drain, along with the life of James Adams, who died on May 10, 1984, on the first jolt from Old Sparky, the first black man executed in Florida in twenty years.

“It’s beyond logic and rational analysis,” Scharlette Holdman fumed to Neil Skene, the death penalty expert at the St. Petersburg Times. “That court’s going to allow race discrimination in Florida and prohibit race discrimination in Georgia.”

That was a bald way of putting it, and probably unfair. Justice White was always tight-lipped; that didn’t necessarily make him capricious. Maybe there were good reasons to distinguish between the two states. But Scharlette Holdman was always putting things baldly, and often unfairly, because her job was to advocate, not to referee. Her broader point was correct: Executions were coming along every six weeks now in Florida, but no clear selection process was emerging.
The law, and the way courts interpreted the law, were jumping around like a live cable on a storm-slicked street. Every now and then, the cable whipped through a crowd of people and zapped somebody dead. More than twelve hundred people were on America's death rows in the spring of 1984—over two hundred of them in Starke. The zapping of Bob Sullivan, Anthony Antone, Freddy Goode, and James Adams defied rational analysis. Why them and not four others? Perhaps more executions would bring more logic. Maybe a cathedral of law would be built stone by stone, where each stone was another decision by the courts that a particular inmate met the test to die. Maybe as that cable hopped and jerked along the street, a pattern would emerge among the onlookers being zapped.

Perhaps. You could not find a prosecutor or judge in Florida who could discern a rational pattern. It drove them crazy trying. But . . . Perhaps.

Carl Shriner was a career criminal whose career began when he was just eight years old. He was violent, incorrigible—just the sort of man the death penalty was designed for. On parole from a sentence for armed robbery, he robbed a convenience store in Gainesville. Shriner forced the clerk, a hardworking, good-natured mother of four, into a storeroom and shot her five times.

Shriner came from a family of ten children that would now be called "dysfunctional." In those days, such fancy terms were unknown. Police in Cleveland, Ohio, simply referred, disgustedly, to "those damn Shriner kids." Carl's father regularly beat him and the other kids, a brother and sister later testified; Carl was raped by an older relative. His life became even more violent when he was removed from his home to a series of juvenile reformatories. Beatings and rapes were so commonplace that Shriner actually welcomed his periodic stints in the "strip cell," where the boy would sit, naked and alone, for as long as three weeks. The strip cell was cold and humiliating, but it was safe. Maybe some children are scared straight by such brutal confinements. Shriner was not. He fit perfectly into psychiatrist Dorothy O. Lewis's findings.

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that death row inmates come, overwhelmingly, from violent backgrounds.

For all intents and purposes, he spent his entire life in the custody of the state. When he was thirty, Shriner reflected all the way back to his tenth birthday and could recall only three Christmases that he had not spent in jail. Any decent theory of personal responsibility would lay the onus of his wasted life on his own broad shoulders. But any fair accounting would also have to acknowledge that the well-meaning agencies of society had failed utterly in his case.

Even Shriner's strongest supporters believed that he belonged in prison. "Carl was a dangerous man, very dangerous," said the Reverend Fred Lawrence, a Methodist minister from Gainesville who counseled death row inmates. "If they had ever tried to let him out, I would have opposed it." But these same supporters thought that Shriner's troubled childhood, and the failure of the State of Ohio to help this troubled boy, were facts that should have been weighed in deciding whether to give him a life sentence.

As the man awaited execution, his lawyer argued that the trial judge and jury should have considered, at least, the proposition that the garbage heap of Carl Shriner's life was not entirely of his own making. No such evidence had been presented at trial. His appellate attorney maintained that this had been because of Florida's law regarding mitigating factors—the same argument Craig Barnard had urged in nearly every appeal since Spenkelink's. Now, for the first time, the Eleventh Circuit Court of Appeals polled its members to see if they wanted to reopen this question. Shriner's execution was delayed for a day while the vote was taken. (These delays of a day or two were becoming so common that defense attorneys now had a name for them: "baby stays.")

The court voted not to hear the matter, and on June 20, 1984, Shriner was executed—the fifth Florida execution in seven months.

David Washington, the sinewy athlete who had stabbed and shot three people during a twelve-day rampage in Dade County, died in the electric chair three weeks later.
Among the Lowest of the Dead: The Culture of Capital Punishment by David Von Drehle

He was ashamed and remorseful to the very end; he had that small credit. As his twelve-year-old daughter sobbed through their final visit, he cupped her trembling chin in his hand and said: "I want you to look at me, and I want you to see where I am... and I want you to do better." Hours later, strapped into the electric chair, he said of the survivors of his victims: "I'm sorry for all the grief and heartache I have brought to them. If my death brings them any satisfaction, so be it."

Washington also left his name on an important U.S. Supreme Court decision. For years, appellate attorneys had been attacking death sentences by charging that trial lawyers were incompetent. It was the appeal of last resort—when all else failed, attack the lawyer. After all, few of the men on death row had money to hire the best available attorneys. By 1984 literally hundreds of appeals were bouncing around the American court system based on the claim of ineffective counsel. But the courts had no clear, nationwide standard for deciding what constituted ineffectiveness in the era of the new death penalty.

Dick Burr, Craig Barnard's assistant, crafted one of these appeals for David Washington. Burr argued that by failing to present psychiatrists and character witnesses to argue for a life sentence, Washington's trial attorney had shortchanged his client. In January 1984, the U.S. Supreme Court heard Washington's plea and used the case to lay down some guidelines.

By a vote of 8 to 1, the justices set out a two-step test. First, the work of the trial attorney had to be so deficient that it plainly fell below "prevailing professional norms." Appellate courts were instructed to give trial attorneys the benefit of the doubt. Even if the work was proven to be shoddy, another hurdle had to be crossed. The inmate had to show a "reasonable probability" that a better lawyer would have gotten a better result.

In other words, if the circumstances of the crime were awful enough, it didn't matter if the lawyer was ineffective. In the case of David Washington, lower courts had been split on the question of whether his lawyer was inadequate, but given the nature of his crimes—three murders in twelve days, including the stabbing of a college student as the young man recited the Lord's Prayer—no one could say with any confidence that a better lawyer could have saved Washington's
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life. The U.S. Supreme Court therefore affirmed Washington’s death sentence. The opinion was unusual in one respect: Even Justice William Brennan, one of the staunchest opponents of capital punishment on the high court, joined the majority in approving the tough test for effective counsel. He dissented, though, when it came to upholding the death sentence; Brennan never approved of a death sentence. Even as he helped to clarify this one muddy corner, Brennan insisted that the larger field of the death penalty was still a morass. “The Court’s judgment,” he wrote in a stinging footnote to the Washington case,

leaves standing another in an increasing number of capital sentences purportedly imposed in compliance with the procedural standards developed in cases beginning with Gregg v. Georgia. Earlier this Term, I reiterated my view that these procedural requirements have proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. The inherent difficulty in imposing the ultimate sanction consistent with the rule of law is confirmed by the extraordinary pressure put on our own deliberations in recent months by the growing number of applications to stay executions.

In this dissent, Brennan proved his point by quoting earlier opinions by his fellow justices. Even though the execution machinery was picking up steam, neither liberals nor conservatives, it seemed, were remotely satisfied with the death penalty. Justice Thurgood Marshall, a liberal, had complained of “haste and confusion” that was “degrading to our role as judges.” Justice Lewis Powell, a death penalty conservative, had chided the court for “dramatically expediting its normal deliberative processes to clear the way for an impending execution.” Chief Justice Warren Burger, a conservative hard-liner, had bemoaned the fact that death penalty battles were undermining “public confidence in the courts and in the laws we are required to follow.” And so forth. If the death penalty was causing that much confusion at the high court in Washington, surely it was gumming up the works in state and local courts, Brennan ventured. And he was right.
Scharlette Holdman had tried to prepare herself for this: Some of her clients were going to die. She gave speeches all over the country—*Newsweek* and *People* magazines made her famous as “The Mistress of Delay”—and everywhere she went she would say it simply. People are going to die.

And then she’d launch into a string of darkly funny riffs on death. People would ask her about the men on the row, expecting some heartbreaking tales of broken lives, and she’d say, “What really gets me is that none of them has a sense of humor!” And her eyes would widen comically. “I go up there, give ’em joke after joke, and they look at me like stunned dachshunds. Is it my timing? My delivery? I finally figured out that half of ’em are retarded and the other half are seriously crazy, so I try not to take it personally.” She would talk about executive clemency, about Bob Graham’s grants of mercy to half a dozen men, about the mysterious end of official mercy. “There must be some way to get to Graham,” she’d say, “but we just can’t figure it out. We’ve become superstitious—one person chants while I toss chicken bones.” Maybe she’d tell the story about the Florida prison inmate who was denied parole because he masturbated too much. Maybe she’d tell the story of her desperate phone call to Santo Trafficante, the Mafia godfather, and break everyone up with her imitation of the Brando rasp: “Tony was a good boy.”

The old saw: laughing on the outside, crying on the inside. Deep down, Holdman never really expected to lose her clients, and it was tearing her apart. “You’re going to have a tough time with this,” an inmate had told her, “because you white folks aren’t used to losing.” Damn right—Holdman was not used to losing. With her lousy ledger and beige telephone, her coarse charm and chutzpah, she had faced down the governor, the attorney general, and overwhelming public opinion for four and a half years. “It can’t last forever,” she would say, putting up that brave front—but deep down she wondered why the hell not? Jim Smith, the attorney general, had a team of lawyers with good government salaries; he had investigators and legal secretaries and computers and high-speed photocopiers and government airplanes.
Scharlette Holdman had passion. Why couldn’t she prevail? “I grew up with Martin Luther King on the television every night,” she said, as if that explained everything.

Holdman’s life in 1984 was a roaring sea of despair, one wave of panic crashing on the next, a frenzy of barren labor, a chasm of loss. Each new death warrant was a potential catastrophe for her, and the warrants were coming two or three per month. All over the state, lawyers had learned her drill and now refused even to take her calls. Holdman was reduced to working the Yellow Pages. She’d take the book for Orlando, or Jacksonville or Miami, and simply run down the list of attorneys from A to Z, cold-calling—the hardest kind of sell there is. She gave up cajoling, gave up moral blandishment, and went straight to whining. “Hellooohhuuh? This is Scharrrrlette Holdmannnnnnn. The governor signed this man’s warraaannt, and he’ll die if he doesn’t get a lawwwwwyerrr.” When she finally found a grudging volunteer—after twenty or thirty or fifty calls—she and her assistant, Gail Rowland, would do all the legwork, tracking down files, interviewing inmates, calling relatives.

A warrant meant that sixteen-hour workdays became twenty-hour workdays, and as the execution neared, the days turned to round-the-clock marathons. Holdman and Rowland took sleeping bags to the office, slept on the floor amid the heaping cardboard boxes of inmate files and trial transcripts. They took turns at the typewriter (they couldn’t afford a word processor), and sometimes Rowland banged the keyboard until she couldn’t see and she literally collapsed over the keyboard. She’d go home and sleep for two hours before returning. They copied briefs on a crude desktop copier that took forever to copy a single page. For a year, Rowland felt as though she did nothing but type and copy, copy and type. They lived on fried chicken, cigarettes, and cheap wine.

Volunteer lawyers would arrive at Holdman’s office expecting to find a tidy, well-stocked operation—after all, this woman was battling the State of Florida—and instead they walked into a dingy room that looked like it had been hit by a meteor. Crates of papers were stacked on the floor, on the tables, on the desks. Files were strewn like a schoolboy’s notebooks flung sky-high on the first day of summer. Ash-
trays heaped with butts, stale coffee simmering in a grimy pot, photos of inmates taped to the cheap vinyl paneling. Holdman kept all her notes on scraps of wastepaper. “And we would hand the new hot-shot lawyer a file stuffed with Scharlette’s scraps of paper, and he would just about have a stroke,” Rowland recalled. “These lawyers would talk about it like they’d been stranded in the African bush. It was crazy. This vital life-and-death litigation in the highest courts of the land was being run by a couple of cranks in a little smoke-filled room in Tallahassee.”

By spring 1984, Holdman was spending an hour a day just keeping her ledger up to date. And the work continued to expand. Every few weeks another family would arrive in North Florida to face the possible extinction of a son, a brother, a father. Scharlette Holdman raised their bus fares, found them someplace to stay. Some of those sons and brothers and fathers did die; Holdman arranged the funerals. Gail Rowland became an overnight expert in the laws governing interstate transportation of corpses. Holdman, as always, worked the phone: “I need three hundred dollars for a funeral; can your church group handle it?” Or “You’ve got six acres out there; can we bury somebody on your land?” Holdman’s son Tad came home one day and found a station wagon in the carport with a big box in the back. “Is that what I think it is?” he asked. It was. The dead followed her home.

She worked constantly—her first day off that year came in November—but she confided that she cried as much as she worked. She cried though she hated to be seen crying. (When a photographer snapped a picture of her sobbing at a vigil for Anthony Antone, Holdman announced that she would no longer attend such protests.) Death became her life, and it subsumed the lives of those around her. “I got to the point where all I did was buy black clothes,” Gail Rowland said. “I learned so many damn funeral songs. I hope I never sing ‘Amazing Grace’ or ‘Will the Circle Be Unbroken’ again.”

There were moments when the tension broke, moments of bitter laughter. Gail Rowland’s puppet, for example. At the U.S. Supreme Court, one justice was assigned to each region of the country to handle emergency appeals. Florida’s justice was Lewis Powell; naturally, he became a particular target of Holdman’s scorn. Rowland made a hand
puppet that she called "Mr. Justice Powell," and the puppet offered running commentary on events in the office. If, for instance, Holdman and Craig Barnard were talking about an inmate's deprived background, Mr. Justice Powell would pop up and shout, "Oh, shut up! Not another bed-wetting darkie!" Or Jimmy Lohman would strum a folk tune on his guitar, and Mr. Justice Powell would chime in with some grossly racist, sexist lyrics. Holdman either laughed or cried; it was a time of emotional extremes; her nerves glowed like incandescent filaments.

The people who worked at the Clearinghouse learned every way in the world to be murdered—every depravity imaginable and depravity beyond imagining. They lived in the medium of blood. Gail Rowland reached a point where she refused to enter a convenience store unless she saw the clerk, safe, through the window. She began to lock her car doors even when she was driving. She never felt a cool breeze as she slept, because the windows were always down and locked. Tragedy was the nearest thing to her mind. One day, Rowland arranged to pick up her daughter up at noon because the grade school was giving the children a half day off. When she arrived and her daughter wasn't there, she "absolutely freaked out. I was sure we would find her dead in the laundry room," Rowland later recalled. "It was the first thing that popped into my mind." Holdman phoned home one afternoon to check on her son, and when he didn't answer, she got hysterical. "Tad's been murdered!" she screamed over and over. "My God, Tad's been murdered!"

Holdman had given herself completely to her cause, and it drained and warped her. She never saw movies. She didn't take walks or ride a bike or curl up with a lighthearted book. She never went to the beach or the shopping mall. "I wish I had a car that always ran, and I wish I had tuition for my son to go to college, and money for me to go to the dentist," she mused one night over a whiskey bottle with writer David Finkel. "And in the bathroom, I'd like faucets that turned all the way off and screens that fit." But that would be life. Scharlette Holdman—like Tiresias in T. S. Eliot's great poem The Waste Land—walked among the lowest of the dead. The warped and half-witted

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killers of death row made up her future; more and more, her past was filled with bad, burnt men.

If she had an hour or two late at night to call her own, Holdman spent it listening to protest music and drinking from a tall glass. Wine was fine, Scotch was better, Grand Marnier was paradise. Now and then friends would sidle up to Gail Rowland and say in low voices, "Gail, you've got to talk to her about her drinking." And Rowland would say, "To hell with that, you tell her."

To hell with that. When death overtakes your life, maybe you feel like dying a little yourself. A lot of booze was washing down the gullets of a lot of beat-up people that year, people struggling to save the men on death row and people ground down by the work of getting them killed. In West Palm Beach, Michael Mello's girlfriend was on the verge of leaving him. In Tallahassee, George Georgieff and Ray Marky were grinding along toward a couple of heart attacks. At least Scharlette Holdman wasn't having her nightmare anymore. She wasn't waking sweaty in the darkness wondering "Who's the mouse?" Her life was her nightmare.

The insanity of Scharlette Holdman's enterprise did not escape the attention of the media. There were the articles in Newsweek and People. Esquire magazine profiled her, as did The Boston Globe. The New York Times and The Wall Street Journal ran front-page articles on the shortage of lawyers willing to volunteer hundreds of hours, thousands of dollars, and the respect of friends and colleagues to defend death row inmates.

Best of all, Phil Donahue called. Holdman loved Donahue; she kept a beat-up portable TV at the office so she could watch him. In one sense, her appearance on Donahue was a fiasco: Holdman was matched with the families of several murder victims and a man in a wheelchair, paralyzed by gunshot wounds. The audience was not with her. But Donahue gave her a chance to talk to her biggest audience ever.

All this publicity was making the legal lions of Florida uncomfortable. Millions of people were meeting Scharlette Holdman in print and
over the airwaves, and the message she carried was distinctly unflattering: Florida was willing to execute men who had no lawyer, and lawyers didn’t seem to care. Scharlette Holdman was a big black eye on the Florida Bar.

Judges hated her operation, too. She was ruining the decorum of their courts by sending in her panicky volunteers with their hasty briefs typed on paper scrounged from trash cans. Too many of her lawyers were ill prepared, the judges said, and too many were zealots. The law was supposed to be a temple; Holdman’s ragtag operation was making it into a sideshow. The judges turned to Florida Bar president William O E. Henry and said, in effect, Do something.

In June 1984, Henry announced that he was commissioning former Bar president James Rinaman to develop a plan for drawing the state’s major law firms into death penalty cases. Henry was not interested in blocking executions. Of Holdman’s volunteers he said: “A lot of them are more interested in thwarting the death penalty than in representing their clients. Our objective is to make sure each inmate’s constitutional rights are protected and, at the same time, to make sure the system isn’t being abused.” He was interested in saving decorum and shoring up the reputation of his profession.

James Rinaman paid a visit to Holdman’s crummy little office. Rinaman was a courtly man; his goal, he often told reporters, was to see the death penalty handled “in a more lawyer-like fashion.” Holdman, though she was the opposite of courtly, found her visitor unfailingly polite, “the consummate southern gentleman.” In return, she was at her most charming. “He wanted to tell me they intended to take over, and he hoped there wouldn’t be a turf battle,” Holdman later recalled. Rinaman gingerly sounded her out, this strange dynamo, this sharp-spoken hippie. What would she think if the Bar got involved in recruiting volunteers? “I’d love it!” Holdman declared, perhaps surprising him. “I’m desperate to get the Bar involved.” And Rinaman asked, Well, what would she do if the Bar came in? “I’d close my doors,” Holdman answered.

Rinaman seemed relieved—Holdman got the clear impression that he wanted to tell her she wasn’t welcome, but was too polite to say it. “Hell,” she remembered later, “I knew I wouldn’t fit in. It was like
Sesame Street: Look at me, look at Rinaman. One of these things just doesn’t belong.”

They turned to the matter of money. Holdman told Rinaman she ran the Clearinghouse on ten or twenty thousand dollars a year. In a good year the grants were $25,000. “But you aren’t going to find anyone to do what I’m doing on that money,” she said bluntly. Rinaman asked, What do you think it would cost? Holdman paused for a moment, trying to think of the biggest number she was brave enough to utter. “Two hundred and fifty thousand,” she said at last. Rinaman looked a little shocked—ten times as much as Holdman had? Surely she wasn’t ten times better than the professionals. He did not say this, though, merely thanked Holdman cordially and went on his way.

But Scharlette Holdman was ten times better. After several months of study, Rinaman reported to the Florida Bar’s Board of Governors that it would cost $235,000 a year to recruit and advise volunteer lawyers for death row inmates. The cost of the actual legal work would have to be borne by the state’s major firms.

What were the legal lions getting themselves into? Rinaman described a recent experiment. An attorney named Sarah Blakely had volunteered to file an appeal for an inmate named Jimmy Lee Smith. Blakely’s little firm did not have the resources for such effort—perhaps ten thousand dollars just for out-of-pocket expenses. Rinaman had matched her up with Holland & Knight, Florida’s biggest law firm. Holland & Knight had given Blakely use of its libraries, secretaries, and two associates. “It totally wiped out three lawyers for two weeks,” Rinaman reported to the Bar’s Board of Governors. “They were working twenty hours a day. . . . But they were successful in getting a stay.”

That last point was not necessarily popular with all of the board members. Personally, they weren’t all sure they wanted death row inmates to win stays. Obstruction was not the point of their project. But Rinaman had mastered some statistics during his study, which he now shared. “Even with the last-minute nature of appeals,” he said, “the reversal rate—in which the death penalty is completely expunged—has been 50 percent.” That figure astounded the assembled blue suits. Half of all death sentences were turning out to be seriously flawed. “There
will be people executed who should not have been” unless they get good lawyers, Rinaman said. The board approved the money.

The immediate effect of the Bar’s action on Holdman’s life was precisely zero, however. Great institutions of the establishment do not move swiftly. James Rinaman was not going to run out to an office supply store, buy himself a ledger and a stack of index cards, and start dialing. His project would take months to get rolling. And in the meantime, Bob Graham was signing death warrants.

On August 8, 1984, Graham ordered the execution of Earnest John Dobbert Jr. Holdman fielded the case; her pal Pat Doherty was the lead attorney, aided by two other Holdman stalwarts, Bill White and Steve Malone.

The Dobbert case was a tangle of horrible violence and strange jurisprudence. First, the violence: John Dobbert was raised by a brutally abusive father, and, like many abused children, grew up to abuse his own kids. John and Virginia Dobbert had four children, none of whom John wanted, and the parents often vented their rages on the kids. Husband and wife were both abusive, but John was the worst. He hit the kids, kicked them, beat them with belts and sticks. Once he held his eldest son’s hand over a gas flame until the skin blistered. When Virginia went to jail in 1971 for kiting checks, Dobbert pleaded with her to let him send the kids to live with her parents—he couldn’t handle the responsibility. But Virginia insisted that she would divorce him if he gave up on the family. Bitter, overwhelmed, and vicious, Dobbert responded with even worse outrages. He broke bones, gouged eyes, kicked stomachs, held heads under water until the children were nearly drowned. The trailer where the Dobberts lived soon looked like a hospital ward: John III, who was eleven, had suppurating wounds on his back; the eldest daughter, Kelly, who was nine, had internal injuries so severe she couldn’t eat; Ryder, seven, could scarcely walk; Honore, five, cowered in fear.

Neighbors informed authorities that the Dobbert children were being abused, but the resulting investigations—there were at least three—produced no action. Once a nurse and a policeman filed reports that commended Dobbert’s handling of “a bad situation.” (John III and Honore eventually won a million-dollar settlement from the City of

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Jacksonville.) The horror of the Dobbert home was not discovered until John III ran away. He was found in a city park, limping, infected, and blind in one eye.

The boy told police a ghastly story. His sister Kelly had choked to death on her own vomit the previous December, and Ryder had died in February. Both were buried in a field somewhere, the boy said: He had been forced to hold the flashlight as his father dug the graves. A few days after police found John III, little Honore turned up on the doorstep of a Fort Lauderdale hospital. She was clutching a teddy bear, two dollars, and her grandmother’s name and phone number.

The FBI found Dobbert seven months later in Houston, reunited with his wife. At trial, the surviving son, John III, told a story that differed slightly, but crucially, from the one he had first told police. His father had strangled his sister to death, he said. She had not choked on vomit; it was murder. Solely on the strength of this testimony (the bodies were never found), Dobbert was convicted of first-degree murder in the death of his daughter Kelly. He was also convicted of second-degree murder in Ryder’s death (second-degree because the State could not prove Dobbert intended to kill the boy) and of child abuse and torture.

Dobbert’s case tested a trial judge’s power to override a jury’s recommended sentence. His jury voted 10 to 2 in favor of life in prison. Why, when faced with such facts, had so many jurors opted for mercy? They might have felt Dobbert’s own abuse as a child had partly fueled his later offenses. Or perhaps they believed that city authorities shared some piece of the blame for failing to take the children from this wretched man. Maybe some believed Dobbert’s own statement that Kelly had choked on her own vomit, and that he was trying to resuscitate her when she died.

But was that last theory possible? The jurors had convicted Dobbert of first-degree murder, which requires an intent to kill. But the trial judge, for some inexplicable reason, had given the jury an outdated, unconstitutional instruction. If Kelly had died during “an abominable and detestable crime against nature,” the judge told the jury, it was first-degree murder, “even though there is no premeditated design or intent to kill.” This instruction had been stricken from the books;
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nevertheless, the judge gave it no fewer than six times during his charge to the jury.

This glitch might have explained why the jurors could vote for first-degree murder while still believing that Kelly had not been strangled. But then the judge had overruled their recommendation of mercy. Pat Doherty attacked the judge’s decision, based on the Florida Supreme Court’s 1975 ruling that a jury’s recommendation must be followed unless the facts supporting a death sentence were “so clear and convincing that virtually no reasonable person could differ.” Surely, he reasoned, at least one of the ten jurors who had voted in favor of mercy for John Dobbert qualified as a “reasonable person.”

As Doherty learned more about the trial, he liked this issue even more. After all, the reason for allowing judges to override jurors was that Florida’s lawmakers thought calm, experienced judges might be called on to check inflamed emotions. But Dobbert’s trial judge was not a calm man. Hudson Olliff wielded a gavel of doom; by 1984, Olliff had ignored more jury recommendations than any judge in America. He sent men to death with an eccentric flair, salting his orders with harrowing memories of his experiences as a combat soldier in World War II. Clerks in appellate courts from Tallahassee to Washington grew so accustomed to Olliff’s rhetoric that some took to parodies: “I’ve seen war! I’ve seen concentration camps! But never have I seen anything as awful as this!” Pat Doherty found it hard to imagine that appellate courts would think Hudson Olliff was more reasonable than ten Dobbert jurors.

But Doherty had something more on his side as he fought to block Dobbert’s second death warrant. When the first warrant had been signed in 1982, Doherty had received a telephone call from Dobbert’s son, John III, whose testimony had been the key to the death sentence. Now a young man, John III told Doherty that he had lied in court. His first statement to police, that Kelly had choked on her own vomit, was the truth. Doherty was in the middle of a trial when he received this phone call. He contacted Millard Farmer, the tireless warrior, explained the situation, and asked Farmer to go to Wisconsin to get a sworn statement. “I’m packing a bag,” Farmer drawled.

“I did not testify truthfully about the cause of my sister Kelly’s
death at the trial,” John III said in the notarized document. The boy told Farmer that he had feared his father might get out of jail; he “wanted to be sure he’d be locked up where I’d be safe from him.” John III also said he had heightened his testimony in hopes of pleasing his social worker, a woman who’d shown him more kindness than he had ever known. And he said he had been under the influence of Thorazine and hypnosis when he had testified.

The boy’s statement had won Dobbert a stay of execution. In keeping with procedure, the matter had been sent back to Judge Olliff, who dismissed the new evidence with a wave of his hand. Characteristically, Olliff began his ruling with a combat-related anecdote. “This case has been pending for a longer period of time than this nation was involved in World War II and the Korean War combined.” Then he brusquely pronounced that there was “no evidence or proof” that the testimony was untrue. Olliff’s judgment was affirmed by the state supreme court, which opened the door for the second death warrant.

Now Doherty went back to the state supreme court, attacking the override, the flawed jury instructions, and Olliff’s cursory look at John III’s new testimony. For good measure, he attacked the fact that John III’s testimony had been enhanced by hypnosis. The justices in Tallahassee rejected every issue. (Later that year, in another case, the same court ruled that testimony “enhanced” by hypnosis was inadmissible in Florida trials. The slippery law just wouldn’t hold still.)

The federal courts deferred to the courts in Florida, clearing the way for Dobbert’s execution. U.S. Supreme Court Justices William Brennan and Thurgood Marshall, the embattled foes of the death penalty, wrote especially strong dissents on behalf of Dobbert, however. Brennan called Olliff’s treatment of John III’s recantation “absurd on its face.” He charged that Olliff’s mind had been made up even before he saw the son’s affidavit.

Marshall latched onto the unconstitutional jury instruction. Granted, he wrote, the jury instruction did not change the fact that “Dobbert abused and tortured his children,” nor did it alter the truth that Dobbert’s attacks on his dead daughter had been “callous and reckless.” But if the child’s death was not premeditated, it was not a capital offense in Florida. Had that been clear to Dobbert’s jury? No
appellate court had ever tried seriously to find out. “Dobbert is cer-
tainly no innocent man,” Marshall wrote, “but he may well be a guilty
one to whom Florida’s legislators have not chosen to apply the death
penalty.”

On September 7, 1984—after a tearful reconciliation with his
daughter Honore—Earnest John Dobbert Jr. was electrocuted, a few
minutes after 10 A.M.

To Laurence Tribe, the liberal professor of constitutional law at
Harvard Law School, the Dobbert case stood out above all others as a
sign that the U.S. Supreme Court cared less about the strictures of law
than about keeping “the grim line of the condemned moving briskly.”
Even the appellate prosecutor on the case, Carolyn Snurkowski of the
attorney general’s office, was a little surprised that she won. “It was
certainly a case with a lot of issues,” she said.

If the Dobbert case raised so many issues, why did he get a pass to
Old Sparky? Judges are not immune to abominations such as drenched
the Dobbert case. Reporters called Dobbert “the most hated man on
death row”; perhaps some of the judges who considered his appeals had
seen that in print. Actually, Dobbert was well liked in prison. Warden
Richard Dugger, who gave the order for the executioner to trip the
switch, was particularly troubled by killing Dobbert. “I got to know
him at the very end,” Dugger later explained, “and somehow, despite
what he had done, I didn’t think he was an evil man. I think he just
couldn’t cope with all the demands on him. Sitting down to talk to him
was like sitting down to talk to an uncle. You can never see to the heart
of a bad person, but after a number of years around killers, you begin to
think you can tell a few things.”

Pat Doherty once asked his client how he had come to be known
as the worst man in that vile place. “Beats me,” Dobbert answered.
“No one’s ever said an unkind word to me here. These have been the
happiest days of my life. I couldn’t hack it outside.”

Two weeks later, James Dupree Henry, another client of Dick
Burr and Craig Barnard and the West Palm Beach public defender’s
office, was executed for the felony murder of Z. L. Riley, an Orlando

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civil rights leader. Henry had bound and gagged Riley during a robbery; the old man had suffocated on the gag. For his last meal, Henry asked for a dozen raw oysters because he had never tasted them and wondered what the fuss was about. He liked them fine.

Speaking on behalf of the victim's family, William Riley, the son of the murdered man, issued a plea to Governor Graham to spare Henry’s life: “If my father taught me anything about life, it is that God gives life and only He has the right to take it away. We suffered as a family when my father died, and we ask you not to add to our suffering by killing James Dupree Henry.”

Graham’s response had an odd tinge of poor taste—odd because it came from a man who was widely admired for his graciousness and sensitivity. Not only did Graham ignore the family’s plea for mercy; in his postexecution statement released to the press the governor expressed “special sympathy to the family of Mr. Henry’s victim,” and said he hoped the execution would affirm “our respect for such a life.” It was one thing to disregard the family’s wishes; government policy can’t be dictated by individuals. Graham would never order an execution just because a victim’s family begged him for it, and neither would he prevent one. But after the deed was finished, it was a gaffe to suggest that he had somehow honored the family.

A gaffe, even a small one, was surprising coming from Graham, for his handling of the death penalty had been nothing short of masterful. He took office in 1979 with a reputation as a doe-eyed liberal, a pushover for the tougher titans of the state legislature. During his first legislative session, the bosses ran roughshod over him; he had little to boast of beyond a repeal of the auto inspection law. Graham’s handling of the legislature was so weak that the St. Petersburg Times eventually dubbed him “Governor Jello.”

But ever since he had captivated the Florida voters with his “Workdays”—those media-friendly campaign events in which he had sweated and strained and dirtied his hands—Graham’s strength had become his tie to common people. And none of them saw a weakling in the governor’s office. They saw a man willing to make life-and-death decisions, to stand up in the face of intense criticism and do the will of the people. Tallahassee insiders may have believed Graham lacked the
tenacity to carry out an execution. Looking back on the first, Tom Fiedler, the Miami Herald’s Tallahassee correspondent at the time, said: “I thought sure he wouldn’t go through with it. I thought if he had to look Mrs. Spenkelink in the face, he would blink.” Graham had not blinked, and voters had decided he was tough because he had delivered on a tough task. Over time, Graham translated that strength in the eyes of the voters into strength in the eyes of the legislature. In a very real sense, his stance on the death penalty enabled him to govern effectively.

And yet Graham wisely chose not to beat his breast over capital punishment. Though the vast majority of Floridians supported the death penalty, few took joy in it. True, there were some who protested the state’s mandatory seat belt law by plastering their bumpers with strips proclaiming, “I’ll buckle up when Bundy does,” referring to the most infamous killer on death row. A Miami man even ordered vanity license plates that said FRY TED. But most people wanted the death penalty carried out with dignity; it was a grim but necessary business in their eyes, and they would not have approved of a governor who seemed to be gleeful about it. Bob Graham, with his tight-lipped, solemn determination, his refusal to discuss specific cases in public, and his way of ordering each execution with a reverent, even sorrowful “God save us all,” struck the perfect chord.

Opponents of the death penalty recognized Graham’s virtuosity. He was paving a road for liberal Democrats to the popular side of the issue. To Mike Mello, the cerebral young lawyer in Craig Barnard’s shop, Graham was “a model for all the Southern, New Democrat governors” on the death penalty. “He signed enough warrants, but not too many; ordered enough executions, but not too many.” Graham pushed hard for the death penalty and complained about the chaotic appeals process—but even when the breakthrough came in 1984, and Old Sparky cranked up for serious work, Graham never gloated. He stayed on key, his pitch was virtuosic.

Graham pushed, firmly but quietly; the Florida Bar was still nowhere in sight; and Scharlette Holdman kept dialing, pleading for volunteers. She talked Tom McCoun of Saint Petersburg into taking the
case of Timothy Palmes when the inmate’s death warrant was signed. McCoun knew what awaited him, having waged the losing battle for Anthony Antone. When Antone’s first death warrant had been signed, McCoun had cobbled together an appeal in just ten days of nonstop labor and had won a stay. He had used the extra time to examine the case more thoroughly, and turned up some new issues. But after Antone’s second death warrant, when McCoun had tried to raise the new issues he had found, the courts had refused to hear anything not contained in the first filing. Up and down the line, courts were getting tougher. They wanted “finality.” No second chances—even if your first chance was only ten days.

But like any good death penalty lawyer, McCoun also knew that the only predictable thing about these cases was that they were impossible to predict. As he set to work for Timothy Palmes’s life, McCoun figured his strongest option was Craig Barnard’s challenge to the limits on favorable evidence—sooner or later, judges might begin to see the light on that. Same with the racial disparities. As for the specific facts of the Palmes case, McCoun didn’t have much to work with. In 1976, Palmes and his friend Ronald Straight approached a Jacksonville furniture store owner, asking for work as bill collectors. The businessman, James Stone, declined. Palmes and Straight, who had met in prison, looked too tough to Stone—strong-arm tactics weren’t good business. Weeks later, Stone’s body was found in a homemade coffin, weighted with concrete, in the St. John’s River.

At the trial, the store’s bookkeeper testified that she had lured Stone to her home, where Palmes and Straight tied him up and stabbed him to death. Palmes and Straight were both sentenced to death; the bookkeeper went free in exchange for her testimony.

Graham signed Palmes’s death warrant the day after John Dobbert was executed. Tom McCoun filed an appeal based on Barnard’s theories about favorable evidence and racial disparities, and included a claim that the bookkeeper’s testimony was unreliable because she had given it to save her own neck. Once again, the first two issues were denied. As for the third, well, the trial prosecutor offered the best answer. “You’ve got three rats and you’ve only got two bullets,” he told a reporter.
"What are you going to do?" Palmes died in the electric chair on November 8, 1984, the ninth man executed in Florida in a year.

Across the country, twenty-two people had been executed in twelve months, almost half of them in Florida. At last, it seemed, the death penalty logjam was broken. As was customary, Florida took a break for the holidays.

Craig Barnard loved the law, and this love was his deep keel; it kept him on a steady course when he lost so many fights. His love kept him on track, and balanced, as people were melting down around him. The law, at its best, promised rationality in an irrational time, dispassion amid raging emotions, predictability in place of wanton chance.

Even many of his opponents recognized Barnard’s devotion and admired him for it. At the attorney general’s office, there was a lot of contempt for most of the lawyers who opposed the death penalty, but in general the prosecutors made an exception for Barnard because he stuck to the law. “Always on target, always compelling,” said Carolyn Snurkowski, the rising star of Florida’s capital prosecutors. One time the attorney general caught wind of two lawyers from the Miami public defender’s office going outside their jurisdiction to aid a death row inmate and the prosecutors cracked down hard on the violation. But Barnard did the same thing all the time; he had a finger, at least, in nearly every Florida death case. Dick Burr, Barnard’s assistant, had a capital appeal in North Carolina! The prosecutors let Barnard get away with such things because they respected him. As one explained, “We didn’t feel the need to yank his chain.”

Judges mostly appreciated him too, even as they complained about all the repetitive work he generated. Barnard was always cordial and well prepared; his demeanor was not fiery or confrontational. He argued cases lawyer to lawyer, as if the courtroom were a symposium where everyone had gathered to seek good answers to hard questions. And he was gentle with everyone, from chief judges to file clerks. Barnard felt so comfortable in the Florida Supreme Court that he often called it “my court,” and folks in the white marble building on Duval Street liked him right back. Once, he flew from West Palm Beach to
Tallahassee to argue a last-ditch appeal, but his luggage wound up in Jacksonville. The only clothes he had were the jeans he was wearing, and he couldn’t go to court in jeans. The stores were all closed for the night; he was due in court first thing in the morning. So while a friend in Jacksonville scrambled to find the bag, Barnard called Sid White, clerk of the state supreme court, and told him what had happened. The bag arrived in time, but forever afterward when Barnard showed up at the courthouse people would grin and say, “Hey, it’s the guy with no pants!”

He was the rock. Yet as the strain accumulated, even Barnard began to show it. He smoked more, ate more, left the office less. He kept a coffeepot and a small refrigerator by his desk so he could save the time of walking down the hall. His epilepsy was under control—as long as he took his medicine—but the weight and the pipe smoke and the caffeine and the stress were making him look like a poster boy for the American Heart Association. Barnard had hired Susan Cary to represent his office at the state prison, and she began to worry about her boss and friend. Cary was into all sorts of esoteric philosophies, and one day, with Margaret Vandiver, she visited Barnard’s office and secretly popped a New Age tape into his stereo. It was one of those subliminal-message productions—just soothing music, but supposedly there were urgent pleadings underneath that would curb the appetite. The tape played about three minutes before Barnard said, “Want something to eat?” and lumbered toward his refrigerator. “I’m starved!” Vandiver chimed in, reaching for a candy bar.

What bothered Barnard most, perhaps even more than the executions themselves, were the growing haste and impatience with which the courts were treating his appeals. This wasn’t the law he loved. For more than a decade, courts had been cartwheeling and somersaulting and reversing themselves, reinterpreting the death penalty from one case to the next. The courts had said mitigation was limited in Florida, then turned around and said it was unlimited. They had imposed the “reasonable person” standard for overriding jury recommendations, then back-flipped to affirm death sentences where juries had unanimously recommended life. They had upheld Florida’s procedure for determining an inmate’s sanity, then about-faced and struck the proce-
dure down. They had accepted evidence of racial disparities to block death sentences in Georgia and rejected the same argument across the border in Florida. The courts weren’t being arbitrary on purpose. Craig Barnard respected the courts, he liked the judges, and he knew they were struggling with a uniquely slippery law. What frustrated him was the way they appeared to be throwing up their hands, blaming the chaos on defense attorneys, and angrily sending his clients to the chair.

Barnard had a grand plan in his head. Step by step, case by case, he wanted to lead the courts through the job of nailing down the law. Set a standard for the override and then stick to it. Admit the mistake about mitigation and then correct it. Define competent counsel and then guarantee it. Measure racial disparities and then face up to them. Compare death sentences to life sentences and make them balance. People could say that he was trying to thwart justice, to delay the inevitable forever. In his self-assured heart Barnard believed he was defending justice. The “inevitable” was not inevitable; he and his colleagues won half their appeals. Barnard’s questions were genuine. Answering those questions was an arduous prospect, but he believed the law—the Law, his love—required that they be answered, and it was going to take patience and flexibility and candor from the courts.

And he believed ultimately the courts would conclude that the precision promised by the modern death penalty was impossible to attain. When that fact became clear, he trusted that the courts would abolish the practice forever.

Ray Marky had his own grand design, which was in many ways the opposite of Barnard’s: Marky was trying to advance the death penalty while Barnard was trying to stop it. Marky wanted to narrow the appellate field; Barnard wanted to widen it. Marky wanted judges to say no to death row inmates on a predictable basis; Barnard wanted them to say yes. But they shared this yearning for consistency, and both men knew consistency was in short supply. Marky was becoming just as frustrated as Barnard was with the corrosive effect of the death penalty on the courts. They differed a bit on the cause of the problem, but they agreed on the result: The death penalty was making a mockery of the law, which was Marky’s love, too.

“Look, I may be naïve,” Marky once said, “but the Rule of Law
means something to me. It's not just a Fourth of July speech that we all
wink at and forget. From that perspective, the death penalty is an
absolute abomination.” This from one of America's leading death pen-
alty prosecutors. “It's frustrating, it's incoherent, it's impossible. Be-
because we don't have any rational, equal application of the law.” Marky
paused a moment, seething. “You can ask: Is that the result of the
complexity of the system? Is it the result of somebody's social agenda?
Whatever. It's irrelevant. The result is what matters, and the result is
that we don't have the fair, even, principled application of a penalty for
a class of cases. I look at guys who avoid the death penalty, and I look
back at Spenkelink, and I say, 'This system is crazy.' ”

It took a lot of knowledge of the law, and a lot of experience in
the courts, to understand the feelings of Craig Barnard and Ray Marky,
the sense they shared that capital punishment was disfiguring the legal
process. For most people, feelings about the death penalty came from
the gut. Murder rates soared. Local newscasts were ghoulish parades of
sheeted corpses. Citizens could not be blamed for imagining a river of
blood coursing through the land, the skies raining bullets, ravenous
predators roaming the streets. Fear is visceral, and often overmasters
reason. Horror trumps analysis.

America had become, in millions of people's minds, a place where
their children couldn't walk to school, where they couldn't carry their
groceries to their cars, where they couldn't sleep soundly without bars
on the windows. Working the night shift in a convenience store was
like going over the top at Gallipoli. It hit people hard, up under the
ribs; it made them want to throw up, made them want to strike back,
made them want to see the good guys win for a change.

And so inevitably the day came when more people journeyed to
Starke to celebrate an execution than to protest. January 30, 1985—the
brisk pace of Florida executions was continuing. The holidays were
over, J. D. Raulerson was headed for the chair. Raulerson was a stick-
up man, a rapist, and the killer of a young policeman. Some eighty
lawmen from Jacksonville called in sick or took vacation to be there

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when he died. They awaited the moment in the pasture across State Road 16 from the prison.

Some wore T-shirts lettered “Crank Up Old Sparky” or “Raulerson, Make My Day.” Some hooted and jeered at the handful of protestors keeping a candlelight vigil; one or two spit loudly in the direction of the prayer circle. “They ought to put a pot roast in his lap!” someone shouted. “The bacon’s sizzlin’ now,” said another. They roared and guffawed. Someone was singing in a merry voice, “Turn out the lights, the party’s over.” A state senator from Jacksonville, worried about the way this might look, worked reporters in the pasture: “These boys have been waiting a long time for this. If they’re a little jubilant, are you going to put that in the paper?”

One sheriff’s deputy stood a little to the side of his rowdy peers and gazed in the thin light of dawn at a flock of gulls wheeling and diving over the prison grounds. His name was Jim English; it was his partner, Mike Stewart, who was killed by J. D. Raulerson in a gunfight. They caught Raulerson and a cousin robbing a seafood restaurant and raping a waitress. Under his shirt, English still bore the scars of a bullet he took in the battle; in his gut he still carried a mournful longing for his lost friend.

He watched the birds light in the empty space between pasture and prison. He watched them rise, like a cloud, back into the sky. “I was thinking of the time that Mike and I went out on a boat in the river and chased seagulls around for a couple of hours,” he said sadly. “Seeing those birds over the prison reminded me of that.”

Inside the execution chamber, a burly man with a deeply etched face sat expectantly on the edge of a small spectator’s seat, his weight poised on the balls of his feet, his eyes fastened on the door behind the chair. When the door opened, Jack Stewart saw his son’s killer: rangy, slack, bald head slathered with white goo. Stewart continued to watch grimly as Raulerson was strapped in, hooded, and electrocuted.

Nearly ten years before, Jack Stewart had stood over the grave of his dead son and sworn that he would see the killer killed. Through those long years he had often imagined what it would be like—imagined a struggle to strap Raulerson into the chair, imagined a writhing body at the end of the wire, imagined screaming and gore. He kept his

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graveside promise but it was not as he had imagined. "There was no force," he mused. "There was no fight."

When it was over, Jack Stewart emerged from the death chamber into the now-bright morning. "How do you feel, Mr. Stewart?" a reporter asked. "A little weak," Stewart answered, blinking away tears. The great yearning in his gut was not gone, not entirely. He yearned still and would yearn evermore for a son he had loved and lost. But the part of him that ached for justice was salved at last. "This puts some of it to rest," he said, and he spoke for aching millions.

WITT DIES IN FIRST "ROUTINE" EXECUTION, said the Florida Times-Union headline on March 7, 1985. The previous morning, Johnny Paul Witt—who had suffocated an eleven-year-old boy with a gag and mutilated the body—had gone to the electric chair without drama or significant public demonstrations. "Witt's eleven predecessors in Florida's oak electric chair since the death penalty ban was lifted had all received one-day court reprieves before their executions," noted the Times-Union's Andrea Rowand. "But for Witt, there were no temporary stays, no last meal and no last words."

The dead were beginning to run together in the public mind, to become mere numbers. The press stopped thronging to the executions, their accounts shortened and slid to the inside pages. It might have seemed that, after a dozen years, the death penalty machinery was finally cranked up and cruising in the State of Florida. But that was not the case. Florida was now executing criminals at a rate unseen in a quarter century, but for every cell emptied by Old Sparky, another five death row cells were being filled. Despite the executions, death row was sprawling like a Gulf Coast suburb, gobbling up tier after tier of the state prison. Death row had turned into death town.

And Florida could not keep up even this insufficient pace. Just days after the "first routine execution," the death penalty machinery once again ground to a halt.

Scharlette Holdman had finally run out of lawyers. Two inmates were facing imminent execution; neither one had an attorney. And no matter how much she begged, charmed, and wheedled, Holdman
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could not get anyone to take their cases. James Rinaman’s project for the Florida Bar was up and running by this time, but when reporters called him to ask about Holdman’s crisis, he insisted that last-ditch efforts were not his line of work. “To ask a civil firm to jump in when there’s a week or two left is just not appropriate for the lawyer or for the prisoner himself,” Rinaman said. No help was forthcoming from that quarter.

For the first time, Florida faced the question: Would the State execute a man who had no lawyer? “It was bound to happen sooner or later,” Holdman told reporters. “I long ago exhausted every person I knew.” It seemed unlikely that James Agan, the first of the two inmates, would be allowed to slip through to the chair. Substantial mystery still clung to Agan’s case, and surely some court somewhere would grant a stay until it was cleared up. While serving a life sentence at Florida State Prison (minimum twenty-five years), Agan had confessed to stabbing another inmate to death. But after he was sentenced to die, he recounted a curious tale: He said prison investigators, desperate to solve the killing, had offered him a deal. Agan was past fifty years old at the time, with more than twenty years to go before his first crack at parole. In all likelihood he would not live to see the end of his sentence. Agan said the investigators promised him another life sentence, essentially meaningless, and a transfer to a nicer facility if he would take the rap and close their case. Of course, the investigators denied any such deal was ever struck. But they did express doubts that Agan was actually guilty. “There are questions that need to be answered,” prison sergeant Leonard Ball said. It was hard to imagine that Agan would be executed without a hearing.

Robert Waterhouse was another matter. From the record, he looked like an excellent candidate for execution. Paroled from a life sentence for murder in New York, Waterhouse moved to St. Petersburg, where he raped a young woman, bludgeoned her with a tire iron, and dumped her into Tampa Bay to drown. He was an archetype: the paroled killer who kills again. If anyone could be executed without benefit of an appellate lawyer, it might very well be Waterhouse. The shortage of volunteer lawyers had finally come to a head, and that head belonged to Robert Waterhouse.

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Craig Barnard couldn't take the case himself; it was too flagrantly beyond his jurisdiction. As always, though, he was ready to consult. Panicky, Scharlette Holdman contacted Stephen Bright, a brilliant death penalty lawyer in Atlanta who had recently fought and lost the last appeals for J. D. Raulerson. With days left before Waterhouse was slated to die, Holdman begged him to take the case.

Bright argued that it would be ridiculous for him to plunge in so late in the game. He knew he could throw together an appeal, and he would almost certainly win a stay—the Waterhouse case had never been heard in federal court. But the trial transcript alone was 2,200 pages, and if he missed something important in his rush to win the stay, the courts might refuse to consider a new appeal later. It had happened to Tom McCoun in the Antone case, and to Barnard in the Adams case.

Bright had a proposal. What if he simply asked for a stay without filing his appeal? Just go to court and say, Look, Your Honor, I just got this case, I think there are issues, but there's not enough time to investigate. And I refuse to file an appeal just to give the appearance of fair representation. The strategy was essentially: We dare you to kill this man without a lawyer. On the other hand, this business of scrambling around wildly for last-minute volunteers had to stop. Now was the time, Bright argued.

They hardly had any choice. Scharlette Holdman was out of lawyers. Craig Barnard's team was handling fourteen cases and offering advice on dozens more. Millard Farmer was swamped, the Inc. Fund was swamped, the big firms in New York and Washington had reached the limits of their pro bono generosity. The Florida Bar project was not interested in last-minute undertakings. Florida's death row was pushing 230 inmates. If the lawyer shortage was not faced now, it would have to be faced soon.

On Friday, March 15—four days before Waterhouse was to die—Steve Bright stood before Judge Robert Beach in St. Petersburg and asked for a stay of execution. He told Beach he had taken the case because no one else would. He hadn't had time to read the trial transcript, let alone time enough to hunt down witnesses, study his client's
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past, schedule psychiatric examinations, dig up police records. He refused to file a hasty appeal.

Judge Beach granted the stay. "I think if the State is going to execute Mr. Waterhouse, it should be done with the same due process as all of those who preceded him." The grammar was awkward, but the significance was plain. When the Florida Supreme Court refused to overturn Beach's order—and upheld a similar order in James Agan's case—Scharlette Holdman's burden was abruptly shifted to the State of Florida.

The government's dilemma was simple: There would be no executions without defense lawyers, and there were no more defense lawyers. Florida voters demanded executions—so Florida politicians were going to have to solve the lawyer shortage. It was one of those weird ironies that democracy spits up now and again. To please pro-death penalty voters, Florida officials were forced to find anti-death penalty lawyers. The death penalty was turning out to be a whole lot more complicated than anyone had anticipated.

Attorney General Jim Smith, who was spending perhaps a million dollars a year or more trying to put men into the chair, now proposed a bill that would spend close to a million dollars a year for lawyers who would be trying to keep men out of the chair. When the Florida Supreme Court blocked the Waterhouse case, Smith went into overdrive, preparing a bill to provide state-paid lawyers to handle the death row appeals.

While Smith worked, another man was electrocuted—the last, it turned out, in 1985, and the last in the string of almost monthly executions that had started with Bob Sullivan. Marvin Francois had a lawyer, a gifted workaholic from North Carolina named Mark Olive. Olive had been recruited to run the Florida Bar's volunteer lawyers project; his appearance on the scene was a huge shot in the arm for Scharlette Holdman and her beleaguered troops. With help from the Barnard team, Olive plunged into the Marvin Francois's violent past.

The man's crime was enormous. In 1977, with three accomplices, Francois, a heroin addict, robbed a family of drug dealers in their
suburban Miami home. When his mask slipped, exposing his face, Francois decided the witnesses must die. He lined them up—all eight of them—facedown on the floor and shot each one in the head. Miraculously, two survived to testify.

Olive pulled together a harrowing tale, "maybe the most tortured background I've ever seen," according to Barnard's colleague Dick Burr. But this potential mitigating evidence, unknown at the trial, came too late. Francois had already exhausted a full round of appeals, and on his second try the courts agreed that six murder victims outweighed any mitigation. On May 29, 1985, Marvin Francois was electrocuted. He died cursing white people: "If there is such a thing as the Antichrist, it is not one man, but the whole white race," he said as he sat strapped in the electric chair.

Francois had asked that his ashes be scattered in Africa. Susan Cary, the longtime activist who was Craig Barnard's intermediary at the prison, was determined that this last wish would be honored. But it was one thing to find bus fare for a condemned man's family, and quite another to raise the money for a trip to Africa. Cary collected the cremated remains of Marvin Francois and put them in a shoebox in her closet, where they sat for two years while she tried to figure out how to get them across the ocean.

In 1987, Michael Radelet, Cary's friend and fellow activist, announced that he was going to Senegal to visit a relative. Take Marvin, Cary suggested. Radelet was game, but there were rules—human remains can't just be tooted from country to country. Uncertain as to the relevant legalities, Radelet contacted John Conyers, a prominent black congressman from Detroit; Conyers strongly opposed the death penalty, he was well known in Africa, and he had offered more than once to help Florida's anti-death penalty crusaders any way he could. The congressman pulled the right strings, and shortly before his trip Radelet received an official letter announcing that the Senegalese government would be happy to welcome "Brother Marvin" home.

Like Scharlette Holdman and Pat Doherty, Radelet had a darkly comic view of the world. Traipsing around Senegal, shoebox in hand, he would place the box on the opposite chair at restaurants and say things like "Marvin, would you like some water?" On sightseeing
jaunts, he would take snapshots of the shoebox in front of important buildings and picturesque vistas. Finally, Radelet carried the box to a bluff outside Dakar, a lovely spot with the city in the distance and the Atlantic spread out below. He took one more snapshot—“Marvin at the seashore”—then opened the box and sprinkled the ashes on the sun-glittered waves. As he gazed into the oceanic expanse, it occurred to him that this very water might have rocked and sloshed all the way from Florida; now, the waves lapped the shores of Africa, bearing the remains of Marvin Francois to his dreamland.

Actually, as Radelet knew, not all of Marvin Francois made it to Africa. Radelet was an associate professor of sociology at the University of Florida, and one evening in 1985 he found himself talking about executions with a colleague from the psychiatry faculty. The man mentioned that his wife, a neurobiologist, had a collection of brain samples taken from the men who had died in Old Sparky.

This piqued Radelet’s interest, to say the least, and he did a little digging. Back in 1979, some inmates had charged that John Spenkelink was beaten before he went to the chair, so the local coroner had begun performing routine autopsies after each execution. (The exception was Anthony Antone, who asked that his body be left intact for the after-life.) Radelet learned that the coroner, without telling the families of the dead men, was making a practice of removing a piece of each brain—the amygdala, believed to be the seat of aggression—for a research project at the university. The idea was that head injuries in childhood might have damaged the amygdalas of these lethally aggressive men.

It is, of course, debatable just how much you can learn from a brain that has been cooked by two thousand volts of alternating current. In any case, the project never got very far because shortly after Radelet’s chat with his colleague, he got carried away at his weekly seminar on the death penalty. A student posed a question about executions and Radelet countered: “Well, that’s nothing. Right here at this very institution they are keeping the brains of these men in buckets.” A reporter, Bruce Krasnow of the Florida Times-Union, was auditing the seminar. And as Radelet later observed, “There are some things a re-
porter just can’t resist. Like the phrase ‘brains in a bucket.’ That really got Bruce’s attention.”

Krasnow’s story led to front-page articles in Miami and St. Petersburg—even in The Washington Post. No one was ever able to say whether the practice was illegal or unethical, but it sure was creepy. That was the end of the project.

Attorney General Jim Smith made a personal appearance before the Florida Senate’s Judiciary Committee in the late spring of 1985 to push his bill to solve the lawyer shortage. “Mr. Chairman and members of the committee,” he began, “I’d like to take just a minute or two to talk with you about a catch-22 that, uh, relates to capital punishment in Florida. . . . We had our first execution in modern times in Florida in 1979. Since that time, death row inmates have been represented by essentially volunteer lawyers. We’ve got a lot of lawyers from out of state come into Florida and represent these people. . . . We’re at a point in time now, though, where that category of volunteers is really running out.”

Smith explained the recent state supreme court actions, and issued a warning: “I can see capital punishment in Florida coming to a grinding halt.” That grabbed the senators like a python, and they listened intently to a proposal that would normally have struck them as outrageous. Smith outlined a request for more than $800,000 to hire lawyers, secretaries, and investigators to handle “collateral” appeals for condemned inmates—that is, the steps after the automatic review required by law. “I don’t think we want to see this process stagnate,” he said. “I think Florida, as we have been on this issue, should stay ahead of the curve and let’s appropriate this money and get on with it.”

One senator immediately recognized the problem with all this. “Now, how do you feel that the taxpayers are going to feel to have to pick up a second defense of these individuals?” he asked.

“Well,” Smith answered, “I think that means executions will continue in Florida. . . . I don’t think you have any problem.”

“Can you guarantee that that’s going to speed up the process?” the lawmaker persisted.
Having had five years of experience with the new death penalty, Smith answered carefully: "I can't guarantee anything." However, he could promise that without lawyers the process would slow down. This deflated the legislators a bit; they wanted to be able to tell voters that the money would be a down payment on a busier Old Sparky.

Smith moved to another tack, appealing to Florida pride. "You know, we're a big state," he said. "The people in this state want capital punishment and I think we ought to provide the resources to make it happen. As a lawyer and as attorney general it has been embarrassing that we've had these volunteers coming down here always making snide remarks about the legal processes of our state. Like we're trying to rush these people to judgment. That kind of thing, which is clearly not true."

The mention of these snide outsiders prompted a question from another committee member. "We're only going to permit members of the Florida Bar Association to defend someone?"

"We can't really, you know, do that."

Aghast, another member asked, "Some of this money would go to lawyers from, just as an example, New York?"

"No sir!" a horrified Smith responded. (Folks in North Florida hate New York lawyers.) "We're talking about hiring full-time attorneys to be there on a full-time basis to do this work," he said. Mollied, the senate committee approved the bill. Despite the blatant unpopularity of the concept—taxing death penalty supporters to pay lawyers for condemned inmates—the proposal glided through the legislature and was signed into law in June 1985. A new state agency was created, its name stupefyingly bureaucratic: the Office of Capital Collateral Representative (CCR).

Jim Smith was the key: Lawmakers knew he was gung ho on the death penalty. If Smith said this distasteful step had to be taken, then the legislature would take the step. And though he wouldn't "guarantee" more executions, he expected them. Eight men had been executed in 1984; once CCR was up and running, the annual number might be twice that, Smith predicted. "We haven't hit our stride yet," he said.
The people who had fought so long and hard against the death penalty had mixed feelings about Florida's new state agency to defend death row inmates. Millard Farmer, for example, was strongly opposed. Farmer saw the state turning their cause into a bureaucracy; he saw the grinding pressures of popular political opinion controlling the purse strings, the caseload, even the hiring and firing at CCR. He urged Scharlette Holdman to resist, to keep her office open, urged her to wrest as many cases as possible from the hands of government lawyers.

But Holdman knew she had come to the end of her rope. "We have no choice but to believe people will be better represented with the state funding for this office," she said. The legislature had appropriated some $840,000, after all, for the first nine months of CCR's operations. Holdman, just a year before, had had to screw up her courage to speak of a mere quarter million. She loathed bureaucrats as much as Farmer did, but she believed that these unimagined resources would do more good than harm.

Her hopes would be greatly strengthened if Craig Barnard would head CCR. Barnard agonized over the prospect. In long conversations with colleagues, he acknowledged what they all knew to be true: He was the perfect person for the job. Nothing could be more natural than for Craig Barnard to become the official general of the death penalty defense. He knew the law better than anyone, and he knew how to manage a government agency. Barnard was confident he could have the job if he wanted it. The head of CCR would be appointed by the governor, but the governor would choose from a list submitted by the state's elected public defenders. Barnard was a legend among the public defenders, a shining star of their system. He could count on the strongest possible endorsement from them.

He disagreed, however, with the charter of the new agency. Barnard foresaw that once the state began hiring full-time lawyers to file death penalty appeals, private attorneys would stop volunteering to take cases. This, he believed, would be a disaster. In case after case, he had seen lawyers who were lukewarm on the death penalty—even lawyers who supported it—changed utterly by the experience of litigating a capital appeal. "We talked about this over and over," Dick Burr recalled. "Time after time, lawyers had seen the vagaries of the system,
the lousy performance by trial attorneys, instances of incomplete investigations by prosecutors and police. And it was turning lawyers from some very powerful firms against the death penalty.” Barnard strongly supported the Florida Bar’s project to recruit and assist volunteers from the big law firms. Little by little, he imagined, this project might turn the power of the legal establishment to his side. CCR, he felt, could undercut that effort. “We couldn’t afford to give that up,” Burr said.

At last, Barnard said he would seek the job if Burr would come with him. Thus linked, each man’s misgivings multiplied the other’s, and they elected to stay where they were. The job of running CCR went to a man outside the inner circle, Larry Spalding, a Sarasota attorney active in the American Civil Liberties Union. Spalding had had experience with one death penalty appeal, on behalf of Howard Douglas, and Douglas was still alive. But it was hardly the most daunting case to appeal. Douglas’s jury had voted unanimously to spare his life. He had had what was known in the business as “a strong issue.” The inner circle was not terribly impressed.

Still, CCR was clearly the new focus, the new center of the action. Across the country, states had always watched Florida for signs of the future of capital punishment; Florida was the cutting edge, and now they watched this new agency. “If we do it right, we’re going to be a model for other places in the country,” Spalding told reporters. “They’re already looking at us.” The buzz enabled Spalding to assemble a distinguished team: Mark Olive left the Florida Bar project to be CCR’s chief litigator; Steve Malone, a veteran of several difficult appeals, hired on; Mike Mello came up from Craig Barnard’s shop. And, *mirabile dictu*, Scharlette Holdman—the thorn in Florida’s side, the stone in its shoe, “The Mistress of Delay”—became a salaried employee of the State of Florida. She would be CCR’s chief investigator. No one could coax painful information from witnesses like Holdman could. She was, in a sense, Spalding’s most important hire, the ultimate proof that he would not be a bureaucratic sellout.

But this hiring took time, and Spalding had precious little. The day CCR opened its doors, in October 1985, he had only two of the ten lawyers allowed for in his budget. Two attorneys for the thirty-seven death row inmates known to lack a lawyer of any kind. And the
thirty-seven were only the tip of the iceberg: Scores more inmates would lose their lawyers when the state supreme court affirmed their sentences. In addition, a new state-mandated deadline for filing appeals was about to expire for thirty inmates, many of whom were unrepresented. They needed immediate help. And the agency had scarcely started work when crates of documents began arriving from volunteer lawyers washing their hands of their clients.

Mike Mello had worked furiously, endlessly, alongside Craig Barnard through the string of executions from Bob Sullivan to Marvin Francois. But he had never seen anything like the workload facing CCR. And in the first eight days the agency was open, Bob Graham signed four death warrants. Six in the first month. Spalding dipped into his budget to buy roll-away beds so they could sleep at the office.

Craig Barnard, meanwhile, did what he always had: came to work early, stayed late, worked weekends to the sound of the radio. CCR did not significantly lighten his load. He still had more than a dozen death penalty cases of his own, and beyond that he remained the wise man of Florida’s capital defense bar, and the calming older-brother figure.

The attorney shortage had forced Florida’s execution engine into a sputtering stall. For the first time in a year and a half, Barnard had enough time between executions to breathe deeply, take stock. He had a lot of losses to reflect on; Florida led the pack in every category: most people sentenced to death, most people on death row, most executions. As the state’s top anti-death penalty lawyer, Barnard had to feel the weight. And yet, you could flip the statistics: Florida’s defense attorneys, with Barnard in the lead, had won far more than they had lost. Nearly 90 percent of Bob Graham’s death warrants had ended in stays. They had managed it with few friends in high places: not in the legislature or in the executive branch; not in the trial courts, where judges imposed the death penalty with unanticipated frequency, or on the state supreme court; not in the regional federal courts; and certainly not in the U.S. Supreme Court, where death penalty conservatives held firm control.

Death penalty supporters often accused defense lawyers of em-
ploying devious tactics. The truth was something different. Barnard and his colleagues were simply holding the law to its promises. The law promised reliability, predictability, balance. The law promised heightened scrutiny of capital cases. The law promised to weigh every aspect of a defendant's crime and character. The law was staggering under the weight of its promises.

Thus, despite the losses, Barnard still centered his thoughts on victory. Above all, he focused on his favorite issues—racial disparities and limits on favorable evidence—even though appellate judges groused and chafed each time they saw these perennial losers. He was dogged, but he was also creative. Worried that the courts had flat stopped listening to his claims about mitigating factors, Barnard subtly shifted his line of attack. He went back to the Florida Supreme Court's 1976 ruling in Vernon Cooper's case. There, the court applied only the mitigating circumstances listed in the law, and declared that "we are not free to expand the list." Later, the court declared that it had not meant to set limits.

Barnard was getting nowhere by attacking the flip-flop directly, so he decided to try a subtly different approach, saying that no matter what the law intended, many trial judges and lawyers believed favorable evidence was limited. Maybe they were mistaken, but it was a reasonable mistake, especially given the Cooper case. The effect, he argued, was the same as if the law itself had placed intentional limits on favorable evidence. This was a contorted argument—straining beyond the words of the law to focus on the manner in which the law was interpreted. But Barnard hoped this new twist on the old argument would finally catch some appellate court's attention. He desperately needed judges to take a second look.

Barnard had a case, moving through the appeals process, that seemed a perfect test of this strategy. James Hitchcock was on death row for raping and strangling his brother's stepdaughter. Hitchcock had given various accounts of the crime. When he turned himself in, he told police that he had consensual sex with the thirteen-year-old girl, but afterward she threatened to tell her mother and started to yell. He carried her outside, and—trying to silence her—beat and eventually strangled the child. At trial, he again maintained the intercourse was
consensual, but now claimed that his brother had discovered him in the
girl's bed, and that his brother had killed the child in a rage. The jury
believed neither story entirely: They concluded that Hitchcock raped
the girl, and when she cried out, he killed her.

In the hearing to determine Hitchcock's sentence—life or death
—the defense attorney had tried to present a wide variety of reasons to
spare his client. There was evidence that Hitchcock was brain-damaged
from sniffing gasoline fumes as a boy, and evidence that his father's
early death, which forced him and his six siblings to eke out a living
picking cotton, had left him scarred. Hitchcock had no record of crim-
inal activity or violent behavior, had turned himself in, and was a young
man, just twenty years old. Despite a terrible mistake, he might be
rehabilitated during a life sentence that would last at least twenty-five
years. The defense attorney urged the jury to "look at the overall
picture" of James Hitchcock, "the whole ball of wax."

That was precisely what the U.S. Supreme Court, in 1978, had
said courts must do in death penalty cases: Look at the overall picture
of the defendant and his crime, consider the whole ball of wax. But
Hitchcock's trial was in 1976, when the Cooper ruling governed Florida
trials. Hitchcock's judge and prosecutor apparently understood Cooper
to mean that only the favorable factors listed in the law could be
weighed. The prosecutor told the jury to "consider the mitigating
circumstances . . . by number," and he read through the statutory
list. He told the jurors that of all the evidence raised by the defense
attorney, only Hitchcock's youth was applicable. The judge gave the
jurors essentially the same instruction: Stick to the list. The jury recom-
mended death, and afterward the judge noted in his sentencing state-
ment that "this Court is mandated to apply the facts to . . .
enumerated 'aggravating' and 'mitigating' factors." In other words,
only the factors on the list.

No one could say if the additional information would have
changed Hitchcock's sentence. His crime spoke volumes against him.
But it seemed clear that potentially favorable information had been
barred from consideration because the judge and prosecutor believed it
was supposed to be barred. Barnard presented this argument to the
federal district court. As always, he added the claim that racial dispari-
ties made the death penalty unconstitutional. As usual, the district judge denied both claims. Barnard doggedly raised the issues to the Eleventh Circuit Court of Appeals. As usual, the circuit court denied both claims. Barnard appealed to the U.S. Supreme Court to take on these questions—questions the high court had refused so many times before. By the spring of 1986, he was waiting for his answer.

The men of death row often debate the proper way to go to the chair. Is it better to walk in with dignity, to sit calmly, to mask the panic and the horror? Or should they fight? Struggle, kick, twist, spit, scream curses, club with manacled fists. What is the more manly thing to do? The prisoner who sits erect and stoic—is he a man or a sheep? “A fuckin’ sheep to the slaughter,” one inmate says. “They’ll have to take me, I ain’t goin’ easy.” While another inmate says the opposite: “You can’t let them get to you, you can’t show fear.”

Such conversations are a staple of the death house, and every man takes every position at one time or another—the vision of their final moments is one they rehearse over and over in their minds. Doomed men are not different because they are going to die; everyone will die, the good and the bad, saints and sinners, predators and prey. The condemned are different because they have their deaths described to them, they know the day, the hour, the place, the affliction, all in advance. If they read the newspapers, they know that they will die with a wet sponge on their heads, that every muscle in their bodies will spasm, their knuckles will pop. They know the last sound they will ever hear—the thunk of a circuit being opened. They experience it again and again and again, in daydreams and nightmares, and they alter every variable, ponder every option.

They often debate the right way to go to the chair, but through thirteen executions, the decision was always the same. All took the dignified approach, all tried to mask their fear and shame and anger. On April 15, 1986—after nearly eleven months without an execution—Daniel Thomas had to make that choice for himself.

Perhaps it is dull by now to say that Daniel Thomas was the product of a ghastly childhood, but he was. He was three when his
father died; he watched as his mother was raped, he watched as she fried her brain on cheap moonshine, and he watched her taken away to the asylum, where she died insane. He and his brothers survived from a very early age by eating out of garbage cans and sleeping under houses. The older kids kept the younger ones in line by burning them with hot iron rods. At the age of nine, when Thomas came to the attention of the State of Mississippi, the boy had never been to school or even worn a pair of shoes.

"The childhood shows the man,/As morning shows the day," John Milton wrote. So many inmates on death row share backgrounds of deprivation and violence that this common theme becomes impossible to ignore. Such backgrounds don't excuse crimes. The crimes of Daniel Thomas were far beyond any excuse. He was part of a gang of unspeakably violent thugs who terrorized Central Florida for ten months in the mid-1970s. Known as the "Ski Mask Gang" on account of their disguises, Thomas and the others robbed, raped, tortured, and killed. He was sentenced to death for the crimes of shooting a man dead and raping the man's wife beside the bleeding body.

Thankfully, many strong people have overcome deprived childhoods to live admirable lives. But the inmates of death row are not strong people. They are weak and badly flawed people; yet, one has to wonder if many of them might have turned out better had they been faced with less to overcome. The children of bad homes commit a very great proportion of America's most hideous crimes. Death row teaches that. And many people, after a long look at the place, conclude that the best way to cut the number of grisly crimes in the future would be to cut the number of abused and deprived children today. That's the pool death row draws from, overwhelmingly. This isn't bleeding-heart stuff, just simple fact. Better parents would mean less violent crime.

When his time came, Dan Thomas entered the execution chamber passively, hands shackled in front, a prison official on each side. He sat in the chair, just as the others had done before him; experienced hands tightened the chest strap and moved to the straps on his forearms. Then he exploded. Straining against the chest strap, he lashed out furiously with his legs. Assistant Superintendent Hamilton Mathis tried to grab one leg and strap it; Thomas drove his shin into the man's groin.
and Mathis fell back. Al Martin, the electrician, grabbed for the other leg and caught a foot in the chest. “Get off me!” Thomas screamed. “Get off me!”

The guards regrouped. Four men fell on the prisoner, but still Thomas kicked and thrashed. For a man who had lived almost a decade in a tiny cage, his strength was tremendous. “Get off me!” he screamed again. Richard Dugger leaned over him, trying to pin a leg; Thomas chewed at the air, trying to bite Dugger’s ear off. Lieutenant Don Gladish, monitoring the line to the governor’s office, dropped the phone and seized Thomas in a headlock. Thomas squirmed and twisted, trying to sink his teeth into Gladish.

Finally Dugger got a firm grip on Thomas’s right leg. He twisted it back behind the leg of the chair. Exhausted, choking in the headlock, reduced to kicking with one leg, Thomas gave up the fight. But as the panting guards pulled the remaining straps double tight, Thomas continued to writhe and curse.

The fight lasted seven minutes. When it was over, Dugger was trembling. Thomas’s power had amazed him; more than that, the whole time they had struggled, Dugger had been worried about what the two dozen witnesses would say later. It was one thing to subdue a prisoner in the bowels of the prison. It was quite another to subdue a man in front of an audience. For a moment, Dugger felt a surging temptation to bash the prisoner’s teeth in, but he suppressed the urge. Likewise, when Thomas gasped that he would like to make a statement, Dugger resisted the impulse to say, “Fuck you.” Instead, the warden leaned close to Thomas, out of range of the microphone, and barked: “No more bullshit outta you!” He gave Thomas a cold look, then repeated: “You can make your statement, but there will be no more bullshit.”

Thomas, struggling to catch his breath, gasped, “Governor Bob Graham . . . has opened up a new wave . . . of politicking.” A reference, apparently, to Graham’s campaign for the U.S. Senate. “He has made it perfectly clear to all that the best way to win a political race is to boast that he will carry out the execution of every prisoner on Florida’s death row. . . . We are human tools for the people in this state who are running for political positions.”
The last strap was fastened across the prisoner’s jaw. The hood fell. The end came to Thomas as it had to all the rest.

Over the next few days, Richard Dugger granted an unusual set of interviews. If death-chamber struggles were to “become fashionable” among the inmates, the warden said, he would be forced to take them to the chair shackled and bound. “We could add other restraints and bring him in trussed up like a mummy,” he told the Gainesville Sun. For the boss of a maximum-security prison, Dugger was a mild-mannered man. This was the toughest he’d ever talked in print. “They read the papers like everyone else,” he later said of the death row inmates. “I was putting them on notice. If we had to, we would put them in leg-irons and make them crawl to the chair.”

On death row, they got the message.

A week later, April 22, David Funchess went quietly. A group of Vietnam veterans had held a vigil at the war memorial in Tallahassee, asking Governor Graham for mercy. The killer was a decorated Marine in the Vietnam War; the traumas he faced during combat along the Laotian border left him deeply changed. Before the war, Funchess did well in school and abided by the law. After Vietnam—where he saw a comrade decapitated by a mortar shell and was himself badly wounded by a land mine—Funchess was fearful, reclusive, a heroin addict. He locked himself in a garage for days on end, cradling an imaginary rifle; he dug foxholes outside his mother’s house and cowered in them through the night.

To several psychiatrists, Funchess was a classic example of post-traumatic stress disorder, a mental illness seen frequently in Vietnam vets. Its symptoms were known to include violent flashbacks. The doctors speculated that Funchess was flashing back to Vietnam when, in 1974, he stabbed three people while robbing a bar, killing two of them. But the disorder was not officially recognized as an illness until 1980, so the conclusions of the psychiatrists were of no use to Funchess when he was sentenced.

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Graham stepped up the pace of death warrants once again; he was now signing four a month. True, there were more people than ever on death row. But many people—including some strong supporters of the death penalty—believed the warrant torrent was part of Graham’s U.S. Senate campaign. “Nine months of Bob Graham running for senator nearly killed me,” Ray Marky later said.

The lawyers at CCR wondered if it might kill them, too. “We were the only operation of our kind going anywhere,” Mike Mello later recalled, “and we were being hyped as this grand experiment. In reality, it was a place with four roll-out beds in the office because there was never a chance to leave. I don’t know the words to describe just how hard the work really was—in terms of hours or complexity. We worked one hundred hours a week, never less, often more. That spring of 1986, I literally lived in the office. Our personal lives disintegrated into nonexistence. You might think about going to a movie, or hanging out for an evening with friends . . . but then you’d compare that to rereading a trial transcript that might turn up another issue to save a life. And you’d stay at work. I thought it was never going to end. I thought I would end first.”

Among Mello’s cases was the appeal of Ronald Straight, slated for execution on May 20. As a protégé of Craig Barnard, Mello read Straight’s transcript with a careful eye for indications that favorable evidence had been barred from the sentencing. Straight’s was not an especially strong case for mitigation: He was a career con who had murdered a furniture store owner (along with Timothy Palmes, who had already been executed). But Mello built an argument that Straight’s lawyer could have done more to support a life sentence—if he had known how much latitude he really had. The death sentence was thus constitutionally flawed. As usual, Mello included a challenge to racial disparities in the death penalty.

The Florida Supreme Court reiterated its familiar, contorted position that it had never limited favorable evidence. The federal district court ruled that Mello was raising the issue too late. The circuit court of appeals agreed with the district court, but granted a “baby stay” for an appeal to Washington. Straight’s execution was postponed from 7 A.M. until noon. At 11 A.M., Supreme Court Justice Lewis Powell
extended the delay five more hours so the other justices could be polled.

James Stone, the uncle of Ronald Straight’s victim, spent the long day waiting in the prison pasture. He had been there when Palmes paid, and he would be there for Straight. Stone wore a T-shirt he had bought after the Spenkelink execution: “One down—133 to go!” It was terribly out of date. Death row was now swollen to 244 inmates.

Once again, the high court justices declined to consider the claim that mitigating evidence had been limited by Florida law and also the claim that the law was tainted by racial disparities. At 5 p.m., Ronald Straight went peaceably to Old Sparky.

Days later, the same U.S. Supreme Court—the same nine justices, employing the same law clerks, interpreting the same Constitution—announced that they would hear Craig Barnard’s appeal on behalf of James Hitchcock. Two issues warranted their concern, the justices said: racial disparities and limits on mitigation.

Barnard and his colleagues had been scolded dozens of times for bringing up those issues again and again, accused of “abusing” the courts, filing “repetitive” appeals, raising the same tired, settled questions. Racial disparities and limits on mitigation—these two issues had been boilerplate in scores of appeals, beginning with John Spenkelink’s. Now the U.S. Supreme Court, in its magisterial inscrutability, had decided that these questions were serious enough for their consideration. Happy as he was to win the chance to argue his case to the high court, Barnard had to wonder: If the old death penalty had been “arbitrary and capricious,” what was this?

Whatever else it was, it was a big issue. Until the Hitchcock case was resolved, the death penalty would be stalled again in Florida. Governor Graham continued signing four death warrants a month, but stays were routinely granted.

_Hitchcock v. Dugger_, argued on October 15, 1986, was not Craig Barnard’s first appearance before the nation’s highest tribunal. He knew the dark room where the U.S. Supreme Court holds its public sessions, knew the simple podium, knew the imposing dais backed by a mis-
matched melange of tall leather chairs (each justice chooses a personal favorite). He knew the musty curtain through which the Court disappears to exercise its awesome authority. He knew how grueling oral argument can be at the highest level—the justices rarely sit back and let you say your piece; they pepper you with questions, interrupt, dispute, sometimes scold. He was adept at this sort of exchange. He knew when to dodge and when to hold his ground. This was not his first case in that intimidating setting. Merely his most important.

If a majority of the justices sided with him on the issue of racial disparities, the high court might strike down Florida’s death penalty forever. Barnard’s brief contained evidence that in Florida, killers of white victims were five times more likely to get the death penalty than killers of black victims. The data were not perfect; it was impossible to control for every variable among the countless elements that make up a murder case. Still, there appeared to be a pattern.

Despite the high stakes, Barnard planned to say very little on this subject because his presentation was scheduled immediately after a Georgia case dealing with precisely the same question. Anthony Amsterdam had been working for a decade to make this attack; with the Inc. Fund he had put his full weight behind the Georgia case. The statistical analysis from Georgia was more sophisticated than Barnard’s evidence—and more stark. In Georgia, killers of white victims appeared eleven times more likely to get the death penalty than killers of blacks. Blacks who killed whites were the most likely of all. Barnard knew he would not win on the race question if his friends lost in Georgia. For this reason, he deferred to the Inc. Fund lawyers.

But a victory on the question of mitigating evidence would be huge in itself. Barnard was prepared to tell the justices that a favorable ruling would affect about two dozen Florida cases. Two dozen was the minimum, though—he didn’t want the justices to worry about crippling the state’s power. The reality was that a victory in Hitchcock’s case could significantly impede Florida’s death penalty for several years. Lower courts would need at least that long to plow through every case tried under the flawed law, to identify every taint and to remedy each mistake.

The faces behind the imposing dais did little to quiet Barnard’s
nerves. It was a new court, with increased muscle on the Right. The previous month, William Rehnquist had taken the place of Warren Burger as chief justice. Burger had been a solid vote for the death penalty, but Rehnquist was every bit as solid and—in the view of most observers—a more formidable thinker than Burger. Filling Rehnquist’s seat as associate justice was Antonin Scalia, an outspokenly dazzling darling of constitutional conservatives. On this day, the trend on the high court in favor of state sovereignty was stronger—in terms of dedication and intellectual firepower—than it had been in decades.

Barnard had thirty minutes to argue his case. “Mr. Chief Justice, and may it please the Court,” he began in the time-honored style. “James Hitchcock was sentenced to death by a process that precluded the consideration of compelling mitigating evidence.” As the law had been construed at the time of Hitchcock’s trial, Barnard said, evidence in favor of a life sentence had been limited “to a narrow statutory list.”

He got just that far before the conservatives began challenging him: “Mr. Barnard, the Court of Appeals for the Eleventh Circuit in this case I think made a finding that the State of Florida law at that time . . . was ambiguous. Do you disagree with that?”

Barnard knew when to dodge, and when to hold his ground. “I disagree with the Eleventh Circuit,” he said bluntly.

“Ordinarily, of course, we take the view of a Court of Appeals as to the law of a state . . .”

“The same Court of Appeals had previously expressed the view that the Florida statute was limited,” Barnard parried. And he launched into the convoluted history of this matter: The Florida Supreme Court had said in the Cooper case that the list of favorable evidence could not be expanded. That “clear and direct” language was later upheld by federal courts. But then, Barnard said, the courts had taken it all back, claiming that there had never been any limits.

Now Rehnquist interrupted. “Well, Mr. Barnard, in this case I take it the defense counsel did offer mitigating evidence that went beyond [the list].”

“Yes, that is correct,” Barnard answered, but then he tried to explain that it didn’t matter what Hitchcock’s lawyer presented in court. What mattered was that the judge and jury believed they could
consider only certain things. Rehnquist kept after him; Barnard darted and jabbed.

But as they sparred, Barnard began to lose his balance, his plain-spoken command. Other justices chimed in, peppering Barnard with esoteric questions about what lawyers might reasonably have believed about the law, what trial judges might have concluded about the law, what jurors might have interpreted their instructions to mean. Antonin Scalia, the newest justice, seemed puzzled by the progress of the argument. Once or twice he tried to pull the matter back to ground zero, back to the fundamental question at hand: Was favorable evidence limited? But the interrogation soon had Barnard spinning down legal alleyways, skidding on mumbo jumbo.

He had battled for seven years, through more than a dozen executions, in courts across the South, for the chance to make this argument. But now, under heavy questioning, his argument was collapsing into gibberish. The issue was so clear in his mind, but it was becoming mush in his mouth. At his lowest point, Barnard launched into an answer with no obvious point, no visible end: “I think the importance of the jury’s role, however, in Florida, I think might distinguish that, and the Court didn’t decide, but in dicta in Baldwin versus Alabama observed that that might be the case that where deference is given to a jury the constitutional principle . . .”

“Yes,” Scalia broke in forcefully, impatiently—as if he was back at the University of Chicago, quieting a floundering student. Scalia, the new darling of the Right. Seated beside Barnard, Dick Burr braced for the worst.

“But in this case,” Scalia continued, “is it not clear that we have both the erroneous jury instruction—and we also have the judge, in his sentencing order, saying that he based his decision on the statutory circumstances and that’s it?” The justice looked mystified by Barnard’s acrobatics. “I don’t understand what the argument’s about in this case, frankly.”

“Well, the argument is . . .”

“That’s the whole problem, yes?”

It was a stunning moment. Barnard’s help had come from the unlikeliest corner. He had feared Scalia; now Scalia was coming to his
rescue. Barnard later said of this moment: "I wanted to run up and kiss him." Instead, he let out a long breath, a grin creased his round face, and he declared: "I agree that it's that simple. But we haven't been able to convince other courts that it's been that simple."

The normally staid U.S. Supreme Court audience erupted into laughter. Barnard coasted home from there.

On April 22, 1987, the U.S. Supreme Court published two death penalty decisions. The first was the Georgia case, McCleskey v. Kemp, dealing with racial disparities. In the chambers of the justices, among the law clerks, this was considered the most important case of the entire term. If the Court found that the capital punishment process in Georgia was unconstitutionally flawed because of racial discrimination, the death penalty would quite possibly be scrapped in America. It had happened before. Years earlier, arbitrary, racially tainted death sentences in Georgia had moved the Court to wipe out all existing capital punishment laws in Furman v. Georgia. This time there would be no obvious repairs. It was the biggest of the big issues.

Given the Court's strong support of capital punishment, the vote was surprisingly close. Four justices—the stalwarts William Brennan and Thurgood Marshall, joined by Harry Blackmun and John Paul Stevens—were convinced by the statistics that Georgia's law was unconstitutional. Citing a long run of earlier Supreme Court rulings, Brennan argued that a "risk" or "pattern" of "arbitrary and capricious" death sentences is enough to invalidate a death penalty law. "The Court," he declared, "... acknowledges that McCleskey has demonstrated a risk that racial prejudice plays a role in capital sentencing in Georgia."

They fell one vote short. Justice Lewis Powell wrote the majority opinion, signed by Rehnquist, Scalia, Byron White, and Sandra Day O'Connor. Powell did not dispute the statistics. Instead, he declared that such general statistics were not relevant. Warren McCleskey and his lawyers had to prove that he, specifically, had been discriminated against—a tough thing to do, because McCleskey had killed a police officer in the line of duty, a classic capital offense. The defense had to
show who had discriminated against the prisoner—which district attorney, which judge, which jurors—and how and when. It was not enough to show patterns.

The majority did not explicitly acknowledge what they were doing, but implicitly they were undoing a cornerstone of the historic Furman decision. In Furman, Anthony Amsterdam had not shown that death was an arbitrary or capricious penalty in one particular case. He had persuaded five justices that the whole system of capital punishment, viewed broadly, worked in an arbitrary way. He had not proven who was arbitrary—which prosecutor or judge. He had shown a pattern.

Now Powell, writing for the majority, rejected the broad view. The same sort of disparities shown by McCleskey might show up in sentences for car theft, or dope peddling, or purse snatching. The Furman ruling had been interpreted in other Court decisions to mean that "death is different," but now Powell suggested the death penalty was more like other punishments than it was different. This was, apparently, a very great shift. And if the majority had gone the whole nine yards and formally overturned Furman, the McCleskey decision might have meant great changes. The philosophy that "death is different" might have faded from judicial doctrine—and with it the barren, endless attempt to make capital punishment rational and consistent.

But the justices did not take that vast step. Instead, they left themselves in a chasm between conflicting strains of thought. Two incompatible ideas sat side by side in the law. Death was still different, because the earlier decisions enshrining that idea were not reversed. The law still promised a virtually impossible consistency, and condemned inmates could continue to demand it in court. But the failure of the system to deliver that consistency—in the broad view, which is the only way to judge consistency—would not be grounds for attack.

In the days when Furman had been decided, the Supreme Court had been horrified by the idea that some six hundred men sat on death row while only a handful were being executed. That fact, plus concerns about racial discrimination, had led the Court to scrap the old laws. Now the population of America's death rows was climbing toward two thousand. And still, the number of executions was a comparative hand-
ful. Nationwide, between fifteen and twenty men were being sentenced to death for every one who was executed.

And what could be said of the ones who died? Were they the worst, the most unmitigated, irredeemable of the lot? As Florida's experience showed, they were more nearly a random selection of the larger death row population. It was a sort of lottery—and a lottery is the very model of an arbitrary and capricious system.

The McCleskey decision appeared to say that it made no difference that the death penalty was a lottery, not as a general statement. Now every individual inmate had to prove that he, personally, had been screwed. Those would be the rules until the U.S. Supreme Court changed its mind again.

But the courts can change their minds very quickly. That was the message of the second death penalty ruling published on that April day in 1986, Hitchcock v. Dugger. Technically, the U.S. Supreme Court had never ruled on whether Florida's death penalty law limited a defendant's right to present evidence in favor of a life sentence. But the Court had been asked repeatedly to take the question under consideration, and repeatedly the Court had refused. And sixteen people had gone to Old Sparky. That suggests the majority had made up their minds. Now they changed them: The justices ruled unanimously—all of them, the conservatives, the moderates, the liberals—that the law had been "authoritatively interpreted by the Florida Supreme Court" to mean that mitigating evidence was limited.

Craig Barnard was right. The Florida Supreme Court had denied this for some eight years—sixteen executions—but Barnard had kept at it, kept hammering, despite scoldings and even ridicule from judges and prosecutors. The public had complained bitterly about lawyers like him, with their delaying tactics and technicalities. Politicians had proposed all sorts of bills to limit his access, and the access of his colleagues, to the appellate courts.

Now the U.S. Supreme Court said unanimously that Barnard had been right all along. Justice Scalia, the new conservative tiger, wrote the opinion. "We think it could not be clearer," he intoned, in his confident, definitive way, that the judge and the jury believed they could consider only a few favorable factors. It could not be clearer.
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The Court's opinion in *Hitchcock* was brief, scarcely hinting at the years of litigation that had gone into Barnard's victory. In the end, the subtle shift Barnard had made in his argument was the fig leaf the justices grasped to cover their sudden change of heart. "The sentencing judge assumed . . . a prohibition [on favorable evidence] and instructed the jury accordingly," Scalia wrote. Therefore, "we need not reach the question whether that was in fact the requirement of Florida law." But Scalia did note that other judges in other cases had reached the same mistaken conclusion about the law. And he mentioned with obvious approval that Florida's legislature had changed the wording of its death penalty statute to make it clear that all favorable evidence should be considered.

The opinion was written to make it seem that a very small point had been decided, but Craig Barnard could see that a new generation of appeals had been opened for the men who had been on Florida's death row the longest. What was true for James Hitchcock was at least arguably true for all of them—dozens of them, and they were the men closest to Old Sparky. And *Hitchcock* had an even larger meaning for Barnard. After the ruling, he proudly told his troops: When people ask why we keep appealing, why we raise these issues over and over, why we never give up fighting . . . tell them to look at *Hitchcock*. 