

A State of Denial:

Texas Justice and
the Death Penalty

Texas Defender Service

Gary Graham (Shaka Sankofa)

Over the two decades since his 1981 conviction for the murder of Bobby Lambert, grave doubts have surfaced and grown over the guilt of Gary Graham. No court held an evidentiary hearing to consider the most compelling evidence of his innocence – even though Graham and his attorneys repeatedly requested a hearing on this disturbing new material in state and federal habeas proceedings beginning in 1993.

I. Key Facts

- A. The .22 caliber pistol taken from Gary Graham at the time of his arrest was tested by the police crime lab and was determined *not* to have been the weapon that fired the fatal bullet. This evidence was not presented at trial.
- B. The State's primary evidence against Mr. Graham was the testimony of a single eyewitness. Defense counsel failed to cross-examine this witness, or any other witness, to bring out the extremely suggestive police identification techniques used with the sole identifying witness. The jury never learned that the police used a photo array in which Graham's photo was the only one that came close to meeting the description of the shooter. The jury also was not told that, even after viewing this suggestive photospread, the sole eyewitness did not positively identify Graham as the perpetrator. That identification came only after the eyewitness was given a second chance to identify Graham, in a live lineup. After making this identification, the eyewitness commented to a police officer that she recognized Graham from the photo lineup she viewed the night before.
- C. Defense counsel failed to interview any of the other eyewitnesses to the crime, all of whom had made observations of the shooter that were more reliable than the identifying eyewitness: two of these eyewitnesses, both grocery store employees, saw the shooter prior to the shooting in a well-lit area just outside the store and both were certain the shooter was someone other than Graham.

II. The Crime

In May 1981, Bobby Lambert was fatally shot in a grocery store parking lot. He was killed with a .22 caliber pistol by a lone assailant. Several eyewitnesses saw the shooter in well-lit areas before the crime. A single eyewitness claimed to have seen the actual shooting.

III. The Trial

The question of Graham's innocence was raised by the very evidence used to convict him. The *only* evidence that he was involved in the murder was a single witness who identified him. The trial lawyers failed to present forensic evidence that exonerated Graham, failed to investigate the reliability of the identification made by the key witness, and failed to interview other witnesses to the crime – none of whom identified Graham as the gunman.

Prosecutors bolstered their case in the penalty phase by presenting two unrelated pieces of evidence to suggest that Mr. Graham was in possession of the murder weapon at the time of his arrest. During the guilt phase of the trial, the medical examiner testified that the fatal bullet was consistent with a .22 caliber slug. In the penalty phase, the state established that Mr. Graham had a .22 caliber revolver in his possession at the time of his arrest. The misleading inference created by this information went unchallenged despite the fact that shortly after Mr. Graham's arrest, a firearms examiner concluded that the fatal bullet "was not fired" by Mr. Graham's gun. This evidence was never presented to the jury at trial. Mr. Graham was sentenced to death in October 1981.

IV. The Aftermath

In 1993, Mr. Graham's attorneys uncovered existing evidence that called the eyewitness's identification into serious question. The only witness to the shooting had made her identification of Graham based on highly suggestive and improper police techniques. The police first showed the witness a photo array in which Graham's photo was the only one that came close to meeting the description of the shooter. In her pre-lineup statement, the eyewitness told police that the perpetrator had no facial hair and a "short compact afro." The police photo lineup that included Gary Graham's picture consisted of five photographs; three depicted persons with facial hair and of the remaining two, only Mr. Graham had a "short compact afro." The other person without facial hair had an extremely loose, bushy afro. Thus composed, the photo arrays inevitably directed the state's witness toward Graham's photograph. Nevertheless, this witness *could not identify him* as the gunman because of some other differences between Graham and the gunman: She told police that Graham looked like the suspect except the complexion of the assailant was darker and his face was thinner. The next day, the eyewitness viewed a live lineup in which Graham was the only person repeated from the photo array. Not surprisingly, she picked Graham out of the lineup, commenting to a police officer that she recognized Graham as being in the photo lineup the night before.

The additional evidence that would have pointed to a suspect who bore no physical resemblance to Mr. Graham was never presented at trial, not because it was unavailable, but because of the incompetence of his trial attorneys. The defense investigator later summed up the problem in an affidavit: "because we assumed Gary was guilty from the start we did not give the case the same attention we would routinely give a case."

Two of these other eyewitnesses, both grocery store employees, saw the assailant prior to the shooting in a well-lit area just outside the store – one face-to-face as he walked by him and spoke, the other for nearly twenty minutes as she eyed him with interest from about 10-15 feet away. Both

witnesses determined the shooter was approximately 5'3" to 5'5" tall, based on their experience with family members whose height was similar. Graham was 5'10" at the time. They were certain Graham was not the shooter. Indeed, one of these witnesses saw the same lineup as the identifying eyewitness and told the police the shooter was not there.

By contrast, the single identifying witness saw the face of the shooter nearly 40 feet away in a dimly lit parking lot, for only two to three seconds during the 90-second shooting incident. She estimated the shooter's height at 5'10" to 6'0", without being asked to compare his height to someone whose height she knew. Neither of the more reliable eyewitnesses was called to testify.

The federal district court refused to consider this evidence in 1993. The United States Court of Appeals for the Fifth Circuit said this was improper, and returned the case to the state courts for a hearing. Yet when Mr. Graham returned to federal court after again being denied a hearing by the state courts, the federal courts found themselves barred from hearing his claims by the added provisions of the 1996 Antiterrorism and Effective Death Penalty Act. Under this new federal law, evidence of actual innocence had to be "newly discovered" in order to be considered in federal court. Mr. Graham's evidence of innocence did not meet the criteria for being newly discovered – because it should have been discovered by his attorneys before 1993.

V. Conclusion

Graham's case demonstrates convincingly that the appellate courts care first and last about finality. Shortly before Graham's final appeal was denied, several of the original trial jurors came forward to state they would not have convicted him had they heard the testimony of the other witnesses. In the face of worldwide protests and growing concerns that Texas was poised to execute an innocent man, officials with the State of Texas simply tallied the number of courts that had reviewed the case, rather than considering the substance of that review.

The State of Texas executed Gary Graham (Shaka Sankofa) on June 22, 2000.

For further information concerning Mr. Graham's case, see Steven Mills, Texas Case Highlights Defense Gap: for Many on Death Row, Skilled Lawyers Arrive Only after Conviction, Chicago, Tribune, June 19, 2000; Alan Berlow, The Hanging Governor, Salon.com, May 11, 2000, at <http://www.salon.com/politics2000/feature/2000/05/11/bush/index1.html>; and the court files in: Graham v. State (CCA No. 68,916); Ex Parte Graham (CCA No. 17,568); Graham v. Lynaugh (5th Cir. No. 88-2168).