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THE SKY'S THE LIMIT

PEOPLE v. NEWTON

THE REAL
TRIAL OF THE 20TH CENTURY?



LISE PEARLMAN

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Cover photos of the Panthers © Ilka Hartmann 2012

Front: "All the leaders are in jail" Left: Posters of Huey Newton, Center and right, Eldridge Cleaver;

Back: "Huey Newton at the press conference after his release" with his lawyer, Fay Stender, behind him.

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Alameda Courthouse Photo © 2012 Lise Pearlman

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10. THE QUEST FOR A JURY OF HIS PEERS

*If you kill this man, you are killing your wife kids and mother.
We will kill all white dogs—stay in the open
and be shot dog! A brother!*

ANONYMOUS LETTER SENT TO THE OAKLAND POLICE

*Dear Nigger Lover: . . . I hope that race war they are always
threatening would start right away. We outnumber the blacks ten to
one so guess who will win, and a lot of damn nigger lovers will be lying
there right beside them. I wish Hitler had won. Then we could have
finished off the sheenies and started in on the coons. KKK*

ANONYMOUS LETTER SENT TO CHARLES GARRY

Anyone who regularly read the newspapers or watched local news in June and early July of 1968 was inundated with pretrial publicity for the Huey Newton murder trial. The case always evoked an intense gut reaction, pro or con, since Newton had catapulted to international attention. To many in the United States, he was a homegrown terrorist; to many others, at home and worldwide, he was a political prisoner and a symbol of oppression of American blacks, in turn linked with charges of a racist war in Vietnam. By the summer of 1968, the Panthers' high visibility as a revolutionary party elevated it to public enemy number one in the eyes of FBI Director J. Edgar Hoover—a movement to be stopped at all costs.

Public awareness of the upcoming Newton trial extended well beyond the media. Treating the trial like a political campaign, Panthers and other volunteers posted signs on telephone poles and store windows throughout the community and distributed bumper stickers as well. Bus riders could expect to see fellow passengers sporting “Free Huey” buttons and hear responsive murmurs of “Right on.”¹ California would soon be documented as one-third minority—the largest minority population in the nation. Yet judicial proceedings, like other governmental functions, were still almost universally controlled by whites. In his editorials, *Oakland Post* owner Tom Berkley expressed great skepticism about Newton’s innocence and open disdain for the militancy of the Panthers. Yet the underlying issue raised by Newton’s trial reverberated with him as well: “It is impossible for a minority to receive justice in a Court that 99 times out of 100 consists of a white judge, white clerks, white bailiffs, white opposing counsels and white jurors.”²

Galvanized by the killing of Bobby Hutton in West Oakland in April of 1968, pressure escalated on city officials for community control of the police. A number of innocent victims of that shootout brought suits against the police for negligence, alleging that more than a thousand rounds of ammunition had needlessly been fired in the April confrontation with the Panthers, damaging many West Oakland residents’ parked cars. The community pressure on public officials grew exponentially after the county grand jury exonerated the Oakland police of any wrongdoing simply on the testimony of members of the force who were present at the early April shooting. A group of law professors at U.C. Berkeley’s Boalt Hall Law School petitioned the United States Department of Justice to conduct an independent inquiry. The county bar association also requested an impartial review since all of the Panthers at the bloody confrontation declined to testify before the grand jury, which could have easily skewed its findings.

On another front, a group calling itself “Blacks for Justice” picketed Oakland businesses to support community review of the police. Black ministers lobbied the Oakland City Council and the office of the mayor to the same end. Police Chief Gain responded to criticism of his almost entirely white police force by claiming it was difficult to find qualified

black men, but he did impose a moratorium on the use of mace as a crowd control device and forbade shooting at fleeing felony suspects who were not endangering anyone's life. Mayor Reading sharply criticized the police chief for this move, charging that Gain had crippled public protection by yielding to intimidation. Reading himself owned a grocery—run largely by his wife—that was affected by the economic boycott. He became increasingly vocal as the Panthers and Peace and Freedom Party gathered signatures to put on the ballot the creation of separate police districts within the city, permitting blacks and whites to have officers of their own race patrolling their neighborhoods. Mayor Reading soon began openly talking of not seeking reelection; he gave an exclusive interview in a local Sunday paper in which he cited the Panthers and the pending Newton trial as major factors. With blacks now 46 percent of the city's population and more than half of all students in its public schools, speculation grew rampant that should Reading retire, several prominent African-Americans might throw their hats into a wide open race.³

As the city grew increasingly polarized, Garry prepared for a preliminary hearing in late June representing several Black Panthers facing charges from the alleged April 6 ambush. Meanwhile, Stender flew out to Chicago to consult Dr. Zeisel, who offered to donate his time to testify at the trial. He even agreed to advance his own costs because money for the defense was so scarce. Stender tried to convince other experts from the East to come to California at their own expense. They declined, but offered to mail her sworn statements if the court would accept them.

Locally, Stender worked with the volunteer experts she had already recruited, Cal professors Blauner and Dizard and graduate student David Wellman, who helped draft hundreds of questions to ask potential jurors to smoke out evidence of racism. She learned from Penny Cooper in the Public Defender's office that the Alameda County D.A.'s office had the voter registration of every juror. Unlike Stender, Cooper had accumulated substantial trial experience by then, though Cooper was only thirty, six years Stender's junior. That was one of the benefits of going to work for the Public Defender. But in her three years in that office Cooper had experienced firsthand the downsides, too. She realized her days in that conservative office were numbered after the Public Defender pressured

her unmercifully to recant her anti-war views and, not succeeding, had followed up with a series of undesirable assignments. A decade earlier, Stender herself had quit working as a law clerk for an ultra-conservative justice on the Supreme Court when she realized the extent of his bigotry. (Back in the 1920s when he was elevated to the high court, Justice Shenk had supported “Oriental exclusion.” He still used the term “the yellow hordes” to describe Asian-Americans and had written a scathing dissent to *Perez v. Sharp*, the landmark 1948 ruling making California the first state in the nation to strike down anti-miscegenation laws. Shenk fervently believed there was scientific proof that: “The amalgamation of the races is not only unnatural, but is always productive of deplorable results.”⁴)

Identifying with a kindred spirit, Cooper eagerly informed Stender that the D.A. knew whether any potential jurors had ever been arrested, and, if so, he had a copy of the arrest sheet. District Attorney Coakley’s office also had information on any juror who had served on a jury before, including how the juror voted. Cooper had just recently learned of the list and had promptly requested access to the D.A.’s jury file in a few of her own assigned criminal cases. But even liberal judge Sparky Avakian denied Cooper’s requests. Judge Avakian reasoned that the same information the D.A. had accumulated would be available to the defense if they put investigators to work on digging it out. Cooper told Fay that this was not in fact the case—some of the information the District Attorney had accumulated on potential jurors was from a Sacramento Central Intelligence data bank, which was not accessible to defense investigators. Stender wanted Garry to make a motion for its discovery, putting the issue on the record even if Judge Friedman was likely to deny their request. Garry had other priorities. Garry interviewed a forensic medical expert in late June who analyzed Officer Frey’s and Newton’s bullet wounds. The expert had been puzzled by the multiple directions of the wounds to Officer Frey, but concluded that the fatal shot had been fired at close range through Frey’s back. Immediate treatment would not likely have saved him. This was not going to be particularly helpful. Garry had been hoping to get the medical expert to say the fatal wound could have come from Heanes’ gun, shot from thirty feet away. No such luck.

As the date for the Newton trial approached, the media covered both

the Liberal response to racial violence following the twin assassinations — increased civil rights activism and new gun control efforts — and the even stronger backlash. Alabama's Gov. George Wallace entered the 1968 presidential campaign as a candidate on his own American Independent Party ticket. A proud white supremacist, Wallace threatened to take a majority of the Southern states as a base to build a larger coalition he hoped to use to direct the outcome of the presidential election. Some political analysts feared that Wallace's growing support among Northern blue collar whites could force the election to be decided by the House of Representatives. Republican candidate Richard Nixon responded by making subtle appeals to racism central to his own campaign, coupling images of violent urban protests with promises to restore "law and order."⁵ Meanwhile, Senator Eugene McCarthy reached out to black youths, proclaiming that resolution of urban racial problems was of paramount national concern, trumping the Vietnam War.

As the Newton trial approached, *The Oakland Tribune* also gave front page coverage in early July to congressional hearings in Washington, D.C., on Associate Justice Abe Fortas's controversial nomination for Chief Justice. A lame-duck nominee of President Lyndon Johnson, the New Deal scholar from Yale would have replaced retiring Chief Justice Earl Warren. The local paper reported relentless questioning of the Jewish Democrat by Senator Strom Thurmond, one of many Republicans disgusted with the Supreme Court's liberal record of turning rapists and murderers loose on what critics dismissed as mere legal technicalities.

Of greatest impact locally was a hotly contested ruling on July 8 by Alameda County Superior Court Judge George Phillips. Judge Phillips declared a mistrial in an Oakland criminal prosecution against five black inmates of Santa Rita accused of attacking a white inmate. He based his ruling on arguments that the prosecutor had used his peremptory challenges improperly by removing every non-white from the jury panel. The prosecutor had also used a few of his peremptory challenges against prospective white jurors. Generally speaking, peremptory challenges could be used to strike anyone that a lawyer did not want on the jury, with no explanation necessary. An opposing attorney wishing to show that a peremptory challenge was used improperly had to meet an extremely

high threshold of proof. But Judge Phillips ruled that the threshold was met in the case before him because the deputy district attorney had demonstrated a systematic, conscious intent to exclude non-whites as a class, depriving the defendants of a fair trial by an impartial jury of their peers drawn from a cross-section of the community. Not wanting the delighted defendants to read too much into his ruling, the judge added that he was simply delaying their day in court, intoning, "You will be tried for this alleged crime."⁶

The mistrial declaration made front page news as District Attorney Coakley sharply criticized Judge Phillips for holding that a member of Coakley's office had acted in a racially discriminatory manner. Coakley immediately announced he was exploring an appeal: the ruling gave his office a black eye in the community at a very sensitive time, with obvious implications for the imminent Newton trial. Coakley himself still smarted from charges of racism that Bob Treuhaft had levied when he ran for office against Coakley two years earlier.⁷ As racial tension peaked in the community, Garry faced the added distraction of ongoing issues related to Cleaver's continued freedom. The Adult Authority had ignored Judge Sherwin's June 12 ruling in Cleaver's favor and set a hearing on the charge of parole violation for July 8, 1968, at San Quentin prison in Marin County—the same date Judge Friedman had reset the Newton trial. But then Judge Friedman moved the Newton trial one week later, to July 15.

Despite a new order from Judge Sherwin not to do so, the Adult Authority then proceeded with the July 8 hearing, ignoring the judge's threat to hold the state agency in contempt. The impasse was temporarily resolved when the court of appeal issued an order leaving in place Judge Sherwin's ruling. As a result, Cleaver remained free on bail pending an appellate decision in the matter. The review court set a date in late September for its own hearing. Meanwhile, Cleaver tried to generate international support by filing a complaint with the United Nations for human rights violations on the Panthers' behalf. He took advantage of his continued freedom to make a number of public appearances in support of Newton as well as to attack the police for persecuting the Panther organization. Now sporting a small beard and dark sunglasses,

the leather-clad revolutionary told audiences he was convinced that on April 6 he had been marked for death along with Bobby Hutton, and the police only stopped short of double murder because there had been so many black people from the neighborhood crowded around as witnesses.

Cleaver's rhetoric and that of most Panthers had evolved in the past few months. Influenced by the Peace and Freedom Party, as SNCC leaders had predicted, Cleaver abandoned black nationalist positions and was now talking about the need for white and black unity in fighting capitalism. The Peace and Freedom Party then announced its plan to run Cleaver as their candidate for President of the United States, while Newton remained their candidate for Congress. They added Kathleen Cleaver as a candidate for State Assembly.

Thanks to the efforts of the Peace and Freedom Party, the door was now open for anti-war candidates to topple the incumbent Democrat in California's Seventh Congressional District. In 1966, *Ramparts* journalist Bob Scheer had paved the way by running as a Peace and Freedom candidate in a grassroots anti-war campaign that won him forty-five percent of the primary vote. But that opportunity was thrown away by running Huey Newton for that congressional office. Like Big Bill Haywood, Newton enjoyed the notoriety of running for office from his jail cell. But with no chance of success, the Peace and Freedom Party approach all but guaranteed another split among the Left-leaning voters of Berkeley and North Oakland.

Democrats like Ron Dellums on the Berkeley City Council and congressional candidate John George felt thwarted by the radical Left just as the East Bay finally seemed ready to vote for more politically mainstream African-American candidates. Cleaver did not care. He knew he was not going to get elected to anything. He told audiences, "I'm a Black Panther and a madman . . . a symbol of dissent, of rejection."⁸ He despised the white power structure and wanted to build support for the Black Panther Party wherever he could find it. He suggested that women refrain from sex as an incentive to their men to take arms against oppression. He got crowds to yell that they would free Newton "by any means necessary." Cleaver declared, "I've been watching those pigs railroading Huey.

If they kill Huey P. Newton, they're going to have to kill us all first."⁹ Cleaver met with representatives of The American Communist Party. For the first time since 1940, the Party openly supported a candidate for President of the United States. Its platform was twofold: freedom and justice for blacks and an end to the Vietnam War. The Party now estimated its membership at 14,000 to 15,000 people nationwide, of which twenty percent were black.

The FBI had, by now, not only assigned operatives to cover Panther leaders, but began to strategize on how to implode the Panther organization with a campaign of dirty tricks. In the spring of 1968, Alex Hoffmann had publicly documented the government's disabling of his home phone in connection with the April 6 arrest of Eldridge Cleaver. The FBI was listening in on other telephones of Panther officials as well, evidenced by a tell-tale click. They also planted false documentation, seeking to sow suspicion among the Panther rank and file that Stokely Carmichael, David Hilliard, and Newton himself were government agents.¹⁰

On the evening of July 3, Cleaver and Seale were invited to address an emergency session of the Berkeley City Council on which Dellums sat. It drew a crowd of over a thousand people to the 3,000-seat Berkeley High School auditorium. The specially called meeting capped several tumultuous days of violence and strict citywide curfews. Seale appeared haggard and unkempt. Cleaver looked in command of his audience. They used the podium to rail against racist "pig" cops as the council debated a controversial motion to close several blocks of Telegraph Avenue for a massive Fourth of July gathering, permitting rallies by hippies, Yippies, Black Panthers, Peace and Freedom Party members, and other anti-war activists. Though renewed violence was threatened, the holiday celebration on Telegraph Avenue turned out to be peaceful. Cleaver was again among the speakers addressing the Berkeley crowd. He urged them to rally for Newton's release from jail, but the audience was dominated by flower children more interested in enjoying a warm summer afternoon than in his political passion.

Cleaver's busy calendar of appearances at rallies was part of a concerted defense team strategy to draw a huge group of spectators to the Newton trial. Stender filed a motion the second week of July to have the

trial moved to a different venue capable of seating a much larger audience, together with the more than one hundred media representatives expected to cover the trial. She could find no precedent for the unusual motion except that Newton was entitled to a public trial. Her moving papers argued that a larger space would more readily satisfy widespread interest in the case. Of course, the logistics of such a move would have also meant more delay in order to put necessary security precautions in place. The defense team would have welcomed any further postponement they could obtain. Tom Berkley of *The Oakland Post* assumed that no further delays would be seriously entertained by the court: “Barring something unforeseen up the sleeve of wily defense counsel Charles K. Garry, Huey Newton, baby-faced guru of the Black Panther Party . . . will go to trial Monday morning.”¹¹

At the end of that second week of July, spectators filled only about two-thirds of the seats in the small courtroom where the Newton pretrial hearing was set. Many other interested parties stayed away, not anticipating anything exciting to happen until the trial actually started the following week. Friday morning’s spectators included court officials, lawyers, the press, and a dozen or so Black Panthers who stood to salute Huey Newton with *de rigueur* clenched fists as he strode into the courtroom. Garry told Judge Friedman of worldwide interest in the trial as he suggested it be moved to the Oakland Auditorium Theater, the Veterans Memorial Building, or, if available, the presiding judge’s oversized courtroom. Reporters from the *Boston Globe* and *New York Times* were expected along with those from local dailies, a London reporter, network and local television and radio crews, and representatives from the wire services, *Time*, *Newsweek*, and *Life*, and from some underground papers.

Among the reporters already watching the proceedings that Friday was Gilbert Moore, one of two African-Americans on the staff of *Life* magazine. The seventy-two-year-old judge who held Newton’s life in his hands impressed Moore as a man with “the demeanor, the gentle forbearance, the myopia of an aging beagle.”¹² Unpersuaded by the hoopla, Judge Friedman denied Garry’s motion to move the proceedings: “The court of justice is not a place for entertainment or amusement.”¹³ The media reacted in disbelief—only a fraction would receive passes from the sheriff’s office, and they would need a

different pass each day, first-come, first-served. Moore now urgently wanted to be among them. He had originally been assigned in late June to do a story “on Eldridge Cleaver, the Panthers in general or on Oakland: a tinderbox about to explode.”¹⁴ He had accepted the task reluctantly, not relishing the idea that he automatically was considered the best reporter suited to cover a story featuring people of his own race. Raised in Harlem and Jamaica, the thirty-three-year-old New Yorker had never set foot in Oakland. All that he knew at the time of his new assignment was that a man named Huey Newton headed a “bizarre bunch of California niggers, talking bad and occasionally shooting someone.”¹⁵

On his arrival in California, Moore spent a couple of weeks learning the rudiments of the multi-step Black Panther handshake ritual (ending with a finger snap of African tribal origin), so he would be more welcome among the brothers. Moore wanted to nip speculation that he was a government spy. He interviewed Newton in jail, toured the cramped and disorganized Panther headquarters, visited Eldridge and Kathleen Cleaver at their San Francisco apartment, and tagged along after Cleaver and Seale at rallies and education sessions. By then, Moore had already accumulated more than enough information to write the story he had been assigned and had also concluded that none of the Panther leaders “gave a rat’s ass whether *Life* magazine did a story on the movement or not.”¹⁶ His impatient editors demanded an explanation for his delayed return to New York. Moore overcame their skepticism with assurances that the Huey Newton trial would have “very wide political implications” which he felt compelled to cover firsthand.¹⁷

The Friday hearing addressed another, far more basic concern than spectator space in the courtroom. Before the trial began, the defense team wanted to seek review in both state and federal court on an issue Garry deemed critical to the defense—expunging Newton’s prior felony conviction for assault. They fully expected to lose the issue before Judge Friedman. On that assumption, Stender had prepared a writ raising the very same issue later that morning before another Alameda County judge. If this petition was also denied, an appeal to the state appellate court was already planned, together with a request for an order postponing the trial date until the appellate court ruled.

The motion was deemed critical because the status of Newton's prior conviction greatly influenced Garry's trial strategy. He thought his handsome client would make a persuasive, articulate witness on his own behalf. If Newton explained the Panther platform, he might win the sympathy of at least some of the jurors. Garry definitely wanted to consider the option of putting Newton on the stand, though Newton had the constitutional right not to testify at all. But the prior conviction was a powerful disincentive, a sword of Damocles dangling over Newton's head. If it remained unchallenged, Jensen would focus the jury's attention on it, prejudicing the panel against Newton. The prosecutor would even be entitled to have the jury instructed that Newton's prior criminal conduct was reason enough to discredit his testimony on any subject. Unlike witnesses in general, felons could be presumed dishonest.

Garry was also concerned about the impact of Newton's no contest plea to the charges that had been filed against him for the incident in front of Panther headquarters the prior spring. In November, after Newton had been jailed on the murder charges, John George had entered a plea on Newton's behalf for the May 1967 incident and obtained a sentence of fifteen days' jail time, to be served simultaneously. It had seemed a reasonable deal at the time. George had since been persuaded to ask the court to reinstate the original charges against Newton and to set a hearing for late July on those minor charges. On Garry's advice, Newton now wished to plead innocent and have his day in court. George accommodated them by informing the court he had entered the original plea without Newton's approval.

After Judge Friedman denied the motion to expunge the conviction, Judge Lercara, the judge assigned to hear the other petition raising the same issue, took an unusual step to accommodate the parties and the press. Normally, he would have used his own courtroom several floors below. Instead, he simply took the still-warm bench as soon as it was vacated by Judge Friedman. Then he quickly told the parties he had read the petition and response and did not want to hear arguments. Within just minutes of his arrival, Judge Lercara denied the petition, giving the defense time the same day to seek review in the court of appeal. Part of the defense strategy had been to ask Judge Friedman for another continuance

while awaiting review of his ruling on Newton's prior felony conviction. They had hoped the possibility of reversal would persuade him. Not so. Judge Friedman remained firm. Unless another court ordered otherwise before Monday morning, that was when trial would commence. Stender scrambled off to file the appeal as Garry announced, "We're prepared to go to the U.S. Supreme Court if necessary."¹⁸

When the media left the hearing on Friday, they realized they had obtained a preview of precautionary measures they could expect at trial on Monday. Cameras would be relegated to a makeshift press room on the sixth floor, temporarily converted from a jury room. Reporters figured that they had better plan to arrive early Monday morning to allow time for court personnel to process everyone entitled to enter. No one wanted to be left out. Judge Friedman might believe that a court of justice was not an entertainment venue, but show-time was about to begin.

The court of appeal quickly denied the defense request for review; that same afternoon Stender filed a similar petition with the California Supreme Court. She worked all weekend preparing other sets of legal briefs, including a federal petition in the event the California Supreme Court declined to act, and a renewed motion to present to Judge Friedman challenging the jury panel. Garry planned to call the expert witnesses Stender had prepared on this issue before starting the trial in earnest. While the legal work was being churned out, the "Free Huey" committee kicked into high gear. On Sunday, July 14, a huge crowd of Panther supporters gathered at DeFremery Park in Oakland for a four-hour picnic and rally. (By then many in the community called the site "Bobby Hutton Park," though no official name change could ever occur under the terms by which the wealthy financier's family had deeded the land and Victorian mansion to the city back in 1910.) Cleaver again stood out among the militant speakers, galvanizing throngs of followers to show up in force at the trial. Even as Cleaver rallied the troops, Garry hoped against hope that Stender could pull off a miracle and get another court to temporarily postpone the trial.

On Monday morning, July 15, 1968, *The Oakland Tribune* proclaimed that the city's main courthouse looked like a "besieged fortress."¹⁹ Most steps leading to the building were covered with netting. Armed deputies,

with walkie-talkies, mace, and batons, stood outside every entrance to the main courthouse augmented by the National Guard. A multi-racial mass of Panther supporters, many with children in tow, circled the building and overflowed onto the street, impeding traffic until they were dispersed by the police. All but one of the entrances to the building were locked. At the 12th Street doorway a guard required everyone who approached to show identification—couples applying for marriage licenses, attorneys and parties to other cases, as well as county employees. Such high security precautions had never before been implemented in the county. Equally strong security measures were evident inside the courthouse. Special passes obtained at the sheriff's office on the second floor allowed those authorized to attend the trial access to the seventh floor where Judge Friedman's sixty-two-seat courtroom was located. A few eager spectators had begun lining up at 5 a.m. Friends and family of Huey Newton complained they were singled out for photographing and fingerprinting before receiving passes.

Doors permitting seventh-floor access to the stairwells leading to the sixth and eighth floors were temporarily sealed. One elevator with its own armed guard was assigned exclusively for persons headed to the Newton trial. Veteran Judge Cecil Mosbacher could not hide her irritation when the long-time elevator operator on the basement floor turned down her request to let the judge board. She would have to take another elevator to her own courtroom on the seventh floor. No exceptions whatsoever were being made to the tight security arrangements. That morning, when members of the jury pool arrived at the courthouse they were promptly sequestered while more than 2,000 Newton supporters gathered outside. The Panthers had hoped to conduct a mass march through downtown Oakland that morning for the trial's start, but too few supporters had shown up at the designated assembly point. Instead, they all met at the courthouse where Black Panthers in full regalia—sweltering in leather jackets and berets—defiantly led the crowd in chanting, "Free Huey Now" and "Black is Beautiful."

Signs lofted above protesters' heads warned, "The Nation Shall Be Reduced to Ashes," "Free Huey or Else," and "If Anything Happens to Huey, the Sky's the Limit."²⁰ Though most unsympathetic onlookers held

their tongue, reporter Moore heard a few from time to time saying things such as, “Jesus Christ, what is this country comin’ to? Free Huey—my ass! They oughta burn the son of a bitch!” while others wondered exactly what was meant by “Free Huey”: “Is it a command, a request or an exhortation—or perhaps all three? Does it mean, examine the evidence, go through the court rituals and then free Huey? Does it mean storming the Alameda County Jail and freeing him by force of arms? Or what?”²¹

Somehow, though most white males in the crowd wore long hair and beards, Judge Friedman circulated among them unobtrusively gauging the situation for himself. The din made it almost impossible for court staff on the first floor of the building to perform their work. Outside the courthouse, Peace and Freedom Party leader Bob Avakian ascended the flagpole and cut down the American flag as other demonstrators yelled, “Burn it.” The sequestered jurors could hear the shouts through the windows of the courthouse high above the sidewalk. Avakian was immediately arrested and charged with petty theft, flag desecration, and malicious mischief.²² Armed guards patrolled the courthouse corridors. Two stood guarding the door to Judge Friedman’s locked courtroom. Inside, the bailiff inspected the underside of all chairs and tables. Once they exhibited identification and were allowed entry, spectators and media, on opposite sides of the central aisle, overflowed all available seats, spilling into the hallway. Plainclothes policemen spread out among them, attempting to blend inconspicuously into the crowd. To the discerning eyes of Panther supporters, they might as well have been wearing neon.

As expected, no photographers were permitted in the courtroom, but artists employed by the media busily sketched the high-ceilinged room with wood-paneled walls where the drama of the trial would be staged: the raised bench; the judge’s empty leather chair with a huge American flag hanging on the wall behind it; the jury box on the right and the clerk’s desk on the left; the Gettysburg Address framed on one of the courtroom walls. The two counsel tables were positioned in “the well” beyond a gate segregating the players from the spectators—the prosecutor’s table sat nearer to the jury and the defense table to its left.

Unaware of all the last minute machinations, Blauner had obtained his trial pass as a designated defense expert witness on race bias in the

jury pool. He showed up on Monday morning flushed with excitement at the unfolding drama. To his dismay, Stender and Garry arrived late, looking exhausted. By then Stender was routinely putting in twelve-hour days and had had no weekend break. She sat down in the front row, accompanied by Alex Hoffmann. Their seats were right behind Charles Garry at the defense table, where Ed Keating from *Ramparts* magazine also sat. After learning Keating wished to cover the trial for *Ramparts*, Garry had offered to designate Keating as his co-counsel. Unlike other reporters, Keating would have automatic access to the proceedings. Eager to have such a birds-eye-view of the historic event, Keating reactivated his little-used law degree, and offered help in the nature of a paralegal. He had no expertise in criminal law and had not practiced in years.

It quickly became evident to all present that the trial would not begin right away. Garry had persuaded Judge Friedman to agree to a late morning start in case the California Supreme Court or the federal district court granted a temporary stay. When no stay order materialized, the tension in the room was palpable. Twenty-eight credentialed reporters sat in the courtroom ready to chronicle the current trial of the century, leaving another seventy reporters outside due to insufficient space. Gilbert Moore and his new friend Rush Greenlee, a black reporter covering the story from a human interest angle for *The San Francisco Examiner*, had both obtained coveted seats. Greenlee often collaborated with a more senior white colleague assigned daily responsibility for reporting on the high profile case. The Panthers castigated Greenlee as part of the “spineless black bourgeoisie.”²³

The Oakland Post characterized the stakes for the American system of justice to be as high as those involved in the 1920s’ Sacco and Vanzetti trial. Its reporter Almea Lomax expressed amazement that a “self-confessed small-time hood” like Newton could transform himself into a hero with “new-found socialist convictions.”²⁴ *The Post* was not Huey Newton’s only local black media critic. Early in the trial, the Berkeley campus student newspaper, *The Daily Californian*, featured a caustic editorial column entitled “The Paper Panthers” by an African-American graduate student. He derided the paramilitary organization’s “vacant generalities and absurd manifestoes,” its lack of “plausible short term goals,” and reliance

on pistols as “sex symbols.” The author lambasted Newton’s organization as the source of much wasted newsprint in the liberal and radical press as well as wasted time and energy of people in the ghetto.²⁵

In contrast, the alternative press viewed the trial as a pivotal point in the nation’s history of racism that was on the eve of engulfing the nation in flames, “Oppression. Revolt. Suppression. Revolution. Determined black and brown and white men are watching what happens to Huey Newton. What they do depends on what the white man’s courts do to Huey.”²⁶ As the trial officially began, Garry asked Judge Friedman to have the court reporter prepare a daily transcript of proceedings for both the prosecutor and the defense. It would be costly, but essential to have the ability to review each day’s testimony for use in cross-examination and for summing up the evidence in closing arguments. Garry also requested that the judge list his entire firm as Newton’s counsel of record so any of its attorneys could act on Newton’s behalf, if need be, for particular aspects of the case. Everyone in the Garry partnership had by now been mobilized as reinforcements. With Fay Stender in the courtroom, Garry’s partner Frank McTernan was back in the office readying appeals to the Ninth Circuit and the United States Supreme Court if the pending petitions were denied.

Jensen asked Judge Friedman to exclude from the courtroom any persons expected to be called as witnesses, a common order designed to prevent anyone who might be taking the stand from hearing what others had already attested to. Otherwise, the later-called witnesses might be tempted to tailor their testimony accordingly. Two exceptions to the order were requested and granted—an inspector from the District Attorney’s office was allowed to stay and Huey’s fiancée, LaVerne Williams, who was seated with Newton’s siblings and his minister. Everyone else—reporters and interested observers—remained seated. Jensen also asked the court to prohibit any display of support for Newton in the courtroom, including leaflets, buttons, and signs. Garry, in turn, objected to the unaccustomed security measures. He charged that they created an atmosphere of fear and intimidation which gave members of the jury panel the impression Newton was a dangerous killer before the trial even began. Following his cautious custom, the judge took both motions under submission, though

the likelihood that he would abandon the extraordinary security precautions was virtually nil.

It was close to 11:15 a.m. when the clerk called the names of forty-five prospective jurors for “The People versus Huey P. Newton.” All but two acknowledged their presence in the packed courtroom, some seated on folding chairs that had been brought in, some allowed to sit temporarily in the jury box. Many shivered in the sixty-degree courtroom. Out of that group only six were non-white. Newton then entered from a side door, accompanied by a bailiff. Looking cheerful and relaxed, he created a remarkable first impression, with a new haircut, a sharp gray suit, and black turtleneck chosen for him by his brother Walter. As he made his way to the defense table next to Garry, Newton raised his fist to greet supporters.

Out of sight of the spectators, Newton had just been escorted in handcuffs down a stairwell from the tenth floor into a hallway leading to the courtroom. At the side entrance, his cuffs were removed to avoid prejudicing potential jurors against him. For a similar reason, he had been allowed to dress in a turtleneck, slacks, and jacket for the court proceedings. Once he returned to his tenth floor cell, he had to change immediately to his loose, county-issued jail clothes. The same ritual was repeated each court day. Sometimes spectators could get a glimpse of the officers recuffing Newton’s wrists behind his back as they headed into the stairwell.

The court clerk called the names of all the potential jurors in the first group and immediately told them they could leave and report back the next morning. As soon as they departed, thirty more spectators streamed into the courtroom. Judge Friedman had dismissed the panel of potential jurors for the rest of the day because he needed the time to address several preliminary issues Garry had raised. These included a motion Stender had just prepared based on Judge Phillips’ recent ruling. She anticipated that Jensen might use his jury challenges improperly, both to eliminate all black jurors and to exclude anyone with scruples against the death penalty. Garry told the judge he intended to call several witnesses in support of these motions, which the judge would need to rule upon before any jurors were selected.

Judge Friedman called both sides into his chambers. Jensen got up from his chair and started to enter the chambers by himself. When

Garry rose to join him so did Ed Keating, Fay Stender, Alex Hoffmann, and Carleton Innis. The judge looked askance and promptly advised Garry that he had a rule that only two attorneys could represent one side in chambers. Though Jensen had never tried a case in front of Judge Friedman before, Jensen thought the judge made the rule up on the spot. Without hesitation, Garry summoned Stender to join him, leaving the others in the courtroom. In Jensen's view, that decision was a ringing endorsement of her vital role in the case. Garry was among the vast majority of trial lawyers who considered their practice an exclusive men's club, but he was also extremely practical—the decision who would accompany him into chambers was not even close. He could not handle this case without Fay Stender; everyone else was dispensable.

By the end of the first day, Garry's feisty attitude already irked Judge Friedman. Among all the other issues he had dumped on the judge's plate, Garry raised a complaint from Newton's family that they had been discriminated against in being photographed and fingerprinted to obtain trial passes. The judge shouted in reply that Garry needed to file proper papers if he wanted the issue considered. He then emphatically announced, "This court is in recess" and left the bench.²⁷ When the court session ended, Garry and Stender quickly learned from their office mates that the Ninth Circuit had acted that afternoon to deny review of the federal district court's ruling on a technicality—in their hurry, they had not provided proof they had given notice of appeal to the Alameda County District Attorney. Their last hope was the United States Supreme Court. Frank McTernan filed that petition for review Monday night.

On Tuesday, hot weather reduced the crowd around the courthouse to a few hundred, about one-fifth of the crowd that had gathered on Monday. The flagpole on the ground remained bare on Tuesday, but another on the courthouse roof still waved its state and national flags. Standing outside all day, marching and shouting, took its toll. One of the Panthers fainted from the heat. But the remaining crowd still demonstrated noisily. Inside the courtroom, Newton wore the same black turtleneck and gray suit on Tuesday as he wore on Monday. He complained to his counsel that he was chilly, but they were unable to convince the judge to adjust the air-conditioning. Newton often turned to smile at the spectators

in the courtroom, particularly SNCC's leader James Forman, who was seated prominently in the audience. Forman, then in his late thirties, could be easily spotted, dressed in an African tunic with his graying hair uncombed, looking somewhat like a modern-day version of fiery abolitionist Frederick Douglass. Forman made himself even more conspicuous as the only person in the courtroom who remained seated when the judge entered, rising only after Judge Friedman glared at him.

Back in 1964, Forman had gained a reputation for his in-your-face attitude toward authority with an angry challenge: "If we can't sit at the table of democracy, we'll knock the fucking legs off."²⁸ Ironically, Forman was not deemed militant enough for SNCC's new leadership and that of the Black Panthers, who considered him paranoid and unstable. He and Dinky Romilly now had a one-year-old son. His ongoing relationship with her may have contributed to his impending political ostracism from SNCC. Other whites formerly integral to the organization had already been ousted from its power structure. This trial appearance was Forman's last show of public affiliation with the Party. They had a major falling out the following month. But on the second day of trial in mid-July, Forman appeared to offer his full support to Newton.

The first witness Garry called was the County Jury Commissioner to explain how the master jury panel was selected solely from registered voters. Every six months, the county drew the names of 7,000 prospective jurors. From that number, the county used a "working panel" of 1,600 potential jurors selected at random from nearly 1,200 precincts in the county. The master panel for the Newton case had instead been a 900-member emergency panel created after the springtime ruling in *People v. Craig*. The new panel avoided the constitutional problem that Judge Avakian had addressed; none of the 900 panelists had been required to pass a juror intelligence test.

Next came Prof. Vizard, who analyzed the voter registration of various county districts. He noted that Oakland's highest ratio of voter registration, 83.6 percent, was in the hilly Montclair District, which had only a minute percentage of blacks. Vizard also testified that low-income blacks were often apathetic about voting. It presented no meaningful opportunity to them, since they had little, if any, political power. On

cross-examination, Jensen got the professor to admit that in South Berkeley most blacks did vote. The professor attributed this phenomenon to much higher education and income per capita compared to other black neighborhoods.

On Tuesday afternoon, Garry called his co-counsel Ed Keating to the stand. Keating had overseen a review Monday night of the jury commissioner's office records to analyze the number of potential jurors who had been excused and the reasons why. On cross-examination by Jensen, Keating conceded that almost twice as many juror forms were returned from West Oakland as undeliverable than in the county as a whole. On Wednesday, as a record heat wave continued, Panthers outside the building wisely left their leather jackets home, showing up in matching blue tee shirts instead. Inside the courtroom, Garry called Alex Hoffmann to the stand to report on his examination of juror records on Monday night. Seventy percent of potential jurors from West Oakland had been excused, while sixty percent were excused from Montclair. Reporters began to yawn—the showing of disparate treatment was hardly dramatic.

Garry continued a parade of experts, including Prof. Blauner. The bearded academic answered questions for half an hour describing the results of his research, including his work as an adviser to the California commission that investigated the 1965 Watts riot that left in its wake 34 dead, over 1,000 injured, and \$40 million in damages. Blauner addressed the problems of racism in the country and how the jury might prejudice a black man accused of killing a white police officer. Blauner found that he enjoyed sparring with Jensen on cross-examination. He fully supported Garry's position that only poor residents of the Oakland ghettos would constitute a true jury of Newton's peers and freely admitted that he himself held residual racist attitudes.

Garry also called Dr. Nevitt Sanford, one of the principal authors of *The Authoritarian Personality*. The book focused on the type of personality predisposed to convict defendants, the phenomenon the Supreme Court had been troubled by in the *Witherspoon* case. As with the other experts, Stender had prepared the outline for Garry to use. One of the key points she wanted Dr. Sanford to mention on the stand was how few people would admit to prejudice when directly questioned. This was a

major reason why the defense deemed it critical to question potential jurors individually, out of the presence of the other panelists. Reticence to admit prejudice was mentioned again by Dr. Diamond. Reporters might have noticed that he bore a strong resemblance to the then-prominent Hollywood actor, Canadian-American Raymond Massey. Dr. Diamond startled Judge Friedman by saying it was impossible to select a totally impartial jury, even with extensive questioning designed to expose latent racism. He told the judge he would need close to fifty hours alone in his clinic with each prospective juror to attempt such a task. The judge had been planning at most fifteen minutes per prospective juror. Dr. Diamond, like Prof. Blauner, admitted that he himself held residual racist attitudes, prompting Judge Friedman to ask if Dr. Diamond considered himself to be a good potential juror. Dr. Diamond said "No," leaving the judge to wonder who would.²⁹

From the point of view of the press, the star witness on Wednesday was Dr. Hans Zeisel from the University of Chicago. Many were already aware that Dr. Zeisel's seminal work on *The American Jury* had influenced the United States Supreme Court in issuing the landmark *Witherspoon* opinion. Short and balding, with a heavy Austrian accent, the expert exuded an air of authority as he lectured the judge from the witness chair when prompted by Stender's questions. Dr. Zeisel testified that white males were most likely to favor the death penalty, about fifty-five percent in his studies, followed by less than half of white women, while the percentages of black men and black women who supported it declined to the mid to low thirties. He went into other statistics his researchers had derived. Judge Friedman tried to get to the essence of Dr. Zeisel's testimony, "Are you trying to say it is your opinion a white jury is more likely to wrongfully convict a Negro?" Dr. Zeisel spread his hands to underscore his response: "It's rumored it has happened."³⁰

As he concluded his testimony, Dr. Zeisel was taken aback when the judge asked him his own personal views. Zeisel wondered if his objectivity was undercut when he honestly responded that he opposed the death penalty. Newton was pleased with Zeisel's testimony and asked Stender to thank the professor for him. Zeisel, in turn, told Stender he had been impressed with how remarkably attractive a person her client appeared.

“Not only attractive . . . courageous and intelligent,” responded Stender as she promised Zeisel reimbursement for his \$250 in travel costs.³¹ She took great pride in how Newton impressed both experts and activists with the righteousness of his cause, his apparent inner strength, and extraordinarily handsome demeanor. She likely was unsurprised when one Oakland woman who saw Newton in jail in early July compared his charisma to that of Jesus Christ or Lenin.

Rev. Jesse Jackson, the highly touted, new heir-apparent to Dr. King, wired Newton a supportive message: whether found innocent or guilty, he represented “the disenchanting and degraded” against whom “unjust men” could not “render justice.”³² The same theme had pervaded the testimony of the expert defense witnesses who had come forward to defend their conclusions that overt and subtle racism was pervasive among white jurors. The timing for seeking court permission to ask jurors an extensive list of introspective questions could not have been better. Whether from perceived heightened national interest or out of a sense of guilt, or both, national television was for the first time showcasing programs like “The History of the Negro People,” “Black Journal,” and “Of Black America,” narrated by comedian Bill Cosby. Suddenly, other prominent African-Americans were also featured commentators. Locally, since the late spring, *The San Francisco Examiner* had been running a series of articles on “Negro History in California.”

Poet Maya Angelou hosted a ten-week television program, “Black, Blues, Black,” seeking to educate white viewers on contemporary black culture and the current unrest among fellow African-Americans: “The hostility that some blacks are expressing now is just a stage we have to go through. The black person has always been pictured as either subhuman or superhuman We have to arrive at the stage where we’re just human.”³³ The distance to that goal was exemplified by a popular new show on Broadway in San Francisco’s North Beach District. Already famous for its topless go-go dancers, the neon-dominated street now featured a marquee drawing patrons to a “nude inter-racial love dance” until the police arrested the manager and a naked performer.

The point made by all of the experts Garry called to the stand was that the community as a whole was exceedingly far from treating its

black members as just “fellow humans.” In the late 1960s there even remained strong disagreement on the subject of self-identification. Almost forty percent still preferred the term “Negro.” Twenty percent favored “Colored People,” though thirty percent despised that term. Close to twenty percent had warmed to the term “Black,” but twenty-five percent considered that terminology the most distasteful. Ten percent preferred African-American and a roughly equal number found that nomenclature least appealing. Very few, however, did not care.³⁴ Garry himself had just undertaken a crash course on the subject of racism from the sociologists Stender had gathered. The professors were surprised at Garry’s own lack of sensitivity on the subject and his arrogant assumption he had little to learn. Among his long-established black clientele was an African-American doctor then serving as a member of the San Francisco Police Commission. Much to the irritation of the Oakland Police Officers Association, Garry liked to flaunt the gold star the doctor had just bestowed on him, designating his longtime friend as an honorary member of the San Francisco Police Department.

Garry was persuaded by Stender and the experts to spend more effort educating the judge on this issue since his role in the upcoming jury selection phase of the trial would be crucial. To this end, the defense team wanted to offer the affidavits Stender had obtained from additional experts back East to bolster the expert testimony Judge Friedman had just heard. Garry then took a gamble. He had not decided yet whether to call Newton as a witness at trial, but summoned Newton to the stand at this stage to testify that he was penniless. Some of the press in the audience misinterpreted the reason for Newton’s being called to testify about his lack of funds. They thought it was another ploy for delay, assuming he would seek to have court-appointed counsel, instead of Garry. But Garry had no such thought in mind. He wanted to impress on Judge Friedman that Newton could not afford to bring experts from the East Coast to the trial, hoping that the judge would then accept the declarations of the additional experts instead of requiring their live testimony.

Judge Friedman, taken by surprise, warned Newton that anything he said on the stand could be used against him at the trial and that the prosecutor might ask him questions unrelated to his financial status.

But Jensen accepted the limited purpose for which Newton had been called and focused his questions solely on Newton's finances and not on the charged crime. Secretly, Garry admired Jensen as a worthy adversary with strong notions of fair play. Jensen could be counted upon to follow "Marquis of Queensberry" rules in court—like the traditional good sportsmanship rules that governed boxing. An unapologetic street-fighter, Garry came from a different mold. He did not respect rules that interfered with his overall objective.

Newton then testified he had no savings, property, or money held in trust. The defense fund in his name was not under his control, and he did not know how much was in the fund or how it was being used. Newton elicited titters from the packed courtroom when he turned to the judge and said, "I probably could get the names if the court would permit me to be free for a couple of days."³⁵ Actually, Newton had made sure that his brother Melvin was in charge of the Newton Defense Fund, as Garry well knew. All that Garry acknowledged in court was that some \$12,000 of the defense funds had been paid to his firm to date, primarily for cost reimbursements. Jensen still objected to the admission of the expert affidavits since the authors were not available for cross-examination. Judge Friedman agreed with the prosecutor and declined to consider them.

Outside of court, much of Stender's recent work on the case had been dedicated to preparing the expert witnesses and drafting the trial motions back in the office on weekends and evenings. In court, Stender alternated between sitting next to Garry at the counsel table or just behind him in a row of seats inside the barrier separating the audience from "the well" where counsel tables were located. She could usually be seen intensely scribbling notes and sometimes passing them forward to Garry or reviewing them with him at a break. When Keating came, he took his place next to Garry at the defense table, despite his far lesser role in Newton's defense. Reporter Gilbert Moore, attending regularly, saw how Stender's dedication equaled Garry's. He described her as the streetfighter's "nervous, hard-working assistant, like her boss passionately in love with lost causes."³⁶ Moore had to have numbered among the sympathetic reporters joining Stender for lunch at the Court Lounge restaurant. She had little opportunity to express her zeal as an advocate in court.

Whenever David Wellman attended the trial, Garry impressed the Cal graduate student as an overbearing egotist who seemed largely unappreciative of Fay Stender's remarkable talents. Cooper thought so, too. Stopping by occasionally to observe the trial as she pondered her own future career path, she found the Newton case fascinating. Watching Garry's brilliant *voir dire* of the jury had opened her eyes. She thought he had probably won over the black foreman on day one. Cooper could not help but notice Stender's relegation to an insignificant public role, despite the vital motion work she performed. Stender gave Cooper the clear impression that she would like to have much more responsibility in the courtroom if she could make it happen. Had his chief collaborator been a male, it is doubtful Garry would have bounced him back and forth from the counsel table in such fashion. As it was, Garry remained oblivious to Stender's ever-increasing dissatisfaction. After the lunch recess on Wednesday, July 17, Stender addressed the court briefly on a procedural matter. She reported to Judge Friedman that the United States Attorney's office had communicated an objection to one of their experts, Dr. Hunter, being called to testify before they completed a review of a government report he had prepared. There could be privileged information, which it might wish to protect from disclosure. But since the government had not obtained a restraining order, Judge Friedman let Garry proceed with his questioning of Dr. Hunter. Stender sat back down in her role as note-taker.

When the parade of experts concluded, Judge Friedman, like Garry, felt he had just taken an advanced crash course in sociology. The defense topped off their successful day of race-bias sensitivity training by granting interviews with Newton on the tenth floor of the courthouse to all the reporters who could squeeze into the small, green interview room with Newton and his attorneys. Amazingly, sandwiched like students in a telephone booth, sixteen had done so. Newton thrived on the attention. Asked to assess Judge Friedman, Newton was blunt: he did not believe the man presiding over his capital case was "very well versed in the law." He told the gathering that Garry sought to accomplish a "revolution in the courtroom" by obtaining a nontraditional jury, ideally from his same socio-economic background and race. Newton also welcomed younger

white jurors who understood black culture in ghetto communities like West Oakland.³⁷ (Actually, Newton's lawyers likely had heard that in the relatively rare instances when two or three African-Americans had sat together on a jury in a criminal case in Alameda County, the case predictably ended in a hung jury split along racial lines.)

At every recess on the first three days, reporters rushed past the rail dividing the attorneys from onlookers to be the first to obtain quotes from the calm prosecutor and cocky defense counsel. By Thursday, Judge Friedman halted this practice. No reporters would again be allowed into "the well" where the attorneys sat during the trial breaks. On Thursday morning, Judge Friedman denied the pending defense motions. A jury of Newton's peers did not mean a jury of blacks from his neighborhood. Otherwise, a white truck driver defendant could argue that he was entitled to exclude all blacks from his jury and other ethnic defendants could make similar demands. Judge Friedman did rule, based on the United States Supreme Court decision in *Witherspoon*, that challenges for cause based on potential jurors' objections to the death penalty would be limited to those who could not set aside their personal views and consider imposing the death penalty in appropriate circumstances.

The rulings were all that the defense could realistically have hoped for. Stender's long hours preparing all the expert witnesses and briefing the issues of racism and prejudice had rendered Judge Friedman far more aware of the centrality of these issues to the defense's case. The judge would wind up allowing a substantially longer jury questioning process to weed out racists than he had originally intended. He would also bend over backwards to keep jurors opposed to capital punishment in the case who said they would consider imposing the death penalty if the specific facts warranted it. The time had come to see who would have Huey Newton's life in their hands.

11. A MINORITY OF ONE

*I who am left here as . . . passive eye
in the center of a terrible storm.*

ANNE CHRISTINE D'ADESKY

When proceedings continued after the pretrial motions were denied, Prof. Blauner surprisingly abandoned the role of disinterested expert and became a front row spectator and defense consultant for the duration of the trial. Like the other experts, Blauner had not charged for his testimony. He provided his continued consultation free as well. For a specialist in race relations with an open summer schedule, it was far too exciting an opportunity to pass up. Sitting next to Fay Stender and Alex Hoffmann, Blauner got into the habit of taking copious notes, thinking he might write a book about the racially charged case when the trial was over. The three enjoyed long lunches every day at the Court Lounge restaurant across the street from the court house. They were often joined by friendly reporters and Newton's radical Episcopalian minister, Father Earl Neil, who was sitting in on the trial with Newton's fiancée and family. Sometimes Ed Keating, who also planned to write a book about the trial, sat in, and occasionally Garry would join them for lunch as well, if he wasn't too busy working over the noontime break.

Prof. Blauner's expertise came in handy during the jury *voir dire*. Close to 160 prospective jurors would be examined under oath during that question-and-answer selection process over the next two-and-a-half weeks as the lawyers picked twelve jurors and four alternates. From the master panel of jurors, a group of up to fifty were sent to the courtroom

at one time. There, the clerk would spin a wheel to select random people from that group to sit in the jury box for *voir dire*. The very first person questioned was a Hayward dental technician named Orville Miller, who announced that he had read accounts of the killing in *The Oakland Tribune* that made Newton's guilt appear an open-and-shut case. Yet Miller believed he had since "sort of become unbiased."¹ Garry would soon get Judge Friedman to dismiss Miller for cause. The first black of the six in the first batch of potential jurors was Leroy Steveson, a retired waiter who had worked for the Southern Pacific Railroad. But the seventy-year-old was dismissed for cause after he insisted he could not consider imposing the death penalty. Garry had done his best to save Steveson from automatic elimination by asking if his views might change if someone brutally murdered his own child, to no avail.

As the days wore on, many potential jurors, including a high percentage of minorities, insisted that they could not render the death penalty under any circumstance and were then excused for cause. Stender felt that minorities who took an absolute anti-death-penalty position confirmed how racism worked. These jurors clearly believed capital punishment was so skewed in its use, they could never support it. She hoped they would not have to wind up arguing on appeal that Newton's life should be spared because skittish minorities had voluntarily removed themselves from the jury pool, thus making his conviction more likely.

When she was preparing for trial, Stender had learned that the jury commissioner questioned members of the jury panel about their views on capital punishment. She added that to her list for Garry to ask about when he spoke with potential jurors. She was very proud to have collaborated with the sociologists on nearly 300 questions designed to elicit bias, such as the panelists' views of the Black Panther Party, "fair housing," and "Black Power." The list even included the panelists' views on the final report of President Johnson's blue ribbon commission on violence: what reaction did they have to the "Kerner Report," attributing urban blight to white racism? Predictably, Jensen objected to most of the questions as irrelevant. Judge Friedman would not let Garry ask how the jurors voted on Proposition 14 (rejecting the fair housing law) and how they perceived race issues generally. The judge restricted questioning to each

juror's own state of mind or conduct on race issues. Yet, when reworded, most of the questions designed to elicit bias could still be asked. The reporters settled in for a long, slow, and tedious selection process.

After all the effort they had put into preparing the probing set of jury questions, Stender, Blauner, and Wellman (who attended the trial only sporadically) quickly grew disappointed. Garry had no intention of reading the entire list of questions to each potential juror. As an old-fashioned trial lawyer, he trusted his gut and had no patience for their scientific approach. In his experience, questioning potential jurors in *voir dire* was not just to elicit disqualifying bias. A major objective was to obtain a feel for the jurors' personalities. Garry did not want to bore the friendly jurors to death or spend more time than he felt he needed to smoke out an unwanted juror.

Dapperly dressed, Garry proceeded to woo middle-aged women jurors, and joked and tried to develop a rapport with many of the others. He could be warm and sympathetic one minute with a friendly juror and openly hostile and intimidating to the next panelist, hoping to force disqualifying responses. He put on quite a show, sometimes taking his glasses off for emphasis of a particular point. Quickly, he discovered that almost everyone had heard of the case and that some insisted they could put any preconceptions aside; that most of the white panelists had little interaction with blacks in their lives; had never heard of the blue ribbon "Kerner Report" commissioned by President Johnson; had heard of Black Power, but did not know what it meant; and had never heard the term white racism. His ego often got in the way, sacrificing the opportunity for a candid response to his desire to flaunt his skills.

Jensen, more rough-hewn in appearance and not a showman by nature, wore a suit that appeared to come off the rack too short for his long arms. The lanky prosecutor steered clear of most political questions, focusing on the specifics of the case. His approach was far more earnest and respectful of all jurors and relatively devoid of emotion. To some observers, he appeared unfeeling, but sitting at the defense counsel table every day, Keating sized Jensen up as a top-notch trial lawyer, who took his role as a champion of law and order very seriously. Jensen tried a little humor himself, but looked uncomfortable competing with

Garry in that fashion and the attempts largely fell flat. Jensen's aim in examining the jurors for bias appeared obvious—to probe anyone with anti-establishment views and anyone opposed to the death penalty in an attempt to get them dismissed for cause. Garry's strategy in selecting jurors was diametrically opposed and guided principally by intuition. Garry generally wanted to keep anyone who disfavored the death penalty, and all members of minority groups.

The first person seated as a potential juror was a black man employed as an Alameda Naval Air Station aircraft cleaner. He denied ever hearing of the Panthers or Huey Newton and vowed that he could apply the death penalty, if need be. By light questioning, Garry took a calculated risk. He wanted to create the impression that every member of a minority group would understand his client's perspective better than whites, but he knew better. Even most blacks in the Bay Area had varied reactions to the Panthers, viewing them with "a mixture of fear, embarrassment and admiration."² Other minorities often shared the fear and not the admiration. When conservative whites took the stand, Garry might probe them on any affiliation with the right-wing John Birch Society or their views on the Warren Court, as well as asking direct questions designed to elicit race bias. A registered Republican surprised Garry by anticipating a question Garry had asked many others: whether he would relocate his family if black families moved into his neighborhood. The year before, the retired Air Force supply sergeant had moved his wife and six children *into* a mostly black neighborhood in Oakland's flatlands. Garry still did not trust him.

Lowell Jensen reacted similarly to strike most potential jurors the defense favored. The Peace and Freedom Party member from Berkeley with a "Free Huey" bumper sticker on his car—who made pottery and got his news from *The Berkeley Barb*—did not stand a chance of remaining, despite his solemn promise to be impartial. Jensen also rejected the ex-wife of a Berkeley police inspector who, perhaps out of bitter personal experience, seemed too eager to point out that police were no better than anybody else. When the prosecutor used a peremptory challenge to excuse the African-American aircraft cleaner, Garry stood up and pointedly noted his race for the record. Garry would repeat that

announcement each time Jensen challenged a black person, though Garry eventually drew an admonition from Judge Friedman that both the prosecutor and defense had the same right to dismiss jurors of their choice. Everyone could see that Garry had used his own peremptory challenges primarily for jurors from the white suburbs, which Jensen had not commented upon.

Yet Garry did get a rise out of Jensen when a supermarket clerk from the unincorporated Castro Valley took the stand. In answering Jensen's questions, Wesley Kissinger had mentioned his past experience as a reserve deputy sheriff who still knew several high-ranking members of the police force. Given his turn, Garry immediately went on the attack: "We plan to show that the police instigated and plotted the incident that brought Huey Newton here." Jensen's heated objection forced Garry to rephrase the statement as a question: "Would you find it hard to believe that police would plot and instigate an incident against a defendant?" As reporters scribbled notes of the day's highlight, the clerk answered in the affirmative. Try as he might Garry could not get Kissinger disqualified by the judge for cause and had to use his thirteenth peremptory challenge.³

Despite all his efforts to eliminate jurors predisposed to reject his theory of a police conspiracy to get Newton, Garry felt strongly that the entire panel was less than satisfactory because of a pro-prosecution tilt. He had been forced to use his very last peremptory challenge after prolonged questioning of a man from the predominantly white city of Alameda, who belonged to a health club that barred Negro members. The assistant bank manager said he thought the club's "whites only" policy was wrong and that he would not be influenced in evaluating the evidence by the fact one of his handball partners was an Oakland police officer.⁴ Judge Friedman saw no reason not to take him at his word. Garry assumed that Hitler himself would lie about his racist beliefs if asked about them in a polite and respectful manner, the way judges were wont to do with jurors—"Do you have an open mind? Can you be fair?"⁵ *Life* reporter Gilbert Moore empathized with Garry's unusual burden in defending a revolutionary: "[I]f Lowell Jensen had had only twenty and Charles Garry had had *two hundred* peremptory challenges at his disposal, it still would not have been enough."⁶

If jurors seemed unsympathetic, Garry tried to force a reaction with questions such as “If the charge were made in this courtroom that white racism was responsible for most of the problems of black people, would that make you mad?” Though Garry might not elicit a knee-jerk response from the juror being addressed, other panelists would sometimes react visibly. Hearing this question, three potential jurors in the back row hissed loudly; the defense team noted their identities and made sure that none of them were selected.⁷ Some of the challenges had been easy, like the prospective juror who published a newspaper that criticized the Black Panthers, the one who was a close family friend of the District Attorney, or the man who was a local auto mechanic for the FBI. Every successful challenge for cause meant one less peremptory challenge that had to be used. Garry viewed each of his twenty challenges as if Huey’s life depended on it. It may well have.

Judge Friedman performed as hoped, applying his discretion to use great latitude to keep jurors who said that, under some circumstances, they might apply the death penalty, even though they opposed it in principle. Stender also realized that, because of the new restrictions on juror disqualification, Jensen was required to use up more than one of his valuable peremptory challenges on jurors whom he did not trust to apply the death penalty. Under prior standards the same jurors would likely have been excused by the judge for cause as persons too biased toward the defense. Moreover, by persuading the judge to permit juror questioning in far greater depth than was customary, the defense team was able to glean more information about the jurors than was ordinarily exposed.

Garry had another reason for lengthy, repetitive questioning of some jurors he perceived as potentially hostile. He was using the opportunity of *voir dire* to put all of the white panelists on the defensive about their possible latent racism and to educate all of the panelists about key, negative facts before the prosecutor had the opportunity to do so. Garry figured that if he mentioned the prosecutor’s best arguments first, they might lose their punch. So he asked potential jurors if the fact that there would be evidence of Huey Newton having a felony conviction would affect their view of his credibility. Or whether they would assume that if Huey Newton testified he would be motivated to lie because his life was

on the line. He also asked whether they would be resentful of Newton and the Panthers for referring to police officers as “pigs.”

One prospective juror, June Reed, a married secretary with three children, took offense at the derogatory Panther term for policemen—the same reaction she had to hearing “white people call colored people niggers.”⁸ She was uncomfortable that anyone carried guns for self-protection. Reed admitted that she might harbor some residual racist attitudes and that she disapproved of inter-racial marriage. Another prospective juror, Jenevie Gibbons, who was married to a fireman and was herself a factory worker, expressed no problem with the term “pigs.” She volunteered, “People used to call them ‘the fuzz’ and that didn’t bother me either.”⁹ Both eventually made it onto the jury.

As was customary, though Garry had requested otherwise, all of the potential jurors were present as the rest of the panel was interviewed. Each could absorb what the others said. The judge dismissed one man who was frightened by a rumor that the Black Panthers would seek revenge on any person who convicted Huey Newton. The man said, quite frankly, that he assumed a juror who rendered a guilty verdict would have to plan to leave town. In contrast, a white Hawaiian refused to participate because he had an inter-racial son who was unfairly blamed for neighborhood pranks. He emphatically stated, “I have seen with my own eyes how colored people are treated in California . . . So I don’t want no part of this.”¹⁰ Two blacks who were dismissed said they were friends of the Newton family or their kids went to school together, one of them pointing out how nice a kid Huey had always been.

The judge dismissed a woman who admitted that she moved out of her Oakland neighborhood after her other white neighbors left because too many black people had moved in. They had resettled in the white suburb of San Leandro. Another woman prompted Newton to laugh when she said she could not be sure of her impartiality because she sympathized with both the police and the Black Panthers. Jensen issued a peremptory challenge to excuse her from the jury. Most of those who were discharged demonstrated immense relief, jumping at the proffered dismissal slip from the court clerk and scurrying from the courtroom with a perceptible lilt in their steps.

Prof. Blauner did not always agree with Garry's approach. He shared his views frequently with Fay Stender and Alex Hoffmann and sometimes with Garry during breaks, and made suggestions for alternative wording of questions. He thought Garry asked too many directed questions that led to uninformative responses. Blauner favored open-ended questions that might reveal honest, prejudiced answers. He would have asked a juror, "Tell me what feeling Black Power brings to your mind" rather than "Black Power, does that create a revulsion in your mind?"¹¹ Anyone would be expected to say no to Garry's formulation. His critical team members soon realized that, where grounds for excusing someone for cause were not readily apparent, Garry was less interested in the actual answers to bias questions than in trying to read the body language with which the answers were delivered. Garry never expected to achieve an impartial jury. He hoped for one in which he had a few favorably disposed jurors and others intimidated from acting on their pro-prosecution bias.

Prof. Blauner thought the least racist person would not deny race prejudice, would be knowledgeable about Afro-American culture, would interact with blacks daily, and actively seek to combat discrimination. Newton had found his testimony "out of sight" and invited the highly flattered Blauner to meet him in his cell.¹² But *voir dire* was not designed to find and keep the people Bob Blauner would have considered most receptive to Huey Newton's defense. He would have kept the middle-aged woman who was the last to leave her neighborhood in Oakland for an all-white enclave in San Leandro. Her honesty had impressed him as she was excused by the judge for cause.

On Thursday of the first week, the defense filed a renewed motion to exclude Newton's prior conviction from the jury's consideration. They had just obtained the transcript from the prior assault trial in which Newton had acted as his own attorney. They pointed out to Judge Friedman that Newton had asked the court at the beginning of the prior proceeding, "If possible, I would like to have a legal adviser, but I would like to speak for myself."¹³ They argued that the judge in that case had been too quick to deny Newton legal assistance. On Friday at noon, the trial adjourned for the week. Judge Friedman said he wanted to use the afternoon to research the renewed defense motion to expunge Newton's

prior felony conviction. By then, he had issued a new ruling for the media—from now on twenty-five seats would be reserved for the local dailies, the two wire services, television and radio, with only three seats guaranteed for all other reporters, first-come, first-served. Dismayed reporters also realized that the focus of the second week promised to be more repetitive questioning of the remaining members of the jury panel. Despite Garry's feisty approach, they would be in for a fairly boring couple of weeks until jury selection was over. Seventeen jurors had been eliminated for cause out of the twenty-four questioned, leaving seven jurors tentatively chosen—subject to later rejection by either attorney using their remaining peremptory challenges.

The Oakland Post reported that the Alameda County Courthouse was not “where it was at” on Monday and Tuesday, July 22 and July 23.¹⁴ Kathleen Cleaver thought otherwise. Using a bullhorn on Monday morning, she had orchestrated the handful of Panthers and twenty or so children chanting and shouting in Swahili and English until her voice went hoarse. The small crowd on Monday dispersed by noon and no one except Kathleen showed up on Tuesday, amid rumors of a planned rally elsewhere. Kathleen was livid when her husband then told her to go to their new apartment to unpack boxes instead of attending the trial.

Complaints were registered with Judge Friedman about his decision to skew access in favor of mainstream press, leaving representatives of underground papers and other sympathetic media outside the locked courtroom. Yet, by the second week, there were more specially prepared badges for media representatives than reporters seeking access to the trial. Empty seats could be found inside the courtroom as the jury selection process wore on. By then, *Life's* Gilbert Moore was taking no chances, rising as early as 2 a.m. to become a daily fixture. He was obsessed with the absurd theatricality of the event. Moore realized the potential jurors felt otherwise: among the hundreds of mostly white, middle-class voters called to serve, “almost none of the ‘talent’ wanted to be in the show.”¹⁵ All in all, through methodical questioning by Jensen and alternately hard-hitting or playful questioning by Garry, forty-one people of the more than 150 panelists called were successfully challenged for cause because the judge agreed they demonstrated prejudice. Of those,

most admitted that they had some preconception of Newton's guilt, low regard for the Black Panthers, or high regard for police that they could not set aside. Throughout Newton remained cheerful, looking just as dapper when he wore his brown suit accompanied by a mustard-colored turtleneck as he had on day one in sharkskin gray.

One juror, a Hayward technician named Strauss, said that for the last ten months he had assumed that Newton was guilty, but believed he could set that aside and be impartial as instructed by the judge. Jensen argued that the juror should be allowed to stay since "virtually every resident of the county" had some exposure to the sensational murder.¹⁶ Garry was then permitted to probe further. The particularly impressive interchange later made its way into legal textbooks. It began when Mr. Strauss indicated that "to a certain extent" he had already formed an opinion about the case from the pretrial publicity and the fact that the officer was dead. Under further questioning, he professed to be willing to decide the case solely on the evidence presented. Garry's intuition told him otherwise. Ruling in Jensen's favor, the judge denied Garry's challenge for cause, but acceded to Garry's request to ask Mr. Strauss just a few more questions.

Q: As you sit there right now do you believe that Huey Newton shot and killed . . . Officer Frey?

A: I don't know whether he shot him or not.
That I cannot say.

The court then instructed Mr. Strauss on the presumption of innocence.

THE COURT: So, therefore, as it stands right now, do you believe he is guilty before you hear any evidence?

A: No.

Garry then questioned Mr. Strauss again, only to hear him repeat that he would apply the presumption of innocence and look solely to the evidence presented at trial. Garry remained unsatisfied that he was

getting a straight answer, so he pushed it one step further:

Q: As Huey Newton sits here next to me now, in your opinion, is he absolutely innocent?

A: Yes.

Q: But you don't believe it, do you?

A: No.

THE COURT: Challenge is allowed.¹⁷

On the issue of race prejudice, Garry still felt dissatisfied with most of those in the remaining pool whom he could not get to make disqualifying statements. He then had to consider how best to use the remainder of his twenty peremptory challenges after eliminating those with obvious ties to law enforcement, racially exclusive clubs, or conservative political causes. He followed his gut in using some of them on liberal whites who seemed to think too deeply about race issues, attributing some of the civil rights problems to black racists as well as white racists. After two weeks of questioning, Fay Stender and Bob Blauner would have accepted the jurors then impaneled, although the defense still had three of its original twenty peremptory challenges left. David Wellman could not help but notice Garry's conceit as he dismissed Stender's input and that of the sociologists. It made Wellman angry. But Garry trusted no one's instinct but his own and was still not satisfied. Moore described Garry's jury selection efforts as a man "stuck in the apple orchard with a taste only for oranges."¹⁸ Garry had continued to exhaust all of the remaining peremptories and to challenge other potential jurors for cause until he "finally accepted a jury with a few people on it I would not want to have lunch with let alone let them decide Huey's fate."¹⁹ The veteran defense lawyer later insisted that he would have eliminated "at least six of the jurors if I had had any peremptory challenges left."²⁰

Fourteen jurors, presumably favorable to the defense, had been removed by Judge Friedman for cause on Jensen's objection because they stated they rigidly opposed the death penalty and could not apply it if requested to do so. Observers doubted that all of them in fact were so opposed. Anyone listening to prior answers knew that taking such a fixed

position was a sure way off the jury panel. In the entire three-week jury selection process, Garry had not objected to a single minority, implying that race and class affiliation were at the center of the case. Garry had also used the time to remind the jury panel that reality was not like the popular “Perry Mason” television show. It was not Huey Newton’s burden to prove who killed Officer Frey and have the killer confess on the stand.

Of the twelve jurors who were finally selected on Monday July 29, there were seven women and five men. At the time, it did not fit most observers’ image of a felony jury panel, let alone one charged with considering the death penalty. Across the country, juries still looked much more like the *Twelve Angry Men* in the classic 1957 Henry Fonda movie. Though American women officially became eligible to serve on juries when they won the right to vote in 1920, state legislators had immediately responded with protective legislation, primarily by exempting women from jury duty who checked a box on the form indicating they were needed at home with their children.²¹ As a result, until the women’s movement in the 1960s women were rarely seen on juries.²² In fact, not until 1975 did the still all-male United States Supreme Court hold that women constituted such a “distinctive group” from men that laws categorically excluding women from serving on criminal juries violated the Sixth Amendment right to be tried by a jury of one’s peers.²³

Garry generally favored women jurors, but the candor of two of the women during *voir dire* had given Garry particular pause. One was June Reed, the loquacious Safeway secretary who bristled at the term “pigs.” The second was Mrs. Marian Butler, who worked in a pharmacy and was married to a stockbroker. Mrs. Butler had mentioned that her Presbyterian church in Berkeley invited representatives of the Black Panthers to speak to its parishioners only to be insulted by (expletive-laced) accusations that all white Protestants were racists. But Garry had felt obligated to use up all his peremptories on other jurors he trusted even less.

Four of the twelve jurors were minorities. One, Harvey H. Kokka, an always smiling Japanese-American, was a married Shell laboratory technician in his mid-thirties. He generally disfavored the death penalty, but promised to apply it in an extreme case. Two women had Spanish surnames, but Mary A. Gallegos was actually a Portuguese American

department store bookkeeper married to an Hispanic construction worker. Linda M. Aguirre, a Latina, worked as a junior executive secretary for a paper company in San Francisco. The third minority juror was Joseph Quintana, a well-traveled Cuban immigrant machinist with two children, who admitted to having limited English skills, but felt he could understand the testimony. This trio represented most of the non-black minorities in the entire set of prospective jurors called to the courtroom. The last nonwhite on the jury was David Harper, a middle-class married black man with six children who was the only one among twenty-two black voters called for service to make it onto the panel. The defense team assumed that Jensen would have excluded all blacks as his colleague had done the week before in Judge Phillips' courtroom, if Jensen had not been concerned about its legality.

Unlike Garry, Jensen had left five challenges unused. The panel was completed by five other Caucasian women and two Caucasian men. The women were all middle-aged, three were married, and two—landlady Mrs. Eda Prelli and airline caterer Helen Hart—were widowed mothers. The two remaining males were Ronald L. Andrews, a middle-aged, married engineer with three grown children, and Thomas R. Hofmann, Jr., an unmarried bank-trust officer, who lived with his parents in Berkeley and testified that he knew very little about the Panthers. Andrews professed to be free from racism, at least as far as he knew, and looked to be the likely choice for jury foreman.

The alternate selection took a few days more. The lawyers selected one woman, Mary Anderson, a bank secretary from Oakland, the married mother of two children, and three men. They were a twenty-six year old Berkeley surveyor, James H. Jackson; Richard L. Roberts, an Oakland aircraft maintenance technician; and Edgar A. White, a thirty-six year old salesman at a Berkeley camera shop. All four were white; one had been a student at Merritt College. Among those dismissed for cause the chief reason was again opposition to the death penalty—one woman from Berkeley announced her view that capital punishment was “legalized premeditated murder.”²⁴ When the last one had been picked, all of the jurors and alternates were sent home until the following Monday morning. Garry immediately renewed his motion that the entire panel be dismissed since it did not consist of Newton's peers. He also made a

motion for mistrial on the basis that Jensen had systematically excluded blacks as alternates. Judge Friedman denied both motions.

David Harper, the only black man seated on the jury, quickly became the subject of great speculation as to whom he might favor. He had handsome features, somewhat resembling an older, more heavy-set version of Huey Newton. Harper was a veteran of the Air Force and worked at the Bank of America as a lending officer. At night, he also taught a college accounting course. Harper wore his hair long enough to look like a modified statement—halfway between an Afro and the conservative, short cut one would expect at the time of a man in his line of work. Questioning revealed that the Bank of America also employed his wife as head of security.

During *voir dire*, Harper admitted “some reservations” about the death penalty. He said he had heard of the Panthers, but that he had not discussed the case much with anyone. He explained that his colleagues largely steered clear of the subject, just as they had pointedly refrained from talking to him following the Martin Luther King assassination a few months earlier. When asked if he harbored any feelings against the Black Panthers, he said, “Not at all.” He had never formed an opinion from media coverage that Huey Newton killed Officer Frey.²⁵ The defense team thought Jensen made a mistake in keeping Harper on the jury. But the prosecutor was privy to the bank executive’s prior service on three other jury panels, including most recently in an armed robbery prosecution. Penny Cooper had warned Fay Stender that the D.A.’s office knew how jurors who served before had voted. One could assume that Harper had demonstrated in the past his ability to vote to convict in a criminal case or he would have posed far too great a risk to impanel on the biggest case of Jensen’s career, when the veteran prosecutor still had several unused challenges at his disposal.

Harper, on occasion upon entering the courtroom, appeared to nod slightly as a greeting to Newton’s minister, Father Neil. But when Harper passed Newton at the defense table, he invariably kept his face expressionless. Harper was also sometimes observed looking fleetingly at the reporters. As he bore their intense gaze, he maintained an enigmatic expression while they searched for clues to the lone black juror’s thinking.