

Aldape: Trial Transcript
(9/82) (voir dire) (v. 3)



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CAUSE NO. 359,805

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	OF HARRIS COUNTY, TEXAS
RICARDO ALDAPE GUERRA	248TH JUDICIAL DISTRICT

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VOIR DIRE EXAMINATION
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1 SEPTEMBER 1, 1982

2 (A jury panel of six was brought into the
3 courtroom, after which the following proceedings
4 were had:)

5 THE COURT: Good morning, ladies and
6 gentlemen. My name is Henry Oncken. I am the
7 Judge of the 248th District Court which is down
8 on the fourth floor, and we are using Judge Pat
9 Lykos' courtroom, today, to do some work, and she
10 is ill today and not here, so there is another judge
11 down in my courtroom handling matters down there
12 while we pick a jury in this case.

13 This is a capital murder case and the State
14 will be asking a jury to give the Defendant the
15 verdict of capital murder, guilty of capital murder,
16 and asking the jury to return a verdict resulting
17 in the death of the individual charged with this
18 crime.

19 I want to talk to you preliminarily about
20 some things, first of all, and then I am going to
21 let the lawyers visit with you.

22 This case is alleged to have occurred on
23 July 13, 1982. The Defendant is Ricardo Aldape
24 Guerra who is the man seated right here. The lady
25 next to him is Linda Hernandez, and she is an

1 interpreter. Mr. Guerra does not speak English,
2 and we are having an interpreter here for him to
3 tell him everything that is going on in these
4 proceedings.

5 He is represented by his attorneys, Mr.
6 Candelario Elizondo and Mr. Joe Hernandez.

7 MR. HERNANDEZ: Hi.

8 MR. ELIZONDO: Good morning.

9 THE COURT: The State is represented by
10 two Assistant District Attorneys, Mr. Bob Moen, the
11 gentleman standing there, and Mr. Dick Bax, the
12 gentleman seated; and the Court Reporter is Ms.
13 Cindy Layne . She has been taking down everything
14 that is said in these proceedings.

15 Now, it is alleged that on July 13, 1982,
16 in Harris County, Texas, this Defendant intentionally
17 and knowingly caused the death of one, James D.
18 Harris, a peace officer in the lawful discharge
19 of his official duty by shooting him with a gun
20 knowing at the time that he was a police officer.

21 Just by way of what I have read to you,
22 are any of you familiar with this case?

23 (One juror raised hand.)

24 We will talk to you a little more about
25 that.

1 Let me ask you, from what you have read,
2 do you have an opinion as to the guilt or innocence
3 of this Defendant at this time, or would you be
4 able to listen to the evidence in this case and
5 decide that issue?

6 UNIDENTIFIED JUROR: I could listen to
7 the evidence.

8 THE COURT: We will talk to you in more
9 detail about that, later.

10 All right, let me tell you a few preliminary
11 things. First of all, this Defendant, as well as
12 any other defendant in a criminal case is presumed
13 at this point to be innocent.

14 It is up to the Prosecutors, the State
15 of Texas, to bring you evidence to convince you
16 beyond a reasonable doubt that this Defendant
17 committed this crime. He is presumed at this time
18 to be innocent and that presumption will remain
19 with him until such time as a jury is convinced
20 by the evidence beyond a reasonable doubt that he
21 is, in fact, guilty of the offense, if they ever do.

22 The burden of proof in a criminal case is
23 always upon the State of Texas. It is never the
24 burden of the Defendant to prove anything. The
25 State must prove it. They brought the charges,

1 and they must prove it.

2 The Defendant doesn't have to testify.

3 The defense attorneys don't have to ask any questions,
4 they don't have to put on any evidence. It is up
5 to the State to prove it.

6 I don't have any idea at this point whether
7 this Defendant is going to testify or whether there
8 will be any evidence brought to you at all for the
9 defense, but if he does not testify, we will tell
10 you in the charge when I give you the law in the
11 case, that he has the right to remain silent and
12 you are not to take that as a circumstance of his
13 guilt.

14 The State has the burden of proof beyond
15 a reasonable doubt. Now there will be a charge,
16 a written charge given to you, and what that means
17 is I will write down on a piece of paper all of
18 the law that is applicable to this particular case
19 at such time as both sides have rested, and there
20 will be terms defined for you in the charge, but
21 one term that will not be defined for you is the
22 term "beyond a reasonable doubt," because I can
23 only define for you those terms which the legislature
24 defines for me, and they do not define "beyond a
25 reasonable doubt." It means different things to

1 different people.

2 To me, it means common sense, but that is
3 not a definition and that is my own feeling about it.

4 I will also tell you in that charge that
5 the indictment is no evidence of guilt and what I
6 read to you earlier, this instrument, is the
7 indictment. It is a legal pleading by which this
8 case reaches trial at this time. It is the same
9 type of thing that you have if you've ever been
10 involved in a civil lawsuit where, maybe, your
11 automobile was hit by someone else and you received
12 a whiplash or something of that nature, you go
13 across the street and file a pleading over there
14 asking that the person who ran into your automobile
15 and caused you damages be made to pay you money.
16 It is the same principle. It is a pleading.

17 I will tell you in the charge it is not
18 evidence of guilt. It is a piece of paper on which
19 words are typed, and the charge is brought to a
20 court for trial. It is not evidence, and I want
21 you to remember that and I will tell you that again
22 in the charge if you are chosen on this jury.

23 The way a trial is conducted in this state
24 is that there are two stages to it. The first
25 stage is strictly to hear facts about an event which

1 questions, "yes," even if the evidence called for
2 a "yes" answer because you would know at that point
3 and time the Judge would have to assess the death
4 penalty?

5 A Well, I would still have to, you know, vote on that.

6 Q Assume with me now you have already found someone
7 guilty of capital murder.

8 A Uh-huh.

9 Q You and eleven other people have come back and
10 said "yes," this person is guilty of capital murder.

11 At that point in time, we go to the second
12 stage of the trial, the punishment stage. It is
13 at this stage of the trial the jury is going to
14 decide whether the man receives life or death,
15 okay, and depending upon how these questions are
16 answered, the Judge will either sentence the person
17 to death or life. Okay? If all twelve jurors
18 answer question number one "yes," and question
19 number two "yes," you know what the Judge will do:
20 sentence the Defendant to die by injection.

21 If the jury answers question one "no," or
22 question number two "no," then the Judge will have
23 to sentence the Defendant to life. In other words,
24 he will not receive the death penalty in that
25 situation.

1 Could you, after hearing all the evidence,
2 even if you believed the answers to questions one
3 and two should be "yes," after you had heard all
4 the evidence in the case, could you answer both
5 of those questions "yes" knowing then that Judge
6 Oncken, because of what your verdict would be, would
7 then sentence a Defendant to die by injection?

8 A I would have to answer the thing that was actually
9 the truth.

10 Q You see the position you would be in?

11 A Yes, sir. I sure do.

12 Q That is what I am trying to avoid.

13 Let me see if I can follow you correctly.
14 You are opposed to the death penalty? I think a
15 few moments ago you said that you could not
16 participate or be a party to the taking of another
17 person's life?

18 A No, I really wouldn't.

19 Q Okay, you know by answering those two questions
20 "yes," you would be participating in the taking of
21 another person's life. Do you understand?

22 A That is true.

23 Q Could you do that? Could you take an oath that
24 you would answer those questions "yes" if they
25 should be answered "yes"?

1 A That depends on -- if I hear all the evidence in
2 the case, I could make the decision.

3 Q Are you saying you could participate in taking
4 another person's life?

5 A I would have to hear all the evidence in the case.

6 Q I understand that. What I am trying to avoid,
7 now -- we are talking about a hypothetical situation,
8 okay? -- if you were selected to serve on this jury,
9 you would take an oath to follow the law and base
10 your verdict on the evidence. All right?

11 A That's right.

12 Q Can you imagine yourself in a situation where you
13 are back there with the eleven other jurors and
14 you have found the person guilty of capital murder
15 and you have now come to the punishment stage and
16 heard the evidence in the punishment stage and you
17 are saying to yourself, "Well, those questions
18 should be answered 'yes,' according to the evidence,
19 but I don't --", you know, could you give up your
20 feelings about the death penalty and put those
21 aside and answer those questions "yes," knowing
22 that the Judge would sentence someone to die if
23 there is a "yes" answer?

24 MR. ELIZONDO: If the evidence calls for
25 it, Judge.

1 A I think I answered that. If the person is guilty,
2 I would have to say "yes, yes."
3 Q I am not talking about whether he is guilty or
4 not guilty of capital murder. You said you would
5 be more inclined to go for a life sentence?
6 A That is true.
7 Q You see, you are the only one who can answer these
8 questions for us, because you have to look at
9 yourself in the mirror every day and decide whether
10 or not what you did was right for you. Do you
11 understand what I mean?
12 A Yes.
13 Q And again, you don't have to sit on this jury or
14 be involved in the death penalty case if that would
15 violate some of your personal and religious feelings.
16 All right?
17 A Uh-huh.
18 Q What I need to know is -- and you have told me
19 earlier -- in each case, no matter what the facts
20 of the case were, you would automatically vote
21 against the death penalty? Is that correct?
22 A Yes.
23 Q In other words, regardless of what the evidence
24 was, regardless of whether the evidence was
25 overwhelming as to questions one and two, you would

1 vote "no," to one of those questions so that the
2 Judge would impose a life sentence rather than the
3 death penalty?

4 A I presume so.

5 Q Ms. Sewing, don't get me wrong, now. I am not
6 trying to put words into your mouth.

7 A lot of times people sit there and try
8 to answer the questions by what they think we want
9 as an answer, but we want to know exactly how you
10 feel, and if you feel you could not answer those
11 questions "yes," knowing the Judge would give a
12 death penalty, that is fine. Okay?

13 A Okay.

14 Q And I believe -- and I have looked at your jury
15 information card and I see you are the type of
16 person that likes to help other people.

17 A That is true.

18 Q You drive around and see senior citizens and take
19 them to lunch, and I am sure you are a very kind
20 person to other people.

21 A I am.

22 Q I have noticed that you also, you are very involved
23 in your religion, and basically, you are someone
24 that we just don't come across that often as far
25 as willingness to help others who may be in trouble.

1 Okay?

2 Do you think with the way you feel and
3 your background and everything, you could ever
4 answer those questions "yes," knowing that a
5 person would die because of your answers?

6 A There is a possibility I could.

7 Q Can you think of a fact situation where you would
8 answer those questions "yes"? Can you think of
9 a type of case where you could answer those questions
10 "yes" knowing a person would die as a result of
11 those answers?

12 A I am sure I could, because there are some cases
13 that shouldn't be among the society we live in.

14 Q I am sorry. I didn't hear the whole thing.

15 Some cases?

16 A That shouldn't be among the society that we live in,
17 critical cases, you know.

18 Q And certainly, if you give a person a life sentence,
19 they would be part of our society at that point
20 in time, correct?

21 That is what I am trying to determine, ma'am.
22 Would you automatically vote in favor of the life
23 sentence over the death penalty because of your
24 religious and philosophical background?

25 A That's a hard question.

1 Q There are no right or wrong answers to these. I
2 am not trying to -- I am trying to pin you down,
3 because we need to know one way or the other how
4 you feel. I am having trouble understanding,
5 because on the one hand, you tell me there is no
6 case you could participate in the death penalty,
7 but on the other hand, you say you could answer
8 "yes," knowing that would result in the death
9 penalty.

10 Can you see I am having trouble?

11 A I can understand that.

12 THE COURT: Ms. Sewing, if you would, pull
13 that microphone right up to you. I am having a
14 lot of trouble hearing you.

15 A Am I doing right?

16 MR. MOEN: Doing fine. Just talk into
17 it, if you would. We will hear you, then.

18 Q (By Mr. Bax) You see what is going to happen here,
19 after we have selected twelve jurors and twelve
20 people are seated in a box similar to this one,
21 if that jury finds that person right there
22 (indicating Defendant) guilty of capital murder,
23 Mr. Moen and I will have to be before that same
24 jury asking those jurors to answer "yes," asking
25 Judge Oncken to assess the death penalty. I can't

1 make it any more clear, really, than that, and
2 we would be asking you to make a verdict causing
3 you to ask the Judge to give the death penalty to
4 that young man right there.

5 Now looking at him now, could you answer
6 those questions "yes," or would you answer one,
7 "no," to be sure he got a life sentence instead
8 of the death penalty?

9 MR. ELIZONDO: I would ask that he qualify
10 the question to "could you, if the evidence shows."

11 A Yes, if I had the evidence.

12 Q You are telling me that if the evidence were there
13 to say that number one should be "yes," and number
14 two should be "yes," you would answer those
15 questions "yes," knowing that the Judge would order
16 that he be killed by injection?

17 A Well, if the evidence stated, you know, where he
18 was wrong in the case, I would have to say "yes."

19 Q Even though a moment ago you told me you could not
20 participate in a death penalty case because of
21 your feelings?

22 A I don't believe in death.

23 Q But even though you don't believe in the death
24 penalty, you do feel you could participate in the
25 death penalty?

1 MR. FLIZONDO: If the evidence shows it,
2 Your Honor.
3 MR. FAX: I just asked if she could
4 participate. That doesn't mean give me what.
5 Q (By Mr. Fax) Could you be involved in that case
6 of case, knowing what your feelings are concerning
7 it?
8 A Yes, if the evidence showed the guilt, I could.
9 Q Are you saying --
10 A I would have to see the evidence and hear the
11 evidence before I could make a decision.
12 Q Okay, are you saying, then, if you found a person
13 guilty of capital murder, that you would
14 automatically vote for the death penalty?
15 A I would have to vote "yes" if a person is guilty,
16 after I got the evidence, but I would have to see
17 the evidence and really know the evidence, first.
18 Q Okay.
19 A . . . before I can see.
20 Q Maybe I have confused you a little bit, but I
21 think what you are telling me is: You could find
22 a person guilty of capital murder if the evidence
23 were there?
24 A Right.
25 Q You could say "yes," I believe under the evidence

1 that he killed a police officer, that he knew he
2 was a police officer and that the police officer
3 was doing his job when he killed him? You could
4 go that far and say, "Judge he is guilty of
5 capital murder."?

6 A If the evidence showed it, yes, I sure could.

7 Q You understand that -- all right, there are two
8 separate trials that we will be talking about.
9 The first trial will be that question we are
10 talking about: Did he do it?

11 If the jury says "yes, he did it," all
12 right, then we go to the second phase of the
13 trial, a totally new trial. You use the evidence
14 you have already heard plus any other evidence
15 brought to you.

16 On the second trial, though, the jury is
17 going to decide whether Judge Oncken assesses death
18 or life. All right?

19 What I want to talk to you about is the
20 second part.

21 Assume you have already found the person
22 guilty. The jurors come out and say the Defendant
23 is guilty of killing a police officer. Okay, now
24 we have to decide whether that person receives
25 life or death. Okay?

1 That is when you are asked these two
2 questions. You have already found him guilty.
3 He is not going to walk home after this is over.
4 All right? He is going to receive life or death
5 depending on how the jury answers these two
6 questions.

7 Could you participate and could you be a
8 party to the punishment phase knowing that the
9 Defendant will either receive life or death?

10 A Yes. I could participate.

11 Q And could you, at the punishment phase, answer those
12 questions "yes," if the evidence calls for it,
13 and tell Judge Oncken to assess the death penalty?

14 MR. ELIZONDO: I don't believe the jury has
15 to tell Judge Oncken anything, and I object to the
16 Prosecutor telling this juror that she will tell
17 Judge Oncken to kill this man.

18 THE COURT: Overruled.

19 You may answer the question.

20 Q (By Mr. Bax) Just for a second, Ms. Sewing, take
21 a look at the two questions and what they say.

22 The first question is whether the conduct
23 of the Defendant that caused the death of the
24 deceased was committed deliberately and with the
25 reasonable expectation that the death of the

1 deceased or another would result.

2 Would you agree with me that that question
3 calls upon the jury to look back on the facts of
4 the case, itself, and answer that question based
5 on the facts that they have already heard to
6 determine whether or not a person was, in fact,
7 guilty or not guilty?

8 A Number one?

9 Q Number one.

10 A Well, I would give an answer "yes" on number one.

11 Q So, if you found a person guilty of killing a
12 police officer, you would automatically answer
13 question number one "yes"?

14 A Yes.

15 Q On question number two: Whether there is a
16 probability the criminal would commit acts of
17 violence which would constitute a continuing
18 threat to society, if you had known a person had
19 killed a police officer, would you automatically
20 answer that question "yes"?

21 A Yes.

22 MR. ELIZONDO: If the evidence showed it,
23 Your Honor.

24 A If he continued to be a threat to society, yes.

25 Q Do you feel anyone who would go out and kill a

1 police officer would be a continuing threat to
2 society?

3 A I wouldn't know until I hear the evidence, because
4 I don't know what he actually did it for, you know.

5 Q So question number two, you would base that on the
6 evidence, but the question as to whether or not
7 he would commit acts of violence, you would base
8 that on the evidence?

9 A Yes.

10 Q The first question you would answer, if you found
11 he intentionally killed a police officer, you
12 would go ahead and answer that question "yes,"
13 automatically?

14 A Yes.

15 Q Let me ask you about one other thing: You can
16 have a situation where a person is charged with
17 killing a police officer but they have what we call
18 the lesser included offense of murder. Let's say
19 a jury believed the Defendant killed a police
20 officer, but for some reason the jury did not
21 believe the Defendant knew he was a police officer.
22 Then the jury could not find him guilty of capital
23 murder, because they didn't find the fellow knew
24 the person he killed was a police officer, but
25 they could find him guilty of murder, all right,

1 a lesser offense than capital murder.

2 If a person is guilty of murder, the
3 punishment is five to ninety-nine years or life,
4 and in addition, the jury can give him a ten
5 thousand dollar fine. Okay?

6 A Uh-huh.

7 Q If a Defendant has never been convicted before of
8 a felony offense and the jury assesses his
9 punishment at less than ten years, the jury can
10 give the Defendant probation.

11 A lot of people say, "Wait a minute, I
12 could never give someone probation for intentionally
13 killing another person. There is just no way I
14 could give probation."

15 Could you ever conceive of a situation
16 where you could consider probation for someone
17 who intentionally and knowingly takes the life of
18 another person without any justification at all?

19 A No, because he might come out and kill somebody
20 else.

21 Q So if you found a person guilty of murder, you could
22 not consider probation if he had already killed one
23 person, because he might kill someone else?

24 A Right.

25 Q How do you feel about a Defendant that doesn't

1 testify, if he just sits there and doesn't tell
2 his side of the story? Would you think he is
3 trying to hide something, perhaps?

4 A No. Some people are shy and just don't feel like
5 talking or they don't talk.

6 Q Would you like to hear both sides of the story if
7 you were sitting on a jury?

8 A I sure would.

9 Q And if you didn't hear both sides of the story,
10 would that affect the way you look at the evidence?

11 A There is always two sides to a story.

12 Q And if someone didn't tell you their side and had
13 a chance to tell you their side, would that affect
14 the way you weighed the evidence you heard from
15 the other side?

16 A Yes, depending upon both sides, balance.

17 Q Let's say we are talking about two children, okay?

18 A Yes.

19 Q And one fellow said, "Billy came to me and hit me
20 on the side of my head for no reason at all," and
21 you can see the welt mark on his face, and you go
22 to Billy and say, "Billy, what did you do?" and
23 Billy said, "I ain't talking."

24 All right, that would probably affect the
25 way you feel toward the little boy that had the

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1 first mark on his head, because a person would
2 usually say, "I didn't do that."

3 Do you follow me so far?

4 All right, so in a criminal case, after
5 you have heard all the evidence from the State and
6 they have pointed the finger and said pretty much
7 that the Defendant did it and the Defendant didn't
8 take the stand and deny it, would that sort of
9 affect your feelings about the State's case and
10 evidence in the case, saying he is probably right
11 because if he didn't do it, he would probably get
12 up there and tell us he didn't do it?

13 A Maybe he can't speak.

14 Q Assuming he can speak and there is no problem with
15 getting on the stand and speaking -- there is
16 nothing wrong, that is a natural feeling we all
17 have that that would probably affect the way we
18 would look at the evidence .

19 All right, you are shaking your head and
20 she is taking down everything we say, and she can't
21 take down a nod of the head.

22 Are you saying if the Defendant didn't
23 testify and there was no reason, physical reason
24 he couldn't testify, that would probably affect the
25 way you listen to the evidence?

1 A I beg your pardon?

2 Q In other words, you might believe the evidence that

3 you have already heard a little more because the

4 other person didn't deny it?

5 A He pleaded guilty?

6 Q No, he pleads not guilty. Okay?

7 A Not guilty.

8 Q He said, "I didn't do it" when the Judge asked

9 what his plea is. Not guilty, he says. The State

10 calls all it's witnesses, all say the Defendant

11 did it, "I saw the Defendant and saw him do it."

12 Okay, the State rests. The State has no

13 more evidence. The Judge says to the Defense:

14 "Call your first witness," and the Defense says

15 "We have no witnesses." The Defendant does not

16 testify.

17 Okay, you have told me, before, you would

18 like to hear from the Defendant, you would like

19 to hear both sides of the story to hear what his

20 version is.

21 Okay, if he didn't testify would that sort

22 of affect the way you received the evidence you have

23 already heard, or maybe give more weight to it,

24 maybe think it's stronger because you would think,

25 "Heck, if he didn't do it, I would be the first to

1 tell twelve people I didn't do it. Of course if
2 I did it, I wouldn't want to admit it to anybody."

3 Would it have that type of effect on you?

4 A Well, he might not have did it. It could have
5 been somebody else.

6 Q Okay, how do you feel about a fact that a grand
7 jury has indicted this man for capital murder?

8 A Well, I am sure they have evidence.

9 Q So at this point, even though you haven't heard
10 any of the evidence, you believe there must be
11 some evidence he is guilty?

12 A Or some reason.

13 Q Would it be fair to say at this point in time you
14 have a feeling that he probably did something,
15 or probably did something or he wouldn't be here
16 in this courtroom, today? You understand we don't
17 go out and arrest someone and sit them down and
18 say, "Go to trial," without something being there?

19 A That is true. There is a reason for him being
20 here.

21 Q So it wouldn't be fair to say, at this point in
22 time, you believe that the Defendant must have done
23 something wrong, or he wouldn't be here in the
24 courtroom with the two lawyers representing him and
25 the Judge and some D.A.s over here?

1 MR. ELIZONDO: Your Honor, the Prosecutor
2 will qualify the grand jury indictment as being
3 a vehicle for bringing the Defendant to trial.

4 MR. BAX: I am not trying to --

5 THE COURT: Objection overruled.

6 Q (By Mr. Bax) Let me ask you something: Have you
7 formed an opinion just by the fact that he's been
8 indicted by a grand jury as to the fact of whether
9 he is guilty or not guilty?

10 A They have to have some evidence to bring him in
11 from the beginning.

12 Q You would be tending to think that probably he is
13 guilty because somebody has probably already heard
14 some evidence?

15 A Yes.

16 Q Ms. Sewing, I need to just ask you one or two more
17 questions, and I won't have any more questions:
18 Getting back first of all to probation in a murder
19 case, the law says the jury can give probation in
20 certain murder cases, but you have told us
21 earlier you could not give probation in a murder
22 case.

23 Would it be fair to say that you have a
24 bias or prejudice against that portion of the law
25 that allows a jury to give probation for the offense

1 of murder?

2 A Repeat that, please, sir.

3 Q Okay. Okay. Let me give you another example.

4 We have what they call the blue laws, that say

5 on Sundays certain items can't be sold in the store.

6 Okay?

7 A Uh-huh.

8 Q I particularly don't like that law. My personal

9 opinion is I don't see why people can't buy what

10 they buy Monday through Saturday, buy that on

11 Sunday. All right?

12 A Uh-huh.

13 Q I have a bias or prejudice against that law because

14 I don't agree with it. I have to follow that law,

15 but I don't agree with it. I have a bias against

16 it.

17 You have told me you can't consider

18 probation in a murder case if someone intentionally

19 takes the life of another person without

20 justification, that you could not give probation.

21 Would it be fair to say you have a bias

22 against that law that allows a person to receive

23 probation if they have killed somebody without

24 justification?

25 MR. ELIZONDO: I object to the Prosecutor

1 using the word "justification." It should be
2 without committing murder.

3 MR. BAX: Your Honor --

4 THE COURT: Only one at a time.

5 Your objection is overruled.

6 Q (By Mr. Bax) Would that be fair to say? Bias and
7 prejudice sound like such strong words, but the
8 words I am talking about, would it be fair to say
9 that that murder case where someone has intentionally
10 taken the life of another human being without
11 justification or reason, the law that says that
12 person can receive probation if he is eligible
13 for probation, do you have a bias against that
14 law?

15 A I have no bias against it.

16 Q But you personally could never give probation for
17 murder?

18 MR. ELIZONDO: Your Honor, I am going to
19 have to object. The Prosecutor is not finishing
20 the sentence of "murder in a proper case."

21 THE COURT: If you would, just add that
22 phrase.

23 Q (By Mr. Bax) In a proper case, or any case, can
24 you think of a proper case for probation for
25 someone who has intentionally killed another

1 person?

2 A Yes, if it was in self-defense.

3 Q That is not murder. If you killed me because I
4 am coming at you with a gun and get to your gun
5 first and shoot me, you are not guilty of murder.
6 If you kill somebody in self-defense, that is
7 justified. That is okay.

8 But I am talking about a case where a
9 person kills someone with no justification, no
10 reason for it, he just outright intentionally
11 stomps out the life of another person.

12 Could you ever, in any case --

13 MR. ELIZONDO: Your Honor, I object again
14 to the Prosecutor adding the word "justification,
15 without any kind of justification." You can
16 commit murder without justification, and we would
17 object to the Prosecutor interjecting the word
18 "justification."

19 THE COURT: That will be overruled.

20 Q (By Mr. Bax) Could you ever, in a case where a
21 person intentionally killed another person -- all
22 right, intentionally means that is what they want
23 to happen, they want the person to die, and the
24 person does die, and there is no excuse for it,
25 there is no justification for it.

1 Could you ever give someone probation,
2 no matter what the facts in that case? In other
3 words, they would go out, you drive up the street,
4 you can be on probation. There is no going to
5 jail for you.

6 A My answer would be "no," because he should be
7 punished for it.

8 Q Okay. That is fine. That is the way I feel, also.
9 Okay?

10 But the law says that a person can receive
11 probation, so would you be against that portion
12 of the law that says -- and it is all right to
13 disagree with the law -- but would you have a
14 feeling against that portion of the law that allows
15 a person to receive probation for intentionally
16 killing a person without reason or justification?

17 A I guess, no.

18 Q What?

19 A No.

20 Q Did you understand my question?

21 A Yes, I understood you.

22 Q Okay, let me ask it this way: If you were on the
23 legislature -- were a legislator who made the laws,
24 all right, would you vote in favor of or against
25 the law that allowed probation for people that

1 intentionally took the lives of other people?

2 Would you be for that law or against that law?

3 A I think I would be against it.

4 Q Okay, because of your feelings that someone should
5 be punished if they intentionally --

6 A If they do wrong.

7 Q Sure, if you do wrong and take the life of another
8 person, no matter what the facts, as long as it
9 wasn't self-defense or something like that, you
10 feel a person should not receive probation in
11 those cases?

12 MR. ELIZONDO: I believe the question
13 should be consider probation, not give probation.

14 THE COURT: Sustained.

15 MR. BAX: Your Honor, we would have a
16 challenge at this time on the basis that the
17 prospective juror could not consider probation in
18 any case, participate in probation where a person
19 intentionally takes the life of another person, an
20 aspect of punishment the State has a right to
21 rely on.

22 THE COURT: I don't remember her saying
23 consider probation. I think the question was "give
24 probation."

25 Overrule the objection at this time.

1 MR. ELIZONDO: Your Honor, may I take her
2 on voir dire?

3 THE COURT: Yes, sir.

4 VOIR DIRE EXAMINATION

5 Questions by Mr. Elizondo:

6 Q Ms. Sewing, how are you doing?

7 A Fine.

8 Q My name is Candelario Elizondo. This is Joe
9 Hernandez, and this is Linda Hernandez.

10 The Prosecutor was asking you a few
11 questions a little while ago, if you could consider
12 probation in a murder case where somebody intentionally
13 and knowingly takes the life of someone else.

14 Let me give you a hypothetical example and
15 see if you could consider probation in this type
16 of case. I am not saying give it, but consider
17 it.

18 There are two elderly people and they are
19 seventy-five and seventy-six years old. The man's
20 wife is in an iron lung. She has been in an iron
21 lung for four years. The doctors say there is
22 no hope of recovery, she is going to die in an
23 iron lung, and all this time that wife who is in
24 the iron lung, she is in pain, intense pain, and
25 all this time during the four-year period of time,

1 it costs money to maintain that iron lung in a
2 hospital, and the wife tells the husband, she says,
3 "Listen, I am in a lot of pain right now. This
4 iron lung has taken all our resources, all our
5 financial resources that we have saved for over the
6 years. Why don't you just pull the plug and let
7 me die."

8 So, the husband pulls the plug and she
9 dies. The man is later prosecuted because he
10 intentionally and knowingly killed somebody, and
11 that is the law.

12 Let's assume you found him guilty of that.
13 Could you consider probation in that type of case?
14 That is murder, also.

15 A Yes, I could consider that, because that was a
16 mercy killing.

17 Q But would you agree with me, there, that he
18 intentionally and knowingly took the life of
19 somebody? She said, "Honey, pull the plug," and
20 he did.

21 Under our laws, that is murder, so let's
22 say you found him guilty of murder. Could you
23 then at that time consider probation, consider it?

24 A I could consider it.

25 MR. ELIZONDO: Objection, Your Honor.

1 I suggest she has been rehabilitated.

2 EXAMINATION (continued)

3 Questions by Mr. Bax:

4 Q Could you even find that person guilty of murder?

5 A I don't know what you would call it guilty of,
6 but that would come under a mercy killing.

7 Q That is what I am asking you. Would you feel like
8 perhaps a mercy killing is not even a murder, that
9 a person shouldn't be found guilty in that situation?

10 A A mercy killing should have probation.

11 Q Could you find that man guilty of killing his wife?

12 A He did it, all right.

13 Q I didn't hear you.

14 A I said he is guilty, all right, but I still would
15 give him probation, because he was a mercy killer.

16 MR. BAX: Pass the juror, Your Honor.

17 EXAMINATION

18 Questions by Mr. Elizondo:

19 Q Hello, Ms. Sewing. How are you doing?

20 I am going to ask you a few questions.
21 Just relax. They are not very many, but I want
22 to briefly run over some of the facts -- I am
23 sorry -- facts during voir dire. I can't talk
24 to you about the facts in this case.

25 The Defendant is charged with capital

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1 murder. This case, as in all cases in Texas, all
2 criminal cases, the State must prove to you and
3 all other jurors beyond a reasonable doubt that
4 on a particular day in Harris County, Texas, this
5 Defendant shot and killed a police officer in
6 the lawful discharge of this official duty knowing
7 at the time the man was a police officer.

8 MR. BAX: We will pass, Your Honor.

9 The State would excuse this juror, Your
10 Honor.

11 THE COURT: Ms. Sewing, thank you very
12 much.

13 We appreciate your coming. You may go home.

14 MS. SEWING: Oh, thank you. I am going to
15 work with my senior citizens.

16 R. A. BAME,
17 called as a prospective juror, answered the
18 questions propounded to him as follows:

19 THE COURT: How do you pronounce your
20 name, sir?

21 MR. BAME: Bame.

22 THE COURT: Just relax and they are going
23 to ask you a few questions and we will move right
24 along.

25 MR. MOEN: May I proceed, Your Honor?

1 THE COURT: Yes, sir.

2 EXAMINATION

3 Questions by Mr. Moen:

4 Q Mr. Bame, my name is Bob Moen. I am with the
5 District Attorney's office in Harris County, Texas.
6 Seated over here is Dick Bax, also with the
7 District Attorney's office. Together, Mr. Bax
8 and myself will be representing the District
9 Attorney's office and the family of J. D. Harris
10 and the State of Texas, styled the State of Texas
11 vs. Ricardo Aldape Guerra, and it is alleged that
12 on July 13th he caused the death of a police
13 officer by the name of J. D. Harris who was acting
14 as a police officer at the time of this death,
15 by shooting him with a gun.

16 Let me tell you a little bit about the
17 facts, or as much as I can.

18 Although I cannot go into the facts, I
19 can discuss some of the facts to see if you either
20 remember hearing or reading anything about the
21 offense, itself.

22 It is alleged it took place on the corner
23 of Edgewood and Walker Streets, and it was on the
24 east side of town, near Harrisburg.

25 It is alleged another man was killed in

1 the presence of his son and daughter just down
2 the street from where the officer was shot, and
3 another officer was shot about an hour and a half
4 or an hour and forty-five minutes later, shot
5 five times during the arrest that took place.

6 With that brief description of the facts,
7 do you remember either having heard anything or
8 read anything about this case at all?

9 A No. The only thing I remember is J. D. Harris,
10 his name. That is about all I remember.

11 Q The only reason I even bring it up in the first
12 place is that the law requires us to be careful
13 when we select jurors to be sure no juror has
14 formed an opinion about the guilt or innocence
15 of the man on trial based on anything from the
16 radio, television, or newspapers.

17 And I take it, based on what you may have
18 heard or read, you haven't formed any opinion one
19 way or the other?

20 A That's correct.

21 Q Okay, the Defendant is seated at the end of the
22 counsel table. He is represented by two attorneys,
23 Mr. Candelario Elizondo and Mr. Joe Hernandez.
24 They will be representing Mr. Guerra in this case.
25 They will be his defense in this case.

1 Let me explain, in this type of case, like
2 the Judge mentioned earlier to you, when he talked
3 to you, there are two possible punishments the
4 Defendant can receive. The jury will decide
5 whether or not he should receive a life sentence
6 in the Texas Department of Corrections or whether
7 he should receive the punishment of a death
8 sentence, and the Judge asks you to read the two
9 questions.

10 What we do at this portion of the trial,
11 is the law allows us the opportunity to visit with
12 the jurors informally to find out how they feel
13 and what their opinions are concerning various
14 aspects of the law that will come up during the
15 course of the trial, and also we try to explain to
16 the juror exactly what will be required of him
17 by their verdict, so as to see if they have any
18 disagreement.

19 So, I will encourage you, if you have any
20 questions at any time about anything we are going
21 to talk about in the next thirty minutes, or if
22 you have disagreements, please don't hesitate to
23 speak up and let us know so we can clear it up.

24 The law doesn't require any prospective
25 juror to sit on a capital murder case where the

1 possible punishment might violate their moral
2 scruples, religious beliefs, or philosophies
3 they have held all of their lives.

4 With that little prelude in mind, can you
5 tell me what your feelings or opinions are
6 concerning capital punishment, a person receiving
7 the death penalty for a crime?

8 A I would almost have to hear the evidence. I guess
9 I could be swayed one way or the other, but I
10 need to know -- I could go either way, I guess.

11 Q I take it from what you tell me you don't have
12 conscientious, religious or moral scruples to the
13 death penalty, per se?

14 A No.

15 Q That would keep you from being able to serve on
16 a capital murder jury panel?

17 A No.

18 Q Is that pretty much the way you have felt all your
19 life, or did you at one time oppose the death
20 penalty, and by discussions reach a different
21 opinion?

22 A No, I have been that way most of my life.

23 Q Okay, let me explain to you a couple of things:
24 First of all, not all murders that take place are
25 punished as capital murders. A person who commits

1 the offense of murder, the punishment range for
2 that crime is five to ninety-nine years or life in
3 the Texas Department of Corrections.

4 Our legislature has said that if a person
5 commits murder in the course of certain other
6 felonies, or murders a particular class of
7 individual, then that person is going to have to
8 answer to a jury if he is found guilty, and the
9 jury is going to have to decide if he receives
10 a life sentence in the Texas Department of
11 Corrections or the death penalty.

12 Now they have said that is going to be
13 like the case where a man commits a burglary and
14 kills the manager or owner, robs someone in the
15 home and there is somebody there and he kills them
16 in that crime, the rapist kills his rape victim,
17 the kidnapper kills the kidnap victim, the arsonist,
18 someone sets a fire and kills someone, the murder
19 of a police officer or fireman during his or her
20 official duties, murder for hire is another capital
21 murder, and finally two other types of capital
22 murder: If someone is confined in a penal
23 institution and during the course of escaping they
24 murder someone or someone is confined in a
25 penal institution during an escape or attempted

1 escape and they murder an employee of the
2 institution, whoever it might be, cafeteria worker
3 or guard or whoever might be assigned to a medical
4 staff, but during the course of confinement or
5 escape the convict kills one of those employees,
6 or murder for hire, the legislature says those
7 are murders and those alone are going to devise
8 capital murders. The other murders, no matter how
9 horrible, fall within this different range of
10 punishment.

11 Do you follow me so far?

12 Okay, the way a person receives the one
13 of two possible punishments he can receive if he
14 is found guilty of the offense of capital murder
15 is by the jurors' answers to those two questions
16 there on your left.

17 You see, the jury doesn't go back on a
18 capital murder case after they have found someone
19 guilty of a capital murder and say, "Your Honor,
20 we have discussed it, and we are going to find
21 this man guilty and give him a life or death
22 sentence." Instead, the jury says, "We will take
23 back all the evidence and decide what those answers
24 should be."

25 Nobody is trying to hide anything, and I

1 will tell you right up front, if both of those
2 answers are answered yes, it is an automatic
3 death penalty. If there are two "no" answers,
4 the Defendant receives a life sentence rather than
5 the death penalty.

6 Do you follow me so far?

7 A Yes.

8 Q Now the way the trial works, in the first stage
9 of the trial, all you hear is testimony concerning
10 whether or not the man is guilty or not guilty.

11 The second phase of the trial, the law
12 allows Mr. Bax and myself to present evidence about
13 the man on trial. What kind of person is he? Has
14 he committed any other crimes of violence? Does he
15 have any prior convictions?

16 Any other information, at that time, can
17 be presented to the jury in addition to what they
18 have already heard, to help them decide what their
19 answers to questions one and two ought to be.

20 Now what I would like you to do, if you
21 didn't earlier have a chance to read those questions,
22 I would like you to read them to yourself quickly
23 and I will go over some of the language with you.
24 Okay?

25 Let me direct your attention to the first

1 question, to start off with. That first question,
2 I consider to be a rather straightforward question.
3 It asks you, after you have found someone guilty
4 of the offense of capital murder, to then make a
5 determination whether or not that person's conduct
6 that caused the death of the deceased was committed
7 deliberately and was it done with the reasonable
8 expectation that the deceased would die. It is
9 a fairly straightforward question.

10 You found the man guilty of knowingly
11 committing capital murder, and you are called upon
12 to decide whether his conduct was done deliberately
13 and with the reasonable expectation the man would
14 die.

15 I think that second question is a little
16 more difficult because it asks you to make a
17 prediction about the type of person the man on
18 trial is. The second question asks you to make
19 a determination as to whether there is a probability
20 that the Defendant is the type of person that would
21 commit criminal acts of violence that would
22 constitute continual threats to society.

23 I would like to point out, and I think you
24 can see that certain words are underlined.

25 Let me direct your attention to the word

1 "probability." The legislature drew these up,
2 said these are the questions that the jurors are
3 going to have to answer on capital murder cases,
4 which is fine, but they didn't give me a definition
5 of "this is how the legislature last defined
6 probability." They didn't do that.

7 All I can tell you is the law will require
8 of you and the legislatures, themselves, will
9 require you to use "probability," and I take
10 it from your information form and from eyeballing
11 what you have, you are a family man, have been in
12 the service, and you have your own working
13 definition of the word probability.

14 That is what I will ask you to use if you
15 are selected for the jury panel. Okay?

16 Let me direct your attention to that phrase
17 "criminal acts of violence." Before you or any
18 other members of the jury can answer the question
19 "yes," you don't have to believe, nor would any
20 Defendant have to prove to you he would commit
21 certain kinds of criminal violence.

22 You don't have to believe in the future
23 he would go out and commit future murders, rapes,
24 or similar criminal acts of violence. The only
25 thing you would have to find is is there a

1 probability the Defendant is the type of person
2 who would engage in that type of conduct, and
3 would that type of conduct constitute a threat
4 to society.

5 That gets me to the last word, which is
6 society, and you will once again have to use your
7 own working definition for that word.

8 The only thing I want to touch base on,
9 is would you agree, disagree, and once again, I
10 don't care what position you take -- but would
11 you disagree with me or agree with me that the
12 prison system, although it is an unsavory part of
13 our society, nevertheless is a part of our society
14 where we incarcerate parts of our society which
15 don't fit in with the general population?

16 A I agree.

17 Q Okay, the only thing I would like to point out
18 to you, let me go back to question one, quickly,
19 and ask you to look at that, that word "deliberately."
20 You will have to make a determination about the
21 Defendant's conduct, whether his conduct was
22 deliberate, in answering the first question, okay,
23 if he is found guilty.

24 The only thing I would like to discuss with
25 you about question one is that that would depend

1 upon the jurors' feelings based on the evidence
2 they heard. Certainly, the jury could answer both
3 questions "yes" just on the facts of the case,
4 alone, and the case that comes immediately to mind
5 as being a classic example of that point is the
6 Ronald Clark O'Brian case, which I don't know if
7 you are familiar with or not, but it was the
8 man who murdered his own children by giving them
9 poisoned candy.

10 A In Pasadena.

11 Q That is the case where the jury didn't need any
12 information other than the case, itself, in
13 determining what kind of person that man was, and
14 whether his conduct was deliberate in causing
15 the death of one of his children and attempting to
16 cause the death of another.

17 The law does allow Mr. Bax and myself to
18 present other evidence to the jury, as well, but
19 you will be called upon in regards to the first
20 question to make a determination as to the man's
21 conduct, and like I say, the answer to that
22 question is not automatically "yes," just because
23 a man has been found guilty. It depends on how
24 a crime is committed as to what your answer ought
25 to be.

1 Now, is there any reason now that we have
2 had a chance to go over questions one and two, you
3 could not answer the questions just because of
4 the way they are worded?

5 I am not asking about evidence, but is
6 there anything about the wording of the questions
7 that would make you feel it would make it
8 impossible?

9 A I think it's pretty straightforward.

10 Q Do you have any questions of me? I have been doing
11 most of the talking, but did you have questions of
12 me as far as number one or two about anything we
13 have talked about?

14 A Not so far.

15 Q Let me explain to you what you would be required
16 to do as a juror on a capital murder case as a
17 part of your jury service.

18 The Judge will charge you the jurors must
19 do certain things during the course of their
20 deliberations. He will tell you first off, if
21 the Defendant doesn't testify, you are not to
22 consider the Defendant's failure to testify as
23 any evidence or circumstance of his guilt. In
24 other words, you don't base your verdict on what
25 you haven't heard. Instead, you base your verdict

1 on what you have heard from the witness stand,
2 rather than what you have not heard.

3 A trial, a criminal trial -- I don't know
4 if you have ever served on one before.

5 A No.

6 Q A child custody case. That would be a civil
7 matter.

8 A criminal trial is open to both sides.
9 Both sides can subpoena any witnesses they want,
10 come to the courthouse to testify. It is not a
11 closed hearing. Both sides have the option to
12 do this. They can call whoever they want, really,
13 to the witness stand in an effort to prove whatever
14 they hope to prove from the testimony.

15 The only difference is Mr. Bax and I have
16 the burden of proving to you beyond a reasonable
17 doubt -- that is the test -- before you can return
18 a verdict of guilty.

19 The Defendant doesn't have to prove
20 anything. In some European countries, the Defendant
21 has to prove his innocence, but I think you know
22 that is not the way our system works; so if a
23 Defendant chooses, for whatever reason, to remain
24 totally silent and his lawyers, for whatever reason,
25 strategy, or whatever, don't even have to cross

1 examine witnesses if they don't want to.

2 But I anticipate they will, that they will
3 subject Mr. Bax and my witnesses to vigorous cross
4 examination. But, the Defendant does not have to
5 testify, and if he doesn't testify, the Judge will
6 tell you you are not to consider that as evidence
7 of guilt, and if he does get on the witness stand
8 to testify, you will judge him like any other
9 witness.

10 The Judge will also tell you the Defendant,
11 as he sits in the courtroom now, has a presumption
12 of innocence. That is your second obligation,
13 if you would, as a juror: You must, as a juror,
14 presume the Defendant to be innocent.

15 There is a difference between presuming
16 innocence and someone who is innocent. Just because
17 there is a legal presumption a person is innocent
18 doesn't mean he is. The person can be just as
19 guilty the day he commits a crime and is caught in
20 the act by the police as the day he comes to the
21 trial in the courthouse, the day he's got to
22 answer up to the jury; but the law says people who
23 don't know anything about the crime at all, haven't
24 formed an opinion about whether a man is guilty
25 or not guilty, should presume him innocent, and

1 then decide based on the evidence they have heard
2 in the courtroom, whether or not he is guilty or
3 not guilty.

4 Do you follow me on that?

5 A Uh-huh.

6 Q Do you feel like you would be able to accord the
7 Defendant that right?

8 A Yes.

9 Q Okay. The Judge will also charge you -- and this
10 is your third obligation as a juror -- he will
11 charge you with regards to the grand jury indictment.
12 He will tell you that is just a piece of paper,
13 a formality, the way we start this trial, and you
14 are not to consider the grand jury indictment as
15 any evidence whatsoever of any kind. Instead, you
16 look once again to what you heard from the witness
17 stand and you will not find somebody guilty or
18 not guilty on the indictment.

19 Do you follow that and feel you will be
20 able to abide by that in regards to the indictment?

21 A Yes, sir.

22 Q The Judge will also charge you that we have the
23 burden of proof, "we" being Mr. Bax and myself,
24 to prove the Defendant's guilt beyond a reasonable
25 doubt before you, as a juror, can return a verdict

1 of guilty. You must believe beyond a reasonable
2 doubt.

3 I think the Judge mentioned earlier, and
4 I want to mention it, again: There is no definition
5 of the phrase "beyond a reasonable doubt" and I
6 think the reason for that is it is hard to get
7 two lawyers to agree to anything. It is almost
8 impossible to get many lawyers to agree to what
9 beyond a reasonable doubt means.

10 I can tell you beyond a reasonable doubt
11 does not mean beyond all, any, or beyond a shadow
12 of a doubt. Those are the phrases we hear often
13 on lawyer shows. Why is that? Well, people
14 who have formed an opinion about a particular
15 criminal case, based on what they have heard
16 or read, people who are witnesses, cannot be
17 jurors. Only people who don't know basically about
18 a criminal offense a person is charged with can
19 serve as jurors, and therefore, the test is not
20 to prove to people who know absolutely nothing about
21 a case and are hearing it only in the courtroom,
22 to prove to those people beyond any or a shadow
23 of a doubt. It is to prove to them beyond a
24 reasonable doubt.

25 I think any or beyond a shadow of a doubt

1 would be a proper test if you were trying the case
2 to twelve witnesses to the crime, but that is not
3 the way the system works. The test is beyond a
4 reasonable doubt, rather than beyond any doubt or
5 beyond a shadow of a doubt. Do you understand
6 that?

7 The burden of proof rests on Mr. Bax and
8 myself. You would have to believe Mr. Bax and I
9 had proved it to you beyond a reasonable doubt.
10 Okay?

11 A Yes.

12 Q I don't think I mentioned this, so let me mention
13 it now.

14 Before questions one and two can be
15 answered "yes" by the jury, all jurors have to
16 unanimously agree that is what their answer should
17 be. It takes all twelve jurors in agreement before
18 a question can be answered "yes," but only ten
19 jurors have to agree to answer a question "no."

20 There is a slight distinction there, a
21 two-juror distinction. It takes ten jurors to
22 answer a question "no," and all twelve to answer
23 a question "yes."

24 Do you have any questions so far?

25 A No.

1 Q Let me talk to you a little bit about judging the
2 credibility of the witnesses, and this is your
3 last obligation as a juror, if you would.

4 When you judge the credibility of a witness --
5 I don't know if I said credibility of a juror, I
6 think I did -- but when you judge the credibility
7 of a witness, you have the right, if you would,
8 or opportunity as a juror, to believe everything
9 a witness has told you under oath or disbelieve
10 everything a witness has told you under oath.

11 Doesn't that sound crazy to think there are
12 some people in the world who would get on a stand
13 and take an oath to tell the truth and do the
14 opposite and in fact, violate that oath and tell
15 an untruth? It is a fact of life and happens
16 every day down here in the courthouse, and I think
17 that is why the obligation falls on the jurors to
18 decide, when they listen to the evidence, whether
19 or not they are going to believe that person,
20 and what bias and prejudice that witness has and
21 what he has to gain by testifying the way he is.
22 Those are all questions the jurors ask themselves
23 in their discussions about them, even though that
24 witness has testified under oath.

25 Do you follow me on that?

1 Now the only thing the Judge will tell
2 you in that regard: You are not to give the witness
3 more or less belief because of a witness' job.

4 The law does not recognize any person, I don't care
5 if it's our favorite minister from the church we
6 attend, the law doesn't recognize a person as
7 being an automatic truth-teller because it is his
8 job, and it does not recognize anyone as being
9 an automatic liar, as well. That is for the jury
10 to determine.

11 Do you follow me on that obligation?

12 A Yes.

13 Q Do you believe you would be able to perform that
14 task, as well, as a juror?

15 A Yes.

16 Q I know what I want to talk to you about, and I
17 would rather give you an example. Let me talk
18 about it first, and I will give you an example of
19 what I am talking about.

20 The offense of capital murder is comprised
21 of two elements. In this case, not only do you
22 have to believe -- before you could say by your
23 verdict "guilty of capital murder," you would have
24 to believe that the man on trial, not only did he
25 kill J. D. Harris, but at the time J. D. Harris

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1 was killed, he was in fact a police officer. If
2 you believe that he was responsible, the Defendant
3 was responsible for the death of J. D. Harris but
4 at the time of J. D. Harris' death, he did not
5 know he was a police officer, then your proper
6 verdict in that case would be to say "guilty of
7 the offense, lesser included offense of murder,"
8 rather than capital murder.

9 Do you follow me on that distinction?

10 A Would you say that again?

11 Q Let me give you an example of what I am talking
12 about. I think it will help to explain what I
13 am trying to drive at or get at.

14 Imagine -- and let's use a facetious
15 hypothetical -- imagine Jack the Ripper is on trial
16 for murder. He has abducted and raped, let's say
17 sixteen or seventeen women, and after he raped
18 those women or during the course of raping them,
19 he took their lives. That is capital murder:
20 rape and murder. We talked about that earlier as
21 being one of the offenses our legislature says
22 is capital murder.

23 Let's say during the course of trial, Jack's
24 trial, he got on the stand and told the jury, even
25 though the jury had heard a ton of testimony to the

1 effect that sexual intercourse had taken place and
2 the women were sexually molested, let's say Jack
3 gets on the stand and says I killed those women,
4 but I didn't have sexual intercourse. I just
5 killed them.

6 Because Jack had testified to that, even
7 if there was not a single soul on the jury panel
8 who believed it, nonetheless, the jury would have
9 to consider, because Jack had said he didn't rape
10 those women, the Judge would have to submit a
11 charge to the jury on murder, rather than capital
12 murder and let the jury decide based on the facts
13 they had whether Jack was guilty of capital murder
14 or murder.

15 Do you see what I am trying to drive at?

16 A Yes.

17 Q You see, every offense of capital murder includes
18 a lesser offense of murder. Sometimes a Judge
19 has a charge with the lesser included offense of
20 murder rather than capital murder, because the
21 evidence raises that question for the jury.

22 The Judge doesn't make a determination as
23 to whether he believes the source that information
24 comes from. That is his obligation as a referee,
25 to submit those charges to the jury. It doesn't

1 make any difference in anyone believing anything
2 Jack said, even if you tried to keep from laughing
3 while he was on the stand, the Judge would still
4 have to charge the jury on the offense of murder
5 for the jury to have to decide. That is the job
6 of the Judge.

7 He submits legal questions to the jury,
8 and regardless of the source or how believable
9 the source, if they raise an issue for the jury's
10 deliberation, they have to charge the jury on that.

11 Do you understand that?

12 A Yes.

13 Q The range of punishment for the offense of murder
14 is different from the range of punishment for the
15 offense of capital murder. The person who is found
16 guilty of the offense of murder runs the risk of
17 being punished from anywhere from five to ninety-
18 nine years or life in the Texas Department of
19 Corrections by the jury, and in addition, the jury
20 can recommend, if they agree on a term of years of
21 ten years or less being the punishment, the jury
22 can recommend to the Court that the Defendant be
23 given probation, even though they found him guilty
24 of the offense of murder.

25 Now that I have explained that, let me give

1 you an example that I hope will tie everything in
2 together for you.

3 We talked about the types of murder so
4 far as being capital murder, which included murder
5 for hire, murder to kill for money.

6 Let me give you an example. Imagine a
7 situation, if you would, where a man and his wife
8 have been married for a number of years, thirty
9 or so years and they are both in their seventies.
10 This lady finds her husband in the hospital after
11 a lengthy illness that they have shared together,
12 and it's been diagnosed as a terminal illness. He
13 has no hopes of recovering, whatsoever. It is just
14 a question of time. Their resources have been
15 dwindling fast and the cost of medical expenses
16 being as they are, he realizes, and both realize,
17 the resources they have put aside to enjoy the
18 last years of their lives, in a careful fashion,
19 will be gone, and they talk about it, he and she,
20 and they reach a decision that rather than linger
21 on, he asks her, and he abides by her request, to
22 go ahead and disconnect him from the life-supporting
23 equipment when no one is around, and he passed.
24 She does that, she does that, and disconnects the
25 life-supporting equipment and he dies.

1 Under our definition of a murder, that is
2 a murder. To knowingly and intentionally participate
3 in the taking of another person's life is a murder.

4 Let's say some of the relatives are
5 terribly upset by the tragedy. They are able to
6 come down and convince the grand jury that the
7 reason she did that was not because of the pain
8 her husband was suffering or that their resources
9 were dwindling fast, but because she owned property
10 and now that he has passed she will be able to
11 sell that property and realize some money, perhaps
12 a substantial sum of money. They are able to
13 convince a grand jury of that and she is indicted
14 for capital murder, murder for hire.

15 The case goes to a jury and they say that
16 is the most preposterous hypothetical. The only
17 thing here is more in the definition of an action
18 of love, and the jury rejects the allegations that
19 it was a capital murder, but technically, they
20 will follow the oath of jurors and find her guilty
21 of murder because she did assist in taking her
22 husband's life, and then it falls, in the hypothetical,
23 into deciding what this lady's punishment ought
24 to be, whether or not she ought to be sent to the
25 penitentiary, and they decide on a term of years

1 less than ten and recommend probation.

2 What I hope we have done by giving this
3 hypothetical we have talked about is to explain to
4 you how it is possible for someone to be charged
5 with capital murder and the jury to decide that
6 person is not guilty of capital murder but decide
7 they are guilty of a lesser included offense of
8 murder and arrive at a probated sentence.

9 I hope I have managed to fit everything
10 we have talked about together where it makes some
11 type of sense.

12 A Uh-huh.

13 Q And the Judge would submit that lesser included
14 charge of murder, including the testimony that was
15 heard during the course of the trial and the jury
16 would decide.

17 I take it you understand what I wanted to
18 ultimately ask you, after I got through with that
19 example, is in a proper case if you were on a jury
20 that had found someone guilty of murder, do you
21 feel you are the type of person who would be able
22 to consider the question of probation if you felt
23 it was a proper case after you heard all the facts?

24 A No, I don't think I could.

25 Q You don't feel like there is any case you can think

1 of where you would be able to consider probation . . .
2 A No.
3 Q . . . of someone you found guilty of murder?
4 A No.
5 Q Even in the example I have given you, in that case?
6 A In that hypothetical case I could, yes.
7 Q That is the reason I gave it. I don't quarrel
8 with what you are saying. I find it difficult
9 myself, to sit here and think of hypothetical
10 examples where I would give probation to a person
11 that took another's life and I didn't want to hit
12 you with a wet rag in the face and say, "Mr. Bame,
13 give me an example if you can where you would give
14 someone probation for someone who's committed the
15 offense of murder." I was trying to suggest to you
16 an example that might be a proper case for
17 probation.
18 A Uh-huh.
19 Q I could perhaps think of another example where a
20 man might come home and find his house on fire, he
21 puts out the fire and there are his wife and
22 daughter and the wife is dead and the daughter is
23 in the process of dying, and she says, "Joe Blow
24 down the block did it," and she expires and dies
25 at the house. He grabs his pistol, goes to Joe

1 Blow's house, and on the way down there -- he is
2 mad as hell like anybody would be. Here is his
3 wife and child and they have been sexually abused
4 and killed and the house set on fire to keep any
5 evidence from being discovered and he grabs his
6 pistol to find out what this is about and his
7 daughter has said, "Joe Blow did this to us,"
8 and on the way to Joe Blow's house he says, "There
9 is not a single witness to this." Let's say he
10 just takes things in his own hands. Joe Blow comes
11 to the door and he says, "I want to talk to you
12 about my wife and child," and Joe Blow says,
13 "What about it?" and he fires one time and kills
14 Joe Blow. Technically, he's committed murder.

15 It might be hard to find a jury that would
16 convict him, but technically, he is guilty of
17 murder. That might be another case. If they
18 believed all the facts and Joe Blow was the one
19 who had done that to his wife and daughter, it
20 might be shown he's done everyone a favor by doing
21 in Joe Blow even though he committed the offense
22 of murder.

23 There might be other examples. The only
24 thing I wanted to ultimately ask you is this: If,
25 after you heard the facts in a murder case, a case

1 where you have found someone guilty of the offense
2 of murder, if you felt like it was a proper case
3 for a recommendation for probation to the Court,
4 do you feel you would be able to do such a thing
5 if you felt it was proper, after you heard all
6 the facts?

7 A I guess it is possible.

8 Q I am just asking you to keep an open mind on it.

9 A Yes.

10 Q There are so many different fact situations. The
11 phrase "murder" is such a horrible phrase. It
12 ought to be. It is one that makes all of us
13 repel when we hear it, but there are many types
14 of crimes that fit within that definition of murder,
15 and when a jury hears them and decides, "Well,
16 based on everything I have heard, it might still
17 be a proper case for probation," depending upon
18 whether the jury thinks it's proper.

19 It seems like there was something else
20 I wanted to talk to you about, but I can't think of
21 it right now.

22 Let me ask you some questions real quickly
23 about your personal history.

24 I see that your oldest daughter, Susan has
25 some career in psychology, and I can't make out

1 the last word.

2 A Yes. She is the supervisor of a Catholic adoption
3 agency here in Houston.

4 Q Where is Mike a student at?

5 A The University of Texas.

6 Q And before you came to Houston, you were pretty
7 much -- looks like a native Texan? Abilene,
8 San Antonio and Amarillo?

9 A Yes.

10 Q When you were in the service in '43 through '45,
11 were you stationed overseas at all?

12 A Yes.

13 Q Where were you stationed at, please?

14 A Atlanta and England, and then I went to France
15 and Germany.

16 Q Were you a pilot or were you stationed aboard --

17 A I was a tail gunner.

18 Q What type of plane were you in?

19 A B-26.

20 Q Did you receive any commendations or distinguished
21 service awards for your service?

22 A I got the -- no, I guess not -- it's one that after
23 you fly five missions you get a medal of some kind,
24 but it's really nothing.

25 Q Has pharmacy been your occupation the majority of

1 your adult life?

2 A Yes. Yes, it has.

3 Q Let me talk with Mr. Bax just a second.

4 A Okay.

5 Q You know what I wanted to -- and he brought up
6 a good point, Mr. Bax just did -- let me cover
7 question one just a second.

8 The answers to question one are not
9 automatically "yes." Let me give you an example of
10 explaining why the answer to question one is
11 not automatically "yes," when you have given the
12 answer of guilty to the guilt or innocence phase.

13 Our law is that parties to a crime are
14 equally responsible. People who conspire together
15 to commit a crime ought to be responsible for the
16 crime they commit.

17 Let's say by way of explanation -- let me
18 give you a hypothetical where, let's say an old
19 ex-convict who's been around gets a seventeen year
20 old kid to go into a convenience store with him
21 and to hijack them. He talks the seventeen year
22 old, with no prior record, of going to a convenience
23 store, and this boy is nervous, extremely nervous,
24 and the convict gives him a gun he thinks he ought
25 to use, gives him a loaded gun to go in the store

1 with him and the convict goes in with his weapon,
2 and let's say the boy even talks with the convict
3 and says, "I don't like the idea," and the convict
4 says, "Don't worry about it," and they go into
5 the store and he says, "Give me all your money."
6 The manager reaches under the counter for a gun
7 and the man kills and shoots him, and the seventeen
8 year old runs out of the store and he is arrested
9 and charged with capital murder, because he
10 participated, aided, assisted, or attempted to
11 aid the other man in the commission of the offense.

12 They are both tried for capital murder.

13 I think you can perhaps see the difference in this
14 hypothetical when, in answering the question of
15 whether or not his conduct that caused the death
16 of the store owner was done deliberately, I think
17 the jury would have no problem in deciding the
18 answer to that would be "yes." But when it came
19 to the seventeen year old, I think you might see
20 how the jury, when they were trying to decide the
21 seventeen year old's conduct that caused the death
22 of the deceased, did he commit or perform any
23 conduct that caused the death of the deceased and
24 was that conduct done deliberately and with a
25 reasonable expectation that the dead man might die,

1 I think you would see the jury would reach a
2 different answer when they came to trial.

3 Under whatever theory the Judge would charge
4 you, after you had found someone guilty of capital
5 murder, the questions to one and two aren't
6 automatically answered "yes." The jury has to
7 receive all the evidence and decide what their
8 answers should be.

9 Do you follow me on that?

10 A Yes, sir.

11 Q We have talked for thirty or thirty-five minutes.

12 Do you have any questions of me?

13 A I think you have covered it pretty well.

14 Q I hope so. There are things we skip over, we skip
15 over things in the interest of time. We don't
16 ask enough questions. I wish there was a way for
17 us to do this quicker, yet still impart to you,
18 hopefully, everything the jury should know. I don't
19 know how to do it faster.

20 I am going to pass you to the defense
21 attorneys. I am sure they will have questions.

22 THE COURT: Let's let the Court Reporter
23 rest her fingers for just a minute.

24 Mr. Bailiff, would you bring out Mr.
25 Brennan? I am going to let him go ahead to lunch.

1 I don't think we will get to him before lunch.

2 Okay, let's go ahead.

3 EXAMINATION

4 Questions by Mr. Hernandez:

5 Q Mr. Bame, I am Joe Hernandez. This is Candelario
6 Elizondo, Mr. Guerra, and Ms. Linda Hernandez. She
7 is the interpreter.

8 : This portion of the trial is what we call
9 voir dire, which literally means to speak the
10 truth.

11 : We are not here attempting to pry into
12 your personal background or your personal life.
13 We are not here, either, to offend you or embarrass
14 you in any way. We ask these questions or will be
15 asking these questions in good faith in order that
16 we can select twelve people that can be fair and
17 honest and just.

18 There is no right and there is no wrong
19 answer. It is how you feel.

20 We realize and we accept the fact that
21 everybody has certain biases and prejudices, and
22 also, they have their own philosophical beliefs,
23 their own religious beliefs, and their own scruples,
24 more or less, and whatever, and rightfully so.

25 Say, perhaps, if you are not able to be

1 selected on this jury, it doesn't take away from
2 the fact that you are a good citizen and perhaps
3 could serve on another jury. We are not here in
4 any way to embarrass or humiliate you, only to
5 talk about your honest beliefs and opinions, and
6 all that we ask is for fairness in your answers.

7 Can you agree with me on that?

8 A Yes.

9 Q Okay, a moment ago you asked or you answered to the
10 question of if you believed in the death penalty,
11 and if you are selected, you realize of course you
12 will be called upon to decide whether he gets life
13 or death?

14 A Yes.

15 Q Have you, before today, sat with your wife or with
16 someone and discussed how you feel about the death
17 penalty?

18 A Yes, I have. With my wife. She is definitely
19 against capital punishment, but I guess I am on the
20 border. I really don't know whether I am for or
21 against.

22 Q Is it fair to say, you know, never --

23 A Depending on the testimony, I guess. It would sway
24 me one way or another.

25 Q Is it fair to say you really have not formulated

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an opinion?

1
A Right.

2
Q As to the death penalty?

3
A Right.

4
Q And is it fair to say this is the first time you
5 have been confronted where you have to sit and think
6 about it?

7
A It is, really.

8
Q Before I get into your personal background, I
9 would like to go with you and reiterate some of
10 the things that Mr. Moen discussed with you,
11 especially, specifically speaking, three things
12 or three concepts that are very crucial in the
13 criminal justice system, and that is the presumption
14 of innocence, the burden of proof and the reasonable
15 doubt theory where the State has to prove to you
16 beyond a reasonable doubt.
17

18 You understand that in our system, in
19 the criminal justice system, that the Defendant
20 is presumed to be innocent.

21 Can you agree with me there?

22
A Yes, I do.

23
Q And you also agree that is that is the substantial
24 right that is afforded to, not only Mr. Guerra,
25 here, but afforded to every citizen in this United

1 States of America? Do you agree?

2 A Yes, I do.

3 Q Can you agree with me that this innocence or this
4 guilt of innocence that is wrapped around him or
5 any other citizen in a criminal trial can only be
6 overcome by proof beyond a reasonable doubt?

7 A Yes.

8 Q And we will get to reasonable doubt in just a
9 second.

10 Can you give the Defendant, Mr. Guerra,
11 the full benefit of the presumption of innocence
12 if you are selected as a juror?

13 A Yes, I could, if he is proven innocent.

14 Is that what you mean?

15 Q What I mean is, can you sit and listen through the
16 trial -- and you realize he is charged with
17 intentionally and knowingly causing the death of
18 J.D. Harris, a police officer, while in the course
19 of his official duty acting as a police officer --
20 can you, while sitting in the jury, presume he
21 is innocent, keep an open mind until it is time
22 to deliberate?

23 A No, I think I would be prejudiced in what you are
24 saying.

25 Q In what way, sir?

1 A I would have to think that he is guilty.
2 Q And how would that be?
3 A Just from what you said.
4 Q Would it be simply the fact that he is charged with. . .
5 A Charged with.
6 Q . . . charged with killing a police officer?
7 A Yes, uh-huh.
8 Q The fact that he is here represented by two
9 attorneys and has been indicted by the grand jury
10 for causing the death of a police officer, would
11 that affect or taint your mind?
12 A Will you say that again?
13 Q Would the fact -- You are saying that "yes," you
14 said the answer was "yes," that -- there again,
15 what I am trying to say is not so much trying to
16 pry into your --
17 A Yes.
18 Q What we want is how you feel, and I appreciate the
19 honesty, but are you saying that simply because
20 he is charged with the death of a police officer
21 and he is here being represented by two attorneys
22 and has been indicted by the grand jury? You feel
23 that perhaps he might be guilty?
24 A Yes. That is, I am confused, again.
25 Will you try to say that again?

1 Q Excuse me. I am not trying to confuse you in any
2 way.

3 The fact that Mr. Guerra has been charged
4 with intentionally and knowingly causing the death
5 of J.D. Harris, a police officer, and the fact
6 that he has been indicted by the grand jury and
7 the fact that he is here being represented by two
8 attorneys, would that taint your mind or would
9 you feel he is guilty in some way?

10 A I would have to have witnesses, before that.

11 Q As he sits today, do you think there is something
12 like, for example: some people believe where there
13 is smoke, there is fire?

14 A No. You have to prove him -- I mean, he is
15 innocent until proven guilty.

16 Q Let's go back to where you answered my question
17 "yes."

18 I asked you, a minute ago, whether the
19 fact that he is charged with causing the death of
20 a police officer, would that in any way affect
21 your thinking, subconsciously or in any way taint
22 you, and I guess your answer was "yes."

23 A That would sway me; yes.

24 Q That would sway you?

25 A Yes.

1 Q Just the fact that he is charged with that offense?
2 A Yes.
3 Q You would be swaying which way?
4 A Guilty.
5 Q Pardon me?
6 A Guilty.
7 MR. HEPNANDEZ: We would challenge at this
8 time.
9 MR. MOEN: No objections, Judge.
10 THE COURT: Mr. Bame, you may be excused
11 from serving on this case.
12 Thank you very much. I appreciate your
13 time.
14 MR. MOEN: Thank you, Mr. Bame.
15 THE COURT: Mr. Brennan, please, sir.
16 WALTER BRENNAN,
17 called as a prospective juror, answered the questions
18 propounded to him as follows:
19 THE COURT: Have this chair, Mr. Brennan.
20 Okay, just relax and visit with us a
21 minute. The lawyers are going to ask you some
22 questions and you answer them any way you feel and
23 don't worry about what you think they want to
24 hear. Just answer what you feel. You are entitled
25 to your opinions and they are not going to argue

1 with you about them.

2 EXAMINATION

3 Questions by Mr. Bax:

4 MR. BAX: Thank you, Your Honor.

5 Q Good afternoon, Mr. Brennan.

6 As the Judge told you, earlier, my name
7 is Dick Bax.

8 The person you don't see behind me is
9 Bob Moen. He had to go to his office to finish
10 some business over there. But we are both with
11 the District Attorney's office here in Harris
12 County, Texas, and we will be representing the
13 State in this case where it is alleged that Mr.
14 Guerra intentionally caused the death of Mr. J.
15 D. Harris, a police officer, while he was in the
16 lawful discharge of his duty, the Defendant knowing
17 at the time that he was a police officer.

18 As the Judge told you earlier, the reason
19 we conduct this type of jury investigation
20 individually is because of a serious question
21 involved concerning the death penalty. I can't
22 emphasize that to you enough, I guess. We really
23 need to know how you feel, both sides do.

24 We are trying to find twelve people who
25 can sit in the jury box and listen to the evidence

1 and based on the evidence and the law given to you
2 by Judge Oncken, render a fair and impartial verdict
3 in the case.

4 I guess this case contains a lot of
5 controversy, and sometimes we have to interview
6 one hundred to one hundred twenty-five people
7 before we can find twelve who can qualify to sit
8 on a death penalty case. I just ask that you be
9 as honest with us as you can, and let us know your
10 true feelings.

11 We are not trying to pry or embarrass you
12 in anything, and of course this is the one chance
13 you have an opportunity to disagree with the law.

14 There are many laws. The one I always
15 think about is the Sunday blue laws. We are told
16 on Sundays we can't sell certain items or buy
17 certain items, and other days it is okay to sell
18 those items. Personally, I don't agree with the
19 law. I have to follow it, but I don't have to
20 agree with it. And that is the position you are
21 in. You don't have to agree with the law or the
22 questions we are talking about at this time.

23 What we are trying to avoid is a situation
24 where someone has some moral or religious feelings
25 against the death penalty as a possible punishment

1 taking a seat and saying they will, and then
2 finding they cannot.

3 I guess my first question to you would be:
4 If you will just tell us in general terms what your
5 feeling is about the death penalty as an appropriate
6 punishment in certain cases. Are you for it,
7 against it, or just how do you feel about it?

8 A I am for the death penalty to be used very
9 sparingly. I think you have to be very careful
10 with it, but I do believe in some cases it is
11 applicable.

12 Q Have you always felt that way, as far as your adult
13 life is concerned, or was there a time you felt
14 differently, or from newspaper accounts or personal
15 experience your opinion changed?

16 A No, in all my adult life I have always felt this
17 way.

18 Q When you described it, I guess you hit it pretty
19 close to the way the law applies to the death
20 penalty. There are only certain situations in
21 which a person finds himself guilty of capital
22 murder and faced with a possible death penalty.

23 Prior to 1967, you could get the death
24 penalty for any murder, rape, different offenses.
25 Now, there are only certain cases where a person

1 may receive the death penalty, and let me give
2 you a few examples of those.

3 First of all, you always have to have a
4 murder. There has to be an intentional or knowing
5 taking of another person's life. But the murder
6 has to be combined with another factor, either
7 another crime, or if you kill a person of a
8 particular class. If you kill someone during the
9 course of a rape, if you kill someone during the
10 course of a robbery or break in to someone's home
11 and kill someone who is inside of the house, if
12 you kill in the course of an arson or a kidnapping,
13 those types of offenses, the person may receive
14 the death penalty.

15 If you kill a police officer or fireman
16 while they are in the capacity of their official
17 duty, and the person knows they are a policeman or
18 a fireman, that person is subjected to the
19 possibility of the death penalty. If you kill for
20 hire or if you hire someone to kill for you, then
21 you could be subjected to the death penalty. If
22 you kill while trying to escape from a penal
23 institution. Those are basically the only areas
24 where a person can possibly receive the death
25 penalty.

1 Do you feel that those are the proper types
2 of cases?

3 A Yes.

4 Q In other words, you could have a murder that could
5 be very horrible. You could have a person that
6 went out and indiscriminantly killed thirty people
7 on a school bus for no reason other than he is a
8 nasty individual. If it did not fit one of those
9 criteria, he would not receive the death penalty.
10 It has to be one of those enumerated offenses.

11 Let me tell you, now, the questions on
12 the board to your left are the questions which
13 determine whether or not the person receives the
14 death penalty in Texas.

15 First of all, the jury has to find the
16 Defendant guilty of capital murder, so assume with
17 me, if you will, that you have been on a jury that
18 has found a Defendant guilty of capital murder.
19 After hearing all the evidence they have told
20 Judge Oncken, "Yes, we find the Defendant guilty of
21 capital murder."

22 At that time, those two questions would
23 be submitted to the jury and based on the answers
24 the jury gave to the two questions, Judge Oncken
25 would either assess life imprisonment or the death

1 penalty.

2 If all twelve jurors answer question one
3 "yes," and all twelve jurors answer number two
4 "yes," then Judge Oncken must, by law, sentence
5 the Defendant to death.

6 If either question number one or question
7 number two is answered "no," then the Judge must
8 automatically sentence the Defendant to death --
9 excuse me -- to life imprisonment. So, though
10 the jury doesn't go back and say, "We want death
11 or a life sentence," the way they answer questions
12 one and two dictates to the Judge what he will do
13 in that situation. All twelve jurors must agree
14 to "yes," in order to answer "yes." It only takes
15 ten jurors to agree to a "no" answer, so ten out
16 of twelve can go back and it will be "no."

17 You can see, simply because a person is
18 found guilty of capital murder doesn't mean they
19 will receive the death penalty.

20 Let's take a few minutes and go over these
21 questions.

22 Have you had a chance to read those?

23 A Yes, I have.

24 Q The first question is really fairly straightforward,
25 asking you to look at the conduct of the person on

1 trial, the Defendant, and, number one, find and
2 decide if his conduct was deliberate, and number
3 two, if it was done with the reasonable expectation
4 that somebody was going to die as a result of that
5 conduct.

6 Now the first portion of a trial, when
7 the jury finds the Defendant guilty, they have to
8 find he acted intentionally. Okay? So sometimes
9 people look at that second question and say
10 "deliberately" and "intentionally" mean pretty
11 much the same thing to me, and they may say I
12 have already answered that question when I found
13 the Defendant guilty. But it goes on and asks
14 more. It asks if it was done with the reasonable
15 expectation the person was going to die.

16 The first portion, you don't have to make
17 the decision, you don't have to say the person was
18 expected to die as a result of his conduct, so
19 do you agree with me that simply finding someone
20 guilty of capital murder would not answer that
21 first part of the question?

22 A Would I agree? Yes.

23 Q You have to, at the punishment stage, look back
24 at the evidence, agree on the evidence, and based
25 on the evidence answer that question yes or no,

1 and to answer it "yes," you have to answer it
2 beyond a reasonable doubt.

3 Are there any questions about the first
4 question?

5 A No.

6 Q That is pretty straightforward, and the Judge will
7 not define any of those terms for you.

8 For example, "deliberately": You have to
9 use the common everyday meaning of that in determining
10 what the meaning is to you. Okay?

11 The second question, however, is a little
12 different. Basically, that question is asking
13 people to predict future human behavior. Would
14 you agree with that?

15 A Yes.

16 Q The first word underlined is "probability."

17 Do you have any word that you could
18 substitute, if I were to ask you, for the word
19 probability?

20 A I don't know. If anything, "probability" is a
21 judgement, what I would judge the chances of him
22 doing it again, if he is guilty. I don't know.

23 Q Okay, let me see if you can -- certainly, a
24 probability is more than a possibility. Would
25 you agree with me there?

1 A Yes.

2 Q Okay, and it is certainly something less than a
3 certainty?

4 A Yes, but I don't know where I would put the odds
5 on it. I have no idea.

6 Q How about -- would you agree it may mean something
7 like "more likely than not," or "chances are,"
8 something more than fifty percent?

9 A Yes. All right.

10 Q Okay, again, that term will not be defined for you,
11 and I think what I am trying to get at, there is
12 no way I can prove to you to a certainty in the
13 future someone is going to do something, okay?

14 And the law does not require me to have
15 a crystal ball to show the jury that three years
16 from now this person is going to go out and commit
17 another crime. The law only requires that it is
18 probable, more likely than not, that he would
19 commit a criminal act in the future that would be
20 a threat to society.

21 Would you have any problem in listening to
22 evidence and deciding whether or not a person would
23 probably commit those types of crimes in the future?

24 A I wouldn't have any problem listening to it,
25 certainly. I would have a problem deciding, but

1 that you can only answer after you hear the
2 evidence.

3 Q After you hear the evidence.

4 That is what makes it difficult. I am
5 not allowed to go into any of the facts of the
6 case. We have to talk in terms of hypotheticals,
7 what is and what is not. You will have to excuse
8 me for that.

9 Criminal acts of violence, in Texas,
10 certainly includes an act of murder and also
11 includes rape, robbery, forcefully breaking into
12 someone's home, going up and slapping someone up
13 on the side of the head causing them pain. Those
14 are all criminal acts in Texas. There is no way
15 I could prove to you this Defendant or any Defendant
16 would go out and commit a specific crime. All I
17 have to prove is that he more likely than not is apt
18 to commit some type of crime in the future.

19 A I would like to ask a question about this.

20 Q Certainly.

21 A I think it would be very difficult to decide
22 something like that presented with only one case.
23 Is there a history given at the time?

24 Q The law is, the law says the jury has to look at
25 one transaction, the transaction for which the

1 Defendant is on trial, and decide from that
2 transaction alone whether or not he is likely to
3 be guilty of criminal acts of violence.

4 Let me ask you: You have been here eleven
5 years?

6 A Yes.

7 Q You recall several years ago when a man named
8 Ronald Clark O'Brian was convicted for killing
9 one of his children for insurance on Halloween
10 by giving them cyanide? That was his only act
11 for finding the probability he would commit
12 criminal acts of violence in the future. Okay,
13 can you see where people who would kill somebody
14 for money, that would give you an indication that
15 in the future they would be guilty of violence?

16 A All right.

17 Q We may have been talking about one person killed,
18 but it may have been several people harmed. You
19 can look to the conduct and the way the crime was
20 committed. Was there any reason at all for
21 shooting a person or was it cold-blooded and
22 heartless, that that person would be likely to
23 commit crimes in the future, okay? And of course,
24 if there is prior conduct, on the punishment
25 phase, that also can be submitted to the jury to

1 help them decide if the person would be likely
2 to commit, in the future, criminal acts of violence.

3 Does that answer your question?

4 A Yes.

5 Q Yes, you can get further information, and yes,
6 you can answer that question "yes" if you believe
7 from the one fact situation that that one fact
8 situation displays someone who is likely to commit
9 criminal acts in the future?

10 Okay?

11 A Okay.

12 Q It is not an easy question. None of these questions
13 are going to be easy for anyone. I think that
14 anyone who would say that would be an easy
15 question to answer probably would not make a good
16 juror in a case like this.

17 The last thing is the word "society." Of
18 course you and I probably think of society as where
19 we live, where we raise our families, where we
20 work.

21 Would you agree, also, there is a society
22 within the penitentiary that consists not only of
23 the inmates that are housed there, but also guards,
24 there are librarians or medical people there that
25 assist the inmates with any medical problem they

1 have. Would you agree part of our society is the
2 penal society?

3 A Yes.

4 Q Are there any other questions about question number
5 one or question number two?

6 A No.

7 Q Let me give you just a little bit of background
8 about this case and see if there is anything that
9 triggers your mind about this offense that took
10 place. Back on July 13th, about forty-five days
11 ago, it happened on the east side of Houston where
12 an officer named James D. Harris was killed at the
13 intersection of Edgewood and Walker streets.

14 Shorty after, a civilian passing by in a
15 car was shot and killed, and about an hour and a
16 half later when arrests were made in the case,
17 another police officer named Larry Trepagnier was
18 shot five times.

19 Do you recall anything about the facts of
20 the case at all?

21 A No, I don't.

22 Q The reason we ask that, of course, we don't want
23 twelve people on a jury, not even one person on a
24 jury who may have heard about the facts and formed
25 an opinion one way or another about the Defendant's

guilt.

1
2 A I recall several police officers being killed
3 earlier this year, but not in the detail you
4 described, so it may have been in another incident.

5 Q So I assume it may be fair to say as far as this
6 Defendant is concerned you have not formed an
7 opinion as to whether or not he is guilty at this
8 time?

9 A No.

10 Q Let me go over with you, if I can, the principles
11 of any lawsuit, be it driving while intoxicated or
12 capital murder. The rules are the same.

13 First of all, each Defendant as he appears
14 at this stage of the trial is presumed to be
15 innocent by law. The fact that he has been indicted
16 by a grand jury, the fact that he is represented
17 by attorneys, is no evidence of his guilt and
18 the Judge will tell you that in the charge of the
19 Court.

20 Would you have any problems with affording
21 this Defendant that presumption of innocence at
22 this time, and presuming he is innocent?

23 A No.

24 Q Certainly because a person is presumed to be
25 innocent doesn't mean he is innocent. If he was

1 guilty on the day of his indictment, he is guilty,
2 today, and he will be guilty on the day he dies:
3 but the law says you must enter the case with an
4 open mind and presume his innocence until his case
5 is established beyond a reasonable doubt.

6 So, the fact he is here and charged, you
7 would give no inference to that as pointing to
8 his guilt at this point in time? Is that correct?

9 A That's correct.

10 Q As I said, we must prove our case to a jury beyond
11 a reasonable doubt. The Judge will not define
12 that term for a jury, what proof beyond a reasonable
13 doubt is. Lawyers and judges can't agree on
14 anything, let alone agree on a definition for
15 that term.

16 I can tell you what it is not. It is not
17 proof beyond all doubt and it is not proof beyond
18 a shadow of a doubt. There is no way I can prove
19 to twelve people a case beyond all doubt or beyond
20 a shadow of a doubt unless the twelve people were
21 actual eyewitnesses to each and every transaction
22 that took place, and even in that situation, the
23 twelve people may disagree as to what they saw
24 and when they saw it unless they know who did it
25 and the circumstances.

1 Do you understand that?

2 A Yes.

3 Q Would you hold the State to any burden of proof
4 other than beyond a reasonable doubt?

5 A No.

6 Q Do you think that is a fair proof?

7 A I think it has to be done.

8 Q A Defendant in a trial can sit by and do nothing
9 throughout the whole trial. His attorneys don't
10 have to ask one question of one witness, don't
11 have to put the Defendant on the stand, don't
12 have to do anything. They can just say, "State,
13 you said he did this. You prove it."

14 All right, if a Defendant chooses not
15 to testify, the Judge will instruct you you cannot
16 use his failure to testify as any evidence of guilt
17 in this case. That is a right we all have under
18 the Fifth Amendment of the Constitution.

19 Could you afford this Defendant that right
20 should he choose not to testify, and not hold that
21 against him or use it as any evidence against him
22 and hold him to the proof as the law requires?

23 A If he did not want to testify, I could sympathize
24 with that.

25 Q Again, it is my murder case. I am the one who said

1 he did something, and I have to prove it. He can
2 sit by and do nothing, and it would be wrong for
3 a juror to say, "Well, the State almost proved its
4 case, but didn't convince me beyond a reasonable
5 doubt, but you know he didn't testify, so I am
6 going to find him guilty, anyway."

7 You would not do that or have a problem
8 with that?

9 A No, I don't think so.

10 Q As a juror, your most important function will be
11 to judge the credibility of the witnesses. People
12 will get up here on the stand and they will take
13 an oath to tell the truth.

14 Unfortunately, not everybody who takes
15 the stand and takes the oath tells the truth. As
16 a juror, you can believe all, part, or nothing of
17 what a witness says on a witness stand. It is
18 your choice. Of course you look at things like
19 their demeanor, how do they appear, their motivation
20 for testifying, what they say, is it reasonable in
21 relation to all the other evidence you have heard,
22 and you make a decision as to whether you believe
23 all, part or something of what a witness says.

24 Do you think you can do that?

25 A Yes.

1 Q That is something we do in our everyday lives,
2 raising children and doing business. We always
3 have to determine is this person believable or not,
4 and that is basically what you will have to do as
5 a juror.

6 That is only one aspect of the believability
7 of witnesses. No witness, because of their
8 occupation in life takes the stand with automatic
9 believability before they have spoken word one.

10 A lawyer requires the jury to listen to a witness,
11 and after listening, decide whether they believe
12 him or not. In other words, if a person came to
13 the stand and the State were to call Reverand
14 Smith, the fact that the Reverand Smith has the
15 name "Reverand" it would be wrong for the jury to
16 say we are going to believe what this person says.

17 Would you wait before you would assign
18 believability or disbelievability to that witness?

19 A I would go by what he said rather than by what he
20 is.

21 Q That concerns whether he is a police officer, an
22 engineer, a doctor, in any case, you must wait and
23 first hear the witness.

24 A moment ago, we talked about if a
25 Defendant chooses not to testify.

1 Of course, if a Defendant chooses to
2 testify in a criminal case, he is the same as any
3 other witness and the jury must judge his
4 credibility. The fact that he is presumed to be
5 innocent does not presume that he is a truth-teller.
6 Okay? And again, you don't automatically dis-
7 believe him. You don't automatically believe
8 him. First, you must hear his testimony.

9 Any problem with that?

10 A No.

11 Q We have what we call lesser included offenses,
12 and let me see if I can give you an example of
13 how a lesser included offense could come up in
14 an offense such as this. We have alleged that
15 the Defendant killed a police officer knowing he
16 was a police officer while in the lawful discharge
17 of his duty. We could put on ten witnesses that
18 all say that "yes, he is a police officer; yes,
19 this Defendant intentionally caused this death,
20 and yes, the police officer told him before he was
21 killed that he was, in fact, a police officer."
22 That would raise the evidence of capital murder
23 all right, through that testimony.

24 The Defendant could get on the stand and
25 say, "Yes, I killed that person, but I did not know

1 he was a police officer. He never told me that
2 he was a police officer." The Judge would not
3 decide whether the Defendant or the State's
4 witnesses were telling the truth. As the Judge
5 told you earlier, that is the jury's job to decide
6 the facts. The Judge would be required to charge
7 you on the law of a Defendant on capital murder
8 and on the lesser included offense of murder, if
9 the jury were to believe the Defendant and believe
10 he did not know the deceased was a police officer
11 he would not be guilty of capital murder, because
12 one of the elements would be missing, but he could
13 be found guilty of murder.

14 A person guilty of murder is looking at
15 a punishment range of not life or death, but five
16 to ninety-nine years or life in the penitentiary.
17 If a person has never been convicted before and
18 if the jury decides the punishment should be ten
19 years or less, the jury can recommend that the
20 sentence be probated. In other words, that the
21 Defendant receive probation.

22 Do you think that in a proper case that
23 you could consider probation for the offense of
24 murder? I am not asking you could you give it,
25 but could you consider it if it was part of the

1 range of punishment given to you by the Court?

2 A I really can't see anyone getting away with murder,
3 simply put.

4 Q Sort of an unfair question to ask you. I guess we
5 lawyers are down here every day dealing with
6 different fact situations, and here we bring you
7 in and hit you with a question like that.

8 Let me give you an example -- and we don't
9 want to tie you down -- but let me give you an
10 example where a person is charged with capital
11 murder and see how you feel about this.

12 Suppose we have an elderly couple in their
13 seventies, married for fifty-plus years and they
14 have raised a family and have several grandchildren.
15 At some point in time, the wife becomes ill with
16 cancer, and the doctors have all looked at her
17 and say, "There is no chance of her surviving; no
18 chance of her living through this." She is put in
19 the hospital. She is in extreme pain and she is
20 kept alive by some life support machines. Her
21 husband goes there every day and sees her in this
22 pain and she begs with him: "Honey, we've led a
23 good life, done everything we wanted to do, raised
24 our family and everything. Please let me die. I
25 know we are running out of money. Please do

1 something. Pull the plug on the machine. I
2 want to die."

3 At first, he says, "No, I can't do it,"
4 but after seeing her suffer, he reaches down and
5 pulls the plug and she dies.

6 On her side of the family there are some
7 people who feel that is not how it happened. They
8 know they owned property together that he wanted
9 to sell and she didn't, and they have decided in
10 their minds the reason he pulled that plug was
11 not out of love, but because he wanted to become
12 the owner of that property and sell it for benefit,
13 which she would not agree to during her lifetime.

14 Somehow, he is indicted by a grand jury and
15 presented to twelve people, and after listening
16 to the evidence, the jury decides, "Okay, there
17 is no way that person would kill for money, which
18 would be capital murder. He did just as she asked
19 him, because he loved her."

20 Under the law, that jury would have to
21 return a verdict for murder, because he intentionally
22 caused her death, but do you feel that in a case
23 like that you could consider probation for the
24 husband?

25 A I honestly don't know. I think I would have to

1 be confronted with it and to live through the
2 experience, and then when I got to the point where
3 I had to say "yes" or "no," I don't know which
4 way I would go.

5 Q That is exactly what the law would require of you.
6 Anyone who is pre-disposed to do one thing without
7 hearing the facts, in other words, "I could never
8 give probation or life imprisonment," anyone who
9 felt that way could not be a fair juror to both
10 sides, because they could not listen to the facts.

11 I take it by your last answer, in a proper
12 case, if it called for probation you could give
13 probation, but if not, you could not?

14 A Yes, but I don't think it's a question I can
15 answer, no.

16 Q That is fine, but I guess it is fair you would
17 not automatically disregard probation? You would
18 hear all the facts in evidence?

19 A I am sure there are circumstances where I would
20 probably go along with probation.

21 Q But your feeling in that regard --

22 A It's not cast in concrete, but I do feel if murder
23 is involved that the punishment should be adequate.

24 Q I think that about ninety-nine percent of our
25 society feels that way, and so there is nothing

1 wrong with that feeling.

2 Let me just ask you if you have questions

3 about anything we have gone over so far?

4 A No.

5 Q When were you in the navy? How long ago was that?

6 A Oh, that was a long time back. That was 1945.

7 Q Okay, and on your information sheet it shows

8 career in the Philippines. Were you stationed

9 at any place --

10 A No, this was not in the navy. I worked for an

11 oil company, and I was assigned abroad for about

12 seven years.

13 Q You have never served on a criminal jury before?

14 Is that correct?

15 A That is true.

16 Q And as far as -- there is a question concerning

17 your interest in criminal cases. I guess that would

18 be, as the average citizen, just what you read in

19 the newspapers and a lot of time stories that catch

20 your eyes and you follow?

21 A Yes.

22 Q You never come to the courthouse to watch a

23 specific trial?

24 A I never have, no.

25 Q Can you think of any reason whatsoever, Mr. Brennan,

1 why you would not be a fair juror in a case such
2 as this?

3 A I can't think of any reason why I wouldn't be if
4 I were selected as a juror. I would try to be
5 as fair as possible.

6 Q A way to reverse that question and ask it two
7 different ways: Suppose a family member of yours
8 were charged with the offense of capital murder.
9 Would you be satisfied with a jury having the
10 same frame of mind as you do to be sitting on the
11 jury deciding his fate?

12 A I would hope so, yes.

13 Q Reversing it again, if a loved one or family member
14 were the victim of a crime, would you feel secure
15 knowing that a juror had the same frame of mind
16 as you have at this point in time?

17 A Yes, I think so.

18 Q If you have no more questions of me, I think we
19 have fairly thouroughly gone through everything.

20 Thank you very much.

21 EXAMINATION

22 Questions by Mr. Elizondo:

23 Q Mr. Brennan, how are you doing?

24 A Fine.

25 Q My name is Candelario Elizondo. Over here is Joe

1 Hernandez. Over there is Linda Hernandez, the
2 interpreter, and the Defendant, Ricardo Aldape
3 Guerra. There is no relation there.

4 The Defendant is charged with capital
5 murder. In this, as in all criminal cases in Texas,
6 the State must prove their case beyond a reasonable
7 doubt. In other words, they must prove that on
8 a particular day here in Harris County, Texas,
9 this Defendant shot and killed a police officer
10 who was in the lawful discharge of an official
11 duty knowing at the time that he was a police
12 officer. They must prove this to you beyond a
13 reasonable doubt.

14 Now you won't find a definition of
15 reasonable doubt anywhere. I have never been able
16 to find it. Nobody's been able to find it. All
17 I can tell you is it is a pretty heavy burden
18 for the State, and let me give you an example.

19 Across the street when you were down on
20 that civil duty they had a burden of proof and it
21 was called by a preponderance of the evidence.
22 Do you recall that?

23 A What?

24 Q Weren't you on a civil jury before, Mr. Brennan?

25 A Yes. That was a jury.

1 Q And that was a civil case?

2 A Yes.

3 Q And they had a burden of proof down there which
4 was by a preponderance of the evidence?

5 A Yes.

6 Q Down here in the criminal courthouse, the burden
7 is beyond a reasonable doubt, okay, which is the
8 more onerous burden than by proving by preponderance
9 of evidence.

10 If I can give you an example, I can
11 probably explain it a lot better. Let's say you
12 go to the bank, go to your banker and want to borrow
13 money and the banker looks at you and says, "Let
14 me see your financial statement. Where do you
15 work? Where do you live? Does your wife work?
16 Do you work at home? Do you have children? How
17 many bills do you have?", and based upon that
18 evidence that the banker has in his possession,
19 he makes a determination of whether or not he
20 should loan you the money.

21 Well, I submit to you that the banker
22 made his decision by a preponderance of the
23 evidence, because if he had made his decision, his
24 burden of proof beyond a reasonable doubt, then
25 theoretically the banker would never have defaults.

1 Would you agree with me there?

2 A Yes.

3 Q So it is a more onerous burden.

4 In the civil courthouse, they have the
5 burden of proof by a preponderance of the evidence.
6 They are suing people for millions and millions
7 and millions of dollars sometimes, over a broken
8 back and wrongful debts, etcetera.

9 Down here where people's lives are at
10 stake, they have a heavier burden. Would you
11 agree with me there?

12 A Yes.

13 Q Well, how do they go about proving their case or
14 proving their case beyond a reasonable doubt?

15 First of all, they go ahead and call
16 witnesses to go ahead and take that same seat
17 you have right now and ask them questions, and
18 after they present their evidence, then they will
19 rest their case and they will say, "That is all
20 we have."

21 Then the Defendant can, if it chooses,
22 present evidence. Now we don't have to. How
23 do you feel about that? Would you think that maybe
24 he has lied about something because he is not
25 testifying? Would you hold it against him in any

1 way, shape, form or fashion?

2 A No, if you choose not to present evidence, all

3 you can do, or what the juror can do, is make his

4 decision on the rest of the witnesses.

5 Q What he heard from the witness stand?

6 A Correct.

7 Q Because the burden of proof is upon the State.

8 They have accused this man of capital murder.

9 Now they've got to prove it, and many reasons may

10 come into play as to why the Defendant will or

11 will not testify. Maybe they didn't prove their

12 case, and then we will just go ahead and say,

13 "We rest our case, Your Honor," and you will

14 deliberate on what you heard on that witness stand.

15 Okay?

16 A All right.

17 Q Let me ask you a few general questions. I know

18 my wife and I have discussed this and I am sure

19 a lot of people have. How do you feel about --

20 it was a Supreme Court decision that came down

21 maybe eight months ago giving the illegal aliens

22 a right to a free education. Did ya'll talk about

23 that, you and your wife?

24 A She is not a citizen, so I guess we did talk about

25 it, but she is here legally. Yes, we did talk

1 about it. Do you want to know how I feel about it?

2 Q Yes.

3 A I am not in favor of it, quite frankly. I think

4 there are certain rights you have here and one

5 of them is to a free education, but you have to

6 be a citizen to have it.

7 Q Okay, if it came to your knowledge that the

8 Defendant was an illegal alien, would it affect

9 your determination of his guilt or innocence in

10 any way, shape, form or fashion, however minute?

11 A He's being tried for murder? Correct?

12 Q Right. Capital murder.

13 A Not for being an illegal alien. I don't know how

14 the two fit together.

15 Q Some people -- would you agree with me that some

16 people just don't like illegal aliens to begin

17 with?

18 A Of course, but I think you have to separate the two.

19 Q You would do that?

20 A I think certainly I would try.

21 Q That is all we want, to try.

22 Would you also agree that some Mexican-

23 Americans dislike illegal aliens?

24 A I would imagine so. I couldn't quote anyone. It

25 would seem logical it would be this way. You

1 always get a few people --

2 Q Where is your wife from?

3 A Canada.

4 Q Canada. Okay. This trial, as any trial in Texas,
5 is a bifurcated trial, bifurcated meaning two parts.

6 The first part is the guilt or innocence
7 stage. At that point in time you hear the facts
8 and if you believe beyond a reasonable doubt this
9 man is guilty of capital murder, then you find
10 him guilty. If you don't, then you find him not
11 guilty. Then we go to the second part, the
12 punishment stage.

13 In the second part, now once we find him
14 guilty, there are only two possible penalties:
15 life or death, and that is determined by how you
16 answer those two questions, and the first question --
17 would you agree with me that it really calls for
18 two answers? Whether it was committed deliberately
19 and with the reasonable expectation that the death
20 of the deceased would result?

21 A Yes. I am not sure what your question was.

22 Q You're right there.

23 A Well --

24 Q Would you agree the verdict calls for two
25 questions? Question number one?

1 A Yes.

2 Q "Deliberately": I looked it up in Webster's
3 International Dictionary and wrote it down as to
4 what it meant. It means to ponder or think about
5 with measurable careful consideration, and often
6 a formal discussion before reaching a decision or
7 conclusion.

8 MR. BAX: I object to that just because
9 Webster says that. That term will be defined by
10 each and every juror. I believe he is saying
11 something the Judge won't tell the jury in the
12 charge of the Court.

13 THE COURT: To that objection, I will
14 sustain it. What Webster says, not what it means.

15 Q (By Mr. Elizondo) Okay, Webster says deliberation:
16 to measure or think about with careful consideration,
17 often with formal discussion before reaching a
18 formal decision or conclusion. For example, on
19 the guilt or innocence stage, if you are selected
20 on this jury you will have an opportunity to go
21 into the jury deliberation room and then and there
22 you will ponder and think about with measurable
23 careful consideration and with formal discussion
24 before you reach a decision as to this man's
25 guilt or innocence, correct?

1 A Yes.

2 Q Now just because you found him guilty of capital
3 murder of a police officer doesn't mean that you
4 will answer question number one automatically "yes,"
5 does it?

6 A No. I don't think anything is automatic in this.

7 Q Well, some people say he committed the act
8 intentionally, and therefore intentionally means
9 the same thing as deliberately, and therefore "yes."

10 A No. I don't think I reached that conclusion. I
11 don't think I would answer both questions.

12 Q "Intentionally": In the penal code, it says that
13 a person acts intentionally with respect to the
14 nature of his conduct or to a result of his conduct
15 when it is the conclusion, objective or desire to
16 engage in the conduct.

17 After I read those two definitions, do you
18 see any similarity or distinction to be made between
19 intentionally and deliberately?

20 A I don't feel I am in a position to give an answer
21 to that, quite frankly.

22 "Deliberately" to me, implies there was some
23 time involved; premeditated. "Intentionally" means
24 it occurred on the spur of the moment but it was
25 intended to be this way. I don't know if these

1 definitions are accurate. I really don't feel
2 qualified to answer that.

3 Q Okay. Thank you.

4 Let me give you some hypotheticals and
5 I want to get your general idea about how you feel
6 about certain things.

7 Let's say Joe and I go into a 7-Eleven,
8 and let's say we both have guns and I go in to
9 buy a loaf of bread and while I am in there this
10 guy pulls a gun and kills somebody there. I get
11 scared and I run. We both run.

12 Do you feel that I am guilty of anything?

13 A For running?

14 Q Yes.

15 A No.

16 Q How about for murder?

17 A But you didn't do the murder, according to your
18 example.

19 Q Okay, correct.

20 In question number two: The question that
21 calls for you to foretell the future, do you think
22 that a person can change his entire mode of
23 behavior?

24 A He can, yes. I think he can.

25 Q What?

1 A In my opinion, yes. Someone can change.

2 Q The Defendant has filed with the Court an
3 application for probation. Now just because he
4 files an application for probation does not mean
5 in any way that we are guilty or he expects to
6 be found guilty. It is just a code of criminal
7 procedure which says we must file our application
8 for probation before a trial begins or otherwise
9 forfeit that right. Okay?

10 A Yes.

11 Q As Mr. Bax was telling you a little while ago,
12 if -- let's assume you found him guilty, and
13 if you found him guilty of a lesser included
14 offense, can you consider probation in a murder
15 case?

16 MR. BAX: Judge, I just -- I have an
17 objection to saying if you found him guilty.

18 THE COURT: Let's limit it to this --

19 MR. ELIZONDO: Let me rephrase it.

20 Q (By Mr. Elizondo) If you found a person guilty
21 of murder, could you consider probation? I am not
22 saying give it, but just consider it?

23 A We could consider it, but something like the
24 example given before.

25 Q And another example is you go home -- hypothetical

1 example -- somebody goes home and sees his wife
2 and daughter have been molested and raped and the
3 house is on fire, and his wife, in her dying
4 breath says, "Joe Blow down the street did it."
5 He goes down the street and takes the law in his
6 own hands and kills Joe Blow.

7 A To answer your question, I would certainly never
8 rule it out. It can be considered, but expressed
9 as before.

10 Q But you would not automatically give them the
11 maximum, ninety-nine years?

12 A It depends on the evidence and what was proven.

13 Q Let me ask you a few questions from your
14 questionnaire form.

15 What kind of engineer are you?

16 A A civil engineer.

17 Q Where did you go to school, sir?

18 A The city college in New York.

19 Q And you were born in Brooklyn?

20 A No, born in Queens, but I went to school in Brooklyn.

21 Q When you had that jury trial back in 1980, did
22 ya'll reach a verdict in that case?

23 A Yes.

24 Q If you should be selected on the jury panel,
25 would you have any trouble or conflict with your

1 job . . .

2 A I don't think so.

3 Q . . . if the trial would last a week, a week and

4 a half?

5 A For that length of time, no.

6 Q If you were selected on the jury, Mr. Brennan, of

7 course it's a pretty awesome responsibility, I

8 would think, hearing the evidence and making a

9 decision based on the evidence, but would you

10 promise me one thing: That you would hear the

11 evidence and give this man a fair and impartial

12 trial?

13 A Yes.

14 MR. ELIZONDO: Thank you, sir.

15 We pass him, Your Honor.

16 MR. BAX: The State would accept Mr.

17 Brennan.

18 MR. ELIZONDO: May I have a moment, Your

19 Honor?

20 THE COURT: Sure.

21 (The attorneys consulted with the

22 Defendant.)

23 MR. ELIZONDO: We will accept him, Your

24 Honor.

25 THE STATE: We will accept him.

1 THE COURT: Okay, give the oath to the
2 juror, please, sir.

3 (Whereupon the juror was sworn.)

4 THE COURT: Have a seat just a minute.

5 Now you are the first juror selected in
6 this case and we will be doing individual voir
7 dire of many people before we get eleven more
8 jurors to sit in the jury box and actually hear
9 the evidence.

10 I am going to allow you to go to your
11 home and go about your normal business and we will
12 call you when we get ready to start the evidence
13 and have you come down to the courthouse.

14 Now while you are away from the courthouse
15 I must caution you that you are not to read, listen
16 to or watch any media coverage concerning this
17 particular case.

18 There is coverage on the media about it,
19 and I would caution you not to watch that or read
20 anything about it in the newspapers. You know,
21 if you were to be watching television or something
22 and something comes on, turn it off. If you pick
23 up a newspaper and see something about it, please
24 don't read it, and if it comes on the radio,
25 please change stations. Please do not exchange

1 information with anyone or receive information
2 from any source other than the courtroom where you
3 actually hear the evidence.

4 If you are going to leave town or anything,
5 I anticipate that we will probably be a week, two
6 weeks, maybe three weeks in the selection of this
7 jury before we actually are ready to hear evidence.
8 If you are going to leave town or do anything of
9 that nature, please let us know that so we will
10 know where you are and where we can reach you.

11 MR. BRENNAN: Correspond with you directly?

12 THE COURT: Correspond with my coordinator,
13 a fellow by the name of Scott Gordon.

14 Here is all the information you will need
15 to know. Scott Gordon can be reached at that same
16 number. If you will, let us know where you are
17 going to be so we can reach you at all times.

18 Do you have any questions at this time?

19 MR. BRENNAN: No, Your Honor.

20 MR. HERNANDEZ: Your Honor, may it please
21 the Court, I don't think Mr. Bax or Mr. Elizondo
22 or the Court has admonished Mr. Brennan that this
23 will probably be the last time we can ever speak
24 to him or talk to him. We probably won't be able
25 to talk to him until after the trial.

1 THE COURT: Until all the evidence is
2 presented, the verdict rendered and the case is
3 over, no one else can communicate with you except
4 the other jurors. We will not be able to do that
5 until the whole case is over with.

6 MR. BRENNAN: It will be approximately
7 three weeks?

8 THE COURT: I can't say. It depends on
9 a lot of factors as to how long it might be. We
10 may run into a string of uncanny luck and be able
11 to select this jury in a couple of days. I don't
12 anticipate it being that way, it may take as long
13 as four or six weeks.

14 If you will, keep in contact with us.

15 Thank you very much.

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1 MARY JANET MORRISON,

2 called as a prospective juror, answered the questions
3 propounded to her as follows:

4 THE COURT: Have a seat.

5 Let me ask you to do something for us:
6 relax as much as you can. We are not going to
7 bite you at all. We are going to ask you certain
8 questions and we want you to tell us how you feel
9 about certain things. We are not going to argue
10 with you or try to change your mind about anything.
11 We are just going to visit with you. We are not
12 bad guys, and we are going to try to be as nice
13 as we can.

14 You may proceed.

15 EXAMINATION

16 Questions by Mr. Bax:

17 Q Hi, Mrs. Morrison.

18 As the Judge told you, earlier, my name is
19 Dick Bax, and I am Assistant District Attorney here
20 in Harris County, Texas. I, along with Bob Moen,
21 who is back at the office taking care of other
22 business, will be representing the State in this
23 case.

24 Really, we need you to relax, and I know
25 when you are taken out of your environment and

1 singled out and asked questions you have probably
2 never had a chance to think about, it would
3 probably embarrass you.

4 We are not trying to embarrass you in
5 any way, but both sides need to make as
6 intelligent a judgement as we can as to whether,
7 in this particular type of case, you could be a
8 qualified juror. All right?

9 There are many different types of cases
10 that are heard here in Harris County: driving while
11 intoxicated, theft, murder cases and capital murder
12 cases.

13 Some types of cases, because of a person's
14 background or religious upbringing or whatnot, they
15 would make a fine juror in certain types of cases;
16 in other types of cases they may not make a good
17 juror. Okay?

18 The reason we are talking with you here is
19 the law will not force anyone to be put in a
20 position to sit on a jury which may then cause them
21 to violate some scruples that they may have
22 regarding any issues in the case or the punishment
23 to be assessed.

24 There is nothing wrong with people who have
25 come before us and said, "I just can't participate

1 in a death penalty case." All right, no one is
2 going to disagree with you or argue the pros and
3 cons of capital murder.

4 Everyone in this country is entitled to
5 their own opinion about the law. Okay? And we are
6 not going to put any person in the position where
7 they have to make that decision someday about their
8 personal beliefs versus an oath that they took.
9 Okay? We would not make that person take that oath
10 if truly, deep inside, they just could not follow
11 through with it.

12 All right, I know an oath is something we
13 all hold dear, when we raise our hands to say,
14 "We will do something under oath." Most people
15 really mean that, all right? But there are certain
16 things that even come before an oath of a juror,
17 and I would think like the death penalty where a
18 person may be involved in the actual taking of
19 another person's life against their beliefs, that
20 would override the oath that they took. Okay?

21 A Yes.

22 Q Relax and let me ask you the big question: How
23 do you feel about the death penalty? Do you agree
24 with it or disagree with it?

25 A I have mixed emotions about it.

1 Q Okay, I saw the reaction on your face earlier this
2 morning when Judge Oncken was talking to the six
3 of you here and he said, "This is a capital murder
4 case," and you had a look of, "Oh, no."

5 Does it cause you some concern, first of
6 all, to be in this position and talking about a
7 death penalty case?

8 A Yes, it upsets me very badly. I will perfectly
9 honest. I don't feel that I am emotionally
10 capable of handling a situation such as what has
11 been presented to me, today. I have had many or
12 quite a few very bad emotional things with a son
13 of mine about that young man's age, and I just
14 don't believe -- any other cases, I think, civil,
15 I think I would be great -- but I don't think that
16 I can emotionally handle this.

17 And another thing, too: If it had to come
18 to the death penalty, I have a tremendous conscience,
19 and I don't believe that I could be at peace with
20 myself.

21 Q Ma'am, I couldn't ask for a more sincere and honest
22 answer than you have just given us here, today.
23 Okay? And I appreciate your honesty.

24 A Well, I wanted to do my job, and I want to be a
25 good citizen, but I am not doing anybody a favor.

1 Q All right, there are -- and I want you to understand
2 you are not the only one we have talked to or will
3 talk to who have had that same opinion, but there
4 are people who say they believe in the death
5 penalty, but personally, because of a religious
6 background, the way they were brought up, they
7 could not participate in it. It would violate
8 their conscience in such a degree because their
9 emotions would take over, and they wouldn't
10 rationally in that type of situation, they wouldn't
11 be able to make as clear a judgement as they would
12 if they were not confronted with a death penalty
13 case.

14 Is that a fair statement of your beliefs?
15 A Plus my religion. I am Catholic, and of course,
16 we have been taught you don't take another man's
17 life unless they are threatening your life or one
18 of your family.

19 Q I take it what you are telling me here -- and a
20 lot is just for clarification, because this lady
21 is taking down everything your and I say -- is
22 that you have objections to the death penalty?

23 A Yes, I do.

24 Q And someday, some judge will be looking at what we
25 are discussing here today. It has to be clear.

1 We have to make it very clear on the record just
2 what your feelings are.

3 A Yes.

4 Q I take it this is a very, very strong feeling you
5 have, as far as your participation in the death
6 penalty case?

7 A Yes, it is.

8 Q And I think I hit it pretty close to the nail on
9 the head earlier when I said even though you would
10 take an oath that the evidence you hear would be
11 swayed by the fact that you would be deciding
12 on whether a person should live or die?

13 A I am not the one to make that decision.

14 Q Do you feel that, then, in any situation -- let
15 me ask you this: Do you have a bias against the
16 death penalty as far as yourself being involved in
17 that decision?

18 A I know it is the same old saying they say, "Yes,
19 you say that man should be -- get the death
20 penalty, or what have you" but when it comes to
21 me saying, "Crucify him," I can't do it.

22 Q Okay, all right.

23 Let me explain to you how it works and
24 how a person can assess the death penalty once
25 again for the record, so we will all understand.

1 A Uh-huh.

2 Q First of all, I will ask you a general question,
3 and I think I know what the answer would be.

4 No matter what the facts of a particular
5 case were, you could not vote for the imposition
6 of the death penalty? You would opt out for a
7 life sentence because of your feelings?

8 A I couldn't.

9 Q You couldn't vote for death?

10 A No, sir. No, sir.

11 Q The reason I am saying that --

12 A No, sir. No, sir. I don't feel that I could.

13 I will put it this way: If it were someone
14 in my family, my husband or my children or something
15 like that, I think my feelings would be completely
16 different.

17 Q Again, you would be responding to emotions, though,
18 rather than facts?

19 A Yes, sir. Yes, sir.

20 Q So, in a death penalty case where you are trying
21 someone you do not know, your emotions would preclude
22 you from judging the facts fairly?

23 A Yes.

24 Q And even under the law, serving on a jury where
25 a family member were the victim of a capital

1 murder, you could not put your emotions aside in
2 that case? Your emotions would probably say, "I
3 could go for the death penalty," but again, the
4 emotions would control?

5 A That is right.

6 Q I will tell you straight out front that a jury in
7 the state of Texas, if they find a person guilty
8 of capital murder, they do not say, do not go
9 back in the back and say, "Should we give this
10 man the death penalty or should we give him life."
11 That is not how it works.

12 The way it works, there are two questions,
13 and based on the way the jurors answer those two
14 questions, you will tell the Judge whether he
15 will assess life or death. Okay?

16 The two questions are there on the board
17 to your left, and I think you had a chance to read
18 those earlier.

19 Okay, if all twelve jurors answered question
20 number one "yes" and question number two "yes,"
21 the Judge would then assess the death penalty.
22 Okay? So although you don't say life or death,
23 the way you answer those questions, in reality,
24 you decide whether or not a Defendant receives life
25 or death. All right?

1 Knowing now what we have talked about,
2 can you perceive of any situation where you could
3 answer both number one or two "yes," which would
4 allow the Judge to assess the death penalty?
5 A That is fine, but we are the ones that came up
6 with this answer. All this is doing is putting
7 the monkey on the Judge's back and he decides.
8 Q He, the Judge, makes no decision. You decide for
9 the Judge by the way you answer the questions.
10 A If it comes out guilty on both counts, that is
11 the death penalty? Correct?
12 Q I believe from what you have told me before,
13 because of your emotions and religious background,
14 you could never answer those questions "yes,"
15 knowing that man would receive the death penalty,
16 because in essence you would be assessing the
17 death penalty in those situations?
18 A Yes, sir.
19 Q Again, just for the record so it is clear, because
20 of your background and feelings and your religious
21 upbringing, you could not fairly -- and when I
22 use the word "fairly," I am not saying something
23 is wrong with that -- but because of your deep-
24 rooted feelings, you could not fairly answer those
25 questions because your emotions would take over

1 and your logic would be put aside and you would
2 be reacting to emotion rather than to the evidence
3 in the case?

4 A Yes.

5 Q That is fine.

6 In a moment, Mr. Elizondo will have a
7 chance to talk to you about the same things we
8 are talking about.

9 Is there anything else I could say to
10 change your mind, or would your answers to him
11 be the same?

12 A They are going to be identically the same.
13 I have searched my soul and my mind ever since
14 I have found out what this is going to be, and
15 I know myself.

16 Q All right, the law requires probably that I ask
17 you this question: Assume with me you have found
18 a person guilty of capital murder, okay? At that
19 point in time, you know he is going to receive
20 either life or death. You know if you answer both
21 of those questions "yes," he will receive death.
22 One, or just one "no," and he will receive a life
23 sentence.

24 A That's right.

25 Q He is not going to escape punishment.

1 A That's right.

2 Q He is going to at least get life, which is a very
3 significant punishment in itself, would you agree?
4 Life imprisonment?

5 A Yes.

6 Q Assume with me the other jurors have found him
7 guilty. Would you answer "yes," knowing that puts
8 him one step closer to the death penalty, or would
9 you automatically answer it "no."

10 A I would avoid anything that would involve me in
11 someone else's death.

12 Q Could you even deliberate with the other jurors,
13 or are you saying you could not participate with
14 the other jurors in a death penalty case?

15 A I could discuss it with them, but their views
16 would not change my mind or my feelings.

17 Q Which would mean answering one of those two questions
18 "no," to avoid the personal involvement of your
19 being attached to the death penalty in that
20 particular case? If I haven't confused you with
21 that.

22 A No, you haven't confused me, no, but I would like
23 to say something, that once the trial is over,
24 the conviction is over, or whatever, then years
25 later you pick up the newspapers and you see that

1 this person is going to be executed by lethal
2 injection or whatever it is, no. I don't want
3 to. No. I am too sensitive a person. I would
4 take it as a personal vendetta, and at my age and
5 all I have been through, I don't need any more.

6 Q Okay, Mrs. Morrison. I assume there is no way
7 you could answer questions one and two "yes" . . .

8 A No, sir.

9 Q . . . knowing both of those would mean the death
10 penalty, because you would suffer for the rest
11 of your life?

12 A I would.

13 MR. BAX: Your Honor, we have a challenge.

14 MR. ELIZONDO: May I have a moment?

15 EXAMINATION

16 Questions by Mr. Elizondo:

17 Q Mrs. Morrison, how are you doing?

18 A Fine.

19 Q My name is Candelario Elizondo. This is Joe
20 Hernandez. This is Linda Hernandez, and the
21 Defendant, Ricardo Guerra.

22 Let me see if I got it straight. Some
23 laws I don't agree with. The example of that
24 would be the fifty-five speed limit. I don't
25 agree with it. I hate having to go fifty-five miles

1 per hour, but I follow the law.

2 Am I right in understanding what you are
3 saying is there is no circumstance, whatsoever,
4 that you can come up with where you would vote
5 for the death penalty?

6 A Not myself, personally.

7 Q No.

8 A little while ago, you mentioned your
9 loved ones.

10 A Yes, I did, but I think that is a totally
11 different type -- that is someone you know, so
12 therefore, the fact that someone has injured them --
13 as you well know, you can fuss at your child,
14 but if somebody else comes and does it, you don't
15 want -- the emotion is different.

16 Q Okay. I realize that, but could you be for the
17 death penalty in any kind of situation that involved
18 your loved ones?

19 A I think when I really got down to it, I would have
20 to say this was God's will and it is in his hands.
21 I don't believe if I really got down to it and I
22 was able, as he said, that I could be on the jury.
23 I still don't feel that I could condemn another
24 man to death.

25 Q Well, let me give you an example, a hypothetical

1 example.

2 Let's assume that out here on the Southwest
3 Freeway there is a kidnapper and he's got a
4 schoolbus full of deaf children in the bus,
5 thirty deaf children five and six years old. The
6 kidnapper communicates with the authorities and
7 says, "I want a million dollars in ransom or I am
8 going to kill all these five and six year old
9 deaf children, and I want it in two hours."

10 Well, the people, they hustle about, and
11 they finally raise a million dollars and they give
12 it to the kidnapper. The kidnapper gets back on
13 the bus, gets a machine gun and just shoots all
14 those five and six year old deaf children, anyway.

15 We come to find out later that this
16 kidnapper has been in the penitentiary two times
17 before for kidnapping. When he gets to the
18 police station he gives a confession. He says,
19 "Yep, I did kidnap those five year old children
20 and I did kill them and I got the money."

21 On the first stage, by your oath as a
22 juror, would you say "yes, he is guilty," if
23 the State proved it to you beyond a reasonable
24 doubt?

25 A Yes, if they proved he was guilty. Fine. He is

1 guilty.

2 Q And you can answer that question, couldn't you,
3 guilty on the first part?

4 A Right.

5 MR. BAX: Judge, if he would rephrase it --

6 A That is why I am confused. I would appreciate it
7 if he rephrased it.

8 MR. BAX: Could he rephrase it saying
9 knowing that he might receive it ultimately.

10 THE COURT: All right.

11 Q (By Mr. Elizondo) He will be charged with capital
12 murder of course, because he killed somebody and
13 killed them in the process of kidnapping. As in
14 all trials in Texas, it is divided into two parts.
15 The first part is guilt or innocence.

16 If the State proves to you beyond a
17 reasonable doubt that he is guilty of this offense
18 of capital murder, could you find him guilty?

19 A You have already said that the State had found
20 him guilty.

21 Q No, the State proves its case to your satisfaction
22 beyond a reasonable doubt, and you are a jury and
23 you hear the evidence and in your mind you say,
24 "They have done their job, they have proven this
25 case to me beyond a reasonable doubt, therefore

1 I will follow my oath as a juror and find him
2 guilty.

3 Can you do that?

4 A It is a real tricky question you've got there, in
5 a way.

6 Q No, I am not trying to trick you.

7 A Well, what it's doing, it's putting me -- dividing
8 my emotions -- and yet from what I know or the
9 evidence that I have seen --

10 Q Let me rephrase that.

11 Can you set your emotions aside?

12 A No, because I am going to have to live with my
13 emotions the rest of my life.

14 MR. BAX: Judge, we renew our challenge.
15 She would have a problem finding someone guilty
16 of capital murder, let alone getting to the
17 questions if we got to those two questions.

18 THE COURT: Mrs. Morrison, can you envision
19 any circumstance under which you could find
20 someone guilty of a capital murder and participate
21 in a verdict that would result in the Court
22 ordering that individual be put to death?

23 THE PROSPECTIVE JUROR: I would rather
24 not be put in that position because --

25 THE COURT: I understand you would rather

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1 not, but like Mr. Bax was telling you earlier,
2 we've got to have a yes or no answer to the
3 question.

4 THE PROSPECTIVE JUROR: Would you restate
5 the question?

6 THE COURT: Is there any circumstance
7 that you can imagine where you could participate
8 in finding a person guilty of the offense of
9 capital murder and then participate in a verdict
10 that would result in the Court, me, ordering
11 that individual to be put to death?

12 THE PROSPECTIVE JUROR: No, sir. No.

13 THE COURT: Is that your answer? No?

14 THE PROSPECTIVE JUROR: Yes.

15 THE COURT: I sustain the State's
16 objection.

17 MR. ELIZONDO: And Your Honor, we would
18 object to the constitutionality of Article 35.13
19 of the Code of Criminal Procedure --

20 THE COURT: Thank you very much.

21 MR. ELIZONDO: And the contravention of
22 Witherspoon.

23 IVIS V. RISTER,
24 called as a prospective juror, answered the
25 questions propounded to her as follows:

1 THE COURT: Mr. Rister, as I told you
2 earlier this morning, we are going to be, or
3 these gentlemen, however, will be asking you
4 questions about your feelings about certain things,
5 and all we want you to do is tell us how you feel.
6 Don't give us any answers you think we might want
7 to hear, but just tell us exactly how you feel
8 about it, and not anybody in this courtroom is
9 going to argue about how you feel.

10 You may proceed.

11 EXAMINATION

12 Questions by Mr. Moen:

13 MR. MOEN: Thank you, Judge.

14 Q My name is Bob Moen. I am with the District
15 Attorney's officer here in Harris County, Texas,
16 and Dick Bax is this fellow to me, to my
17 immediate left, and we are on the staff together,
18 Mr. Bax and myself, and we will be representing
19 the District Attorney's office and the family
20 of J.D. Harris in the prosecution of this case
21 styled the State of Texas vs. Ricardo Aldape
22 Guerra.

23 It is alleged Mr. Guerra caused the death
24 of Officer J. D. Harris on July 13th of this year
25 by shooting and killing him with a pistol.

1 He is represented by two lawyers to my
2 left, Candelario Elizondo, and Joe Hernandez. Those
3 two gentlemen will be handling the defense of Mr.
4 Guerra who is seated back here with the interpreter
5 at the end of the table.

6 I noticed when the Judge talked with you
7 earlier you thought you may have heard or read
8 something about the facts. I can't go into the
9 facts in the case. I am sure you are familiar
10 with the procedure involved in these capital
11 murder cases, but let me give you a little bit,
12 generally, about the facts in the case to see if
13 if might jog your memory.

14 It is alleged this killing took place at
15 the intersection of Edgewood and Walker streets,
16 which is an intersection not far removed from
17 Harrisburg, which is a major thoroughfare, by
18 a couple of blocks. It is in the east part
19 of town.

20 A police officer by the name of J. D.
21 Harris was shot three times in the face and killed.
22 A man about seventy or eighty feet away was shot
23 with his two children in the car, shot in the
24 head, and he was killed, and about an hour and
25 forty-five minutes later a police officer was shot

1 four or five times in the course of making an
2 arrest of the individuals.

3 With that just touching on the facts, do
4 you remember having heard or read anything about
5 this case at all?

6 A The only thing I can recall is probably more of
7 the headlines and a few of the things, but none
8 of the intricate details.

9 Q Well, I take it in any event, whatever you might
10 have heard or read, I take it unless you tell
11 me differently, that you haven't formed any opinion
12 about the guilt or innocence of this man based on
13 what you have heard, have you?

14 A No, I haven't read it in detail.

15 Q Let me ask you from your prior jury service in
16 '78 if there was something about your jury service
17 in '78 that left a bad taste in your mouth, or
18 at least, may have given you a bad feeling for
19 the criminal justice system, or is that a fair
20 statement?

21 A That is a fair statement.

22 Q What was it about it that left a bad taste in
23 your mouth? Can you explain it for me?

24 A After the trial was over and we discussed it in
25 the hallway, I felt that we were given a bunch of

1 half-truths or a lot of facts were kept from the
2 jury for us to make a decision, and I say a fact
3 is a fact, and if I don't get the fact, then
4 I am not getting the full truth of it which the
5 judicial system knew, and then you ask me, I say
6 "you," the Court asks me to make a decision and
7 not all the facts were available to be given to
8 the jurors.

9 Q Which capital murder case was that? Do you
10 remember?

11 A It was Milton Harris and his cohorts in a murder
12 they committed out here in the Re-Hab center.

13 Q Okay.

14 A On Atascocita Road.

15 Q Was it another inmate who was killed?

16 A Yes. Five of them got together and killed him
17 in the Re-Hab center.

18 Q As far as information that was withheld from you,
19 was it explained to you as to why it was that
20 you weren't allowed to hear that information or
21 why it was the system sometimes keeps things
22 from jurors it might otherwise want to know or
23 like to know? Was that ever explained to you at
24 all?

25 A It was explained, but it doesn't alter a fact.

1 Q I know it doesn't help any, but sometimes, you
2 know, we are guilty. I say, "We are guilty,"
3 police officers and people who are involved with
4 the system, District Attorneys and judges and
5 defense attorneys, with not fully explaining
6 to people sometimes how the system works. Sometimes
7 we can do it and sometimes we can't even give them
8 the explanation.

9 How do you feel about perhaps being on
10 another capital murder case or being a juror in
11 the case? Is there anything about your prior
12 jury service that would cause you difficulties
13 if you were selected as a juror again?

14 A I don't think there would be, but I would like
15 to get all the known facts. I think for me to
16 function as a juror, I should have them, and if
17 it ever comes to that point again, that, you know,
18 the facts are withheld, and when I say facts, I
19 am talking about known facts --

20 Q Without telling me what your verdict was on that
21 Harris case, because that is your business, it's
22 not -- and I am not really concerned about what
23 your verdict was. That is for you and the other
24 jurors -- were you able to reach a verdict or
25 were you unable to reach a verdict?

1 A Unable to reach a verdict.

2 Q At which portion of the trial were you unable to
3 reach a verdict? The punishment phase or the
4 guilt or innocence phase?

5 A The first phase.

6 Q Do you remember who the lawyers were in that case,
7 the prosecutor or defense attorney?

8 A The prosecutor was -- his first name was Ted,
9 a big guy, bald, partially bald-headed.

10 And the defense -- I can't recall his
11 name offhand. I would know him if he walked in
12 a room.

13 Q Do you know who the judge was on it?

14 A He was a visiting judge from east Texas.

15 Q I wonder if that was Wardlow Lane. Does that name
16 ring a bell? He is a real character from east
17 Texas.

18 A Are you talking about an elderly fellow?

19 Q Yes.

20 A It could have been him.

21 Q Wardlow is such an outstanding human being, if
22 it were he, you would probably have the remembrance
23 of it.

24 Let me ask you about something else, too.

25 At one time, you say our office would not

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1 prosecute someone who committed a crime? Was
2 it against some member of your family that that
3 crime was committed or some member of someone
4 else's family, or yours?

5 A A business I was engaged in.

6 Q What was the nature of the crime charge you thought
7 was committed against you?

8 A My office was burglarized and the burglars were
9 apprehended in south Louisiana and the D.A.'s
10 office would not go get them and bring them back
11 here for prosecution.

12 Q We wouldn't extradite them and bring the criminals
13 back?

14 A That's correct.

15 Q Who told you we wouldn't do that? Was that a
16 conversation with our office?

17 A Yes.

18 Q Who told you that?

19 A I don't know. I have it recorded at my office.

20 Q Did they give you an idea of why it was we wouldn't
21 extradite someone who burglarized your business
22 to prosecute them for that? Did they have an
23 explanation for it?

24 A They didn't really come up with an explanation.

25 I take that back. The District Attorney's

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1 office -- the Sheriff's department was who I was
2 talking with.

3 Q Okay.

4 A And the Sheriff would never file charges. I
5 wanted to file charges.

6 Q Was it the county who investigated your case, the
7 Sheriff's department?

8 A The Sheriff's department.

9 Q I don't mean to laugh at what you are telling me.
10 I just have my own pet peeves with the Sheriff's
11 department as a law enforcement agency, period.

12 Were they the ones telling you the District
13 Attorney's office was not going to extradite them
14 or did you also have a conversation with someone
15 from the District Attorney's office in that regard?

16 A I would have to go back over my notes. They and
17 the Sheriff's department in Saint Mary's parish
18 in Louisiana, both of them were involved in it,
19 and they were wanting Saint Mary to send them back,
20 and Saint Mary said, "Ya'll come get them," so,
21 since there was a handful there, they let four
22 people -- I take it back -- there was four, and
23 three were turned loose on the street. One
24 happened to be an A.W.O.L sailor and the deputy
25 got fifty dollars and they took him out.

1 Q How long ago was that?

2 A Less than two years, a year and a half at the most.

3 Q Well, I am -- you know, I don't know what to tell

4 you except that you've got the first-hand view

5 of the Sheriff's department and how it works, and

6 perhaps we are not at fault on that, too, not

7 knowing what the facts are, but we are working

8 with the criminal justice system. And I take it

9 you are saying there was no justice?

10 A Just criminal system.

11 Q Welcome to the system. Leave out the justice part.

12 A Okay.

13 Q Let me talk to you a little bit about your personal

14 feelings concerning punishment. In other words,

15 someone receiving the death penalty for having

16 committed capital murder, can you tell me what

17 your feelings or opinions are concerning capital

18 punishment and the death penalty?

19 A If, in my opinion, they deserve it, then I don't

20 have any problems with that.

21 Q I take it that is probably the way you have felt

22 all your adult life?

23 A That's right.

24 Q It is a product of either your own thought

25 processes or conversations with your friends, or

1 was that a product of your upbringing, as well?

2 Was that the way your mom and dad felt, as well,
3 too?

4 A I don't know how they felt. I can't speak for them.

5 Q So it is pretty much a decision you have formulated
6 as part of your adult thought processes. Okay.

7 Let me tell you or go over a little bit
8 about the procedure. I am sure you are familiar
9 with it, so I am not going to spend as much time
10 as someone not familiar with it, but let me by
11 way of refreshing your memory from four years
12 ago explain to you how capital murder works.

13 Not all murders are capital murders. If
14 someone commits a murder the range of punishment
15 that person receives is five to ninety-nine years
16 or life.

17 Our legislature has said that if someone
18 commits a murder during one of nine different types
19 of crimes, then that person is going to answer to
20 a jury for either a life sentence or the death
21 penalty.

22 If a person breaks into a person's home
23 and kills one of the owners during the course of
24 committing burglary, that is capital murder. If
25 someone comes in at gunpoint and robs someone and

1 shoots someone in the store, that is capital murder.
2 Kidnap-murder, rape-murder, arson-murder, all
3 those are examples of capital murder.

4 Also, the legislature has said if a man
5 murders a police officer or fireman during the
6 course of his official duties, that is a capital
7 murder. Murder for hire is another type of
8 capital murder, and finally, if you are in the
9 process -- if you are a convict and you are in
10 the process of escaping from a penal institute
11 and you kill anyone during the course of that
12 escape, or if you are in the process of making an
13 escape and you kill a prison employee, those are
14 the only instances the legislature has said those
15 cases, and those cases alone, are going to be
16 punished as capital murders.

17 All other murders, no matter how horrible
18 they might be, no matter how many people are killed
19 such as Elmer Wayne Henley, those are murder cases,
20 not capital murder cases.

21 It has to be this particular type of
22 person or particular set of circumstances.

23 Do you follow me on that?

24 Now the way the death penalty is assessed,
25 it's by the jurors answering the two questions

1 that appear to your left on the blackboard. If
2 the jury answers both questions, "yes," it is
3 automatically the death penalty. If a member
4 answers "no," on either, the man receives life
5 rather than the death penalty. All twelve jurors
6 have to unanimously agree before a question can
7 be answered "yes." Ten of the jurors have to
8 unanimously agree before a question can be
9 answered "no." There is a little distinction
10 between a yes and a no answer.

11 Let me explain a little bit about --
12 by way of your '78 jury service -- let me explain
13 a little bit about your rules of evidence.

14 At the first stage of the trial, that is
15 called the guilt or innocence stage. You know
16 that. All you hear at that time is the evidence
17 that is deemed to be admissible testimony within
18 the rules of evidence. Sometimes there are
19 things that are known about people, conversations
20 that are had by witnesses that might help the
21 jury in arriving at a decision, but because they
22 are hearsay or might violate some other rules
23 of evidence, those things are basically kept from
24 the jury.

25 The only evidence a jury can hear during

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1 the course of a criminal trial is that testimony
2 which is deemed to be legally admissible testimony.
3 So often, there are remarks that are made in the
4 course of a police officer's investigation or
5 remarks made to a witness that might be pertinent
6 and relevant to a juror's consideration, yet
7 they violate the Defendant's relevance, and they
8 are kept from the jury.

9 That is the way the system works. I
10 don't like it, necessarily, but sometimes it
11 works to protect my case as well as hurt it. It
12 depends.

13 Sometimes, if you are on the receiving
14 end, you think it's the most wonderful thing in
15 the world. If you are on the other end, it's
16 the most rotten thing.

17 The jury hears only that evidence which
18 is deemed legally admissible, and they go back
19 and reach a verdict if they can. If they reach
20 a verdict of guilty, they come back in the
21 courtroom and the second stage of the trial, and
22 we are allowed to, at that time, to tell the
23 jury about other acts the Defendant may have
24 committed. That is pertinent testimony in a
25 criminal action, in a criminal trial, but in a

1 capital murder case, if a man has committed other
2 crimes that are relevant to the jury to help them
3 answer those two questions, they can hear that
4 evidence in addition to other evidence they might
5 have heard. Any testimony along those lines they
6 can hear, and then the jury goes back to deliberate
7 on the two questions on your left.

8 What I would like to do is briefly touch
9 base with you on some of the words that appear
10 in those questions.

11 A I made an error in that. That was not a capital
12 murder case.

13 Q It was just a straight murder case?

14 A According to your explanation there, I don't
15 believe that -- by your explanation, that was
16 not a capital murder. It was a murder.

17 Q Okay, what we do on capital murder cases -- and I
18 think probably finding yourself by yourself on
19 the witness stand in a capital murder case as
20 the law provides that we must interview
21 individuals individually rather than bring thirty-
22 six people over together and talk to them, our
23 bringing all of the jurors in one at a time and
24 the whole process takes two to three weeks and
25 sometimes as long as five weeks trying to get a

1 jury selected, we bring people in and try to
2 explain to them what would be required for jury
3 service.

4 These two questions on your left, this
5 is the way punishment is assessed on a capital
6 murder case. The jury doesn't go back and say,
7 "Should we give this man life or death, and should
8 we go tell the Judge that." Instead, they
9 take all the testimony they have heard about the
10 man they have found guilty: What type of crime
11 it was he committed, what they know about him,
12 they take that back and deliberate among themselves
13 about what the answers should be.

14 The first question is a rather straight-
15 forward question. It asks you to make a
16 determination about the conduct of the man. Was
17 that man's conduct that caused the death of
18 the deceased, was it done deliberately and was it
19 done with the reasonable expectation that the
20 death of the deceased would result? Was it
21 deliberate conduct committed for the deceased to
22 die, and was it done with the reasonable
23 expectation he would die.

24 I guess you could probably answer that
25 question just based on the evidence surrounding

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1 the case, itself.

2 The second question is a little different.
3 It asks you to make a prediction based on the
4 evidence about what kind of person it is on trial.
5 It asks you to make a judgement call as to
6 whether or not the man is a person where there
7 is a probability that he would commit criminal
8 acts of violence that would constitute a threat
9 to society.

10 I would like to direct your attention to
11 that word "probability." To answer that question
12 you have to believe there is a probability, not
13 a certainty, not a sixty-forty chance or a twenty-
14 twenty chance or anything else, and I think the
15 reason is it's probability rather than certainty.

16 I think you realize the same thing I do,
17 not to be disrespectful or blasphemous, but the
18 only person in the world who can predict that is
19 God, and the juror is not required or asked to
20 play the role of God. They are just asked to
21 make a judgement on the type of person he would
22 be whether he would constitute a continuing threat
23 to society.

24 Now, after we have talked about probability,
25 let me direct your attention to this word "criminal"

1 acts of violence." Before you could answer the
2 second question "yes," you don't have to believe,
3 nor do I have to prove to you the man would commit
4 any specific criminal act of violence. That phrase
5 is all inclusive of whatever he would commit,
6 whether it be assaults, rapes, kidnappings or
7 murders or what have you.

8 Is he the type of person that would
9 probably commit such acts, and would those acts
10 constitute a continuing threat to society wherever
11 the man found himself, whether it be in the
12 street society or prison society, whether he would
13 be the type of person who would do those acts and
14 whether they would constitute a criminal act to
15 other people.

16 Do you follow me on that?

17 A Yes.

18 Q Have you questions of me on question one or two?
19 Is there anything I can go over or clear up for
20 you at this time?

21 A I think you have made it very clear.

22 Q Okay, just based on the way the questions are
23 worded, is there anything about question one or
24 two that makes you feel like, just the way it's
25 worded, the way the questions are worded, that

1 makes you feel like you would be able to answer
2 question two, one and two, depending upon the
3 evidence you hear?

4 If you have any questions, go ahead and
5 spill them out.

6 A Well, whether the conduct -- you know, that word
7 is all inclusive.

8 Q Let me give you an example, I think by way of
9 explanation: The jury, can, in a proper case, the
10 evidence of the crime itself can be enough
11 evidence for the jury to answer both of those
12 questions "yes," and let me give you the classic
13 case that probably comes to mind. In the Ronald
14 Clark O'Brian case, the man who for insurance
15 money gave both of his children poisoned Halloween
16 candy and one of them died and one did not, that
17 case our Court of Appeals held was evidence all
18 in itself. That man's participation in that crime
19 and the jury listening to the evidence in that
20 crime was enough for the jury to answer those
21 questions based on the crime itself. That is
22 an example.

23 The jury, after hearing about what he
24 had done in planning his children's death, could
25 find out his conduct in causing his child's death

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1 was done deliberately and with the reasonable
2 expectation they could die.

3 That's an actual example, not hypothetical,
4 but a real live crime, where our Court of Appeals
5 has held the evidence in that case alone, the
6 evidence was enough to answer both questions "yes,"
7 but the law does provide at the second stage of
8 the trial for the jury to hear additional evidence,
9 but there is no requirement in the law the jury
10 has to hear additional evidence before they can
11 answer the question "yes."

12 Let me give you a hypothetical example,
13 even though you have found someone guilty of
14 capital murder, you might find out his conduct was
15 on the other side of the coin.

16 Imagine a case where a man who is a two-
17 time ex-convict talks a seventeen year old kid
18 into going to the grocery store and committing a
19 robbery. The seventeen year old boy has never
20 been in trouble before and that can be shown to
21 the jury. He has no prior criminal record. An
22 ex-convict is able to exercise a lot of influence
23 over the boy, and the ex-convict goes in the store
24 along with the seventeen year old, and he's got
25 a loaded gun. The convict's got a loaded gun and

1 it's a Ma and Pa store, and he shoots and kills
2 a man and the boy drops his gun and let's say he
3 goes out of the store with the ex-convict right
4 behind him.

5 Now under our law of parties, people who
6 conspire together and act together to commit a
7 crime are equally guilty. In such as this case,
8 the men who acted together to commit that crime
9 are all actually responsible, because regardless
10 of the different parts they played, they were
11 equally guilty as parties.

12 You see how the jury might have no problem
13 answering that question "yes," when it came to
14 the ex-convict who actually pulled the trigger
15 and killed the man, but I would suggest you would
16 probably answer the question "no" when it came
17 to the seventeen year old, because they might
18 find his conduct in causing the death of the
19 deceased was non-existent.

20 Now definitely, he played a part in the
21 robbery, but when it came to the man's death, the
22 jury might feel that it was the conduct of the
23 ex-convict rather than the seventeen year old boy
24 that caused it.

25 That is why none of the answers to these

1 questions are automatically yes or no. It just
2 depends on the jury's feelings after they have
3 heard the evidence, but certainly the evidence in
4 the case can be enough for the jury to answer both
5 questions.

6 But the second stage of the trial does
7 give an opportunity to present certain evidence
8 to the jury within the rules of evidence.

9 Do you follow me so far?

10 A Yes.

11 Q Do you have any questions as far as about those
12 questions?

13 A No.

14 Q Do you feel those are the types of questions,
15 now that I have had a chance to explain a little
16 bit more, that you could answer based on the
17 evidence you would hear?

18 A Right.

19 Q Let me touch base with you on one other thing and
20 that is -- I am trying to explain this in terms
21 that don't sound like a law school professor. I
22 am trying to put it in just terms where we can
23 both understand, kind of together. I mean, I want
24 to be sure you understand what the expression is.
25 It is called "lesser included offenses."

1 Every capital murder charge, every capital
2 murder case includes the lesser offense of murder.
3 You see, murder is not as serious a crime as
4 capital murder from the punishment standpoint.
5 A person who commits capital murder and is found
6 guilty of capital murder can only receive a life
7 sentence or the sentence of the death penalty.

8 Now a person who is found guilty of murder,
9 it is a totally different range of punishment, five
10 to ninety-nine years or life. That is the range
11 of punishment for someone found guilty of the
12 offense of murder.

13 For a person to be found guilty of capital
14 murder, as I have told you earlier, he has to
15 commit one of those specific capital murder cases,
16 the instances I cited, either murder during the
17 course of the commission of another felony: burglary,
18 robbery, rape, kidnapping, arson, or murder of
19 a particular type of individual. In other words,
20 with persons on trial for having killed someone
21 during the course of a robbery, if the jury believed
22 all, they heard all the evidence and decided "Yes,
23 this man killed that other man, but not during the
24 course of robbery," then their proper verdict would
25 be guilty of the offense of murder but not capital

1 murder. Unless the man commits a murder during
2 the course of a felony offense or unless he commits
3 a murder to one of those protected individuals,
4 the employee of a penal institution, a police
5 officer or fireman, then it may very well be a
6 murder case but it is not a capital murder case.

7 Do you follow me on the distinction there?

8 Let me give you an example of what I am
9 talking about on this lesser offense and explain
10 how this comes into play.

11 Let's take the hypothetical instance of
12 say, Jack the Ripper on trial and you are a juror
13 on the Jack the Ripper case. You have heard he
14 has killed forty-eight women and horribly mutilated
15 their bodies and the medical examiner found
16 evidence of sperm which shows the women were raped
17 before they were killed by Jack the Ripper.
18 Because murder during the course of a rape or
19 for a rapist to murder his rape victim is capital
20 murder, yet Jack the Ripper gets on stand during
21 the course of the trial and says, "Yes, I killed
22 those women, but didn't sexually attack them,"
23 but everyone in the courthouse might feel that he
24 is the biggest bald-faced liar in the world, but
25 the Judge would have to submit to the jury the

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1 lesser offense of murder in the event the jury
2 unanimously agreed that Jack the Ripper, was, in
3 fact, telling the truth, and then their proper
4 verdict should be guilty of murder rather than
5 capital murder.

6 But the Judge just makes a call like
7 a referee. He doesn't pick sides and tell the
8 jury, "I don't believe that person when he says
9 it's murder and not rape." His obligation is to
10 submit those charges to the jury, no matter how
11 believable or unbelievable the source may be.

12 Do you understand me on that? That is
13 what I meant by lesser included offenses for
14 capital murder.

15 The punishment for the lesser included
16 offense is from five years to a maximum of ninety-
17 nine years or life, and what I am ultimately
18 getting around to asking you is this: In a proper
19 case, do you feel like you are the type of person,
20 even though he were found guilty of the offense
21 of murder, who could keep an open mind, and if
22 you felt like it was a proper case and if you
23 had unanimously agreed with the jury that the
24 range of punishment for this person you had found
25 guilty of murdering should be ten years or less,

1 could you, in a proper case, consider recommending
2 probation to the Court?

3 Have I made myself clear? I can give you
4 an example of what I am talking about that would
5 clear it up a little bit.

6 A capital murder case where someone might
7 give someone guilty of murder and recommend
8 probation -- let me give you an example -- imagine
9 a case where a man and woman have been married for
10 thirty or forty years and he finds himself down
11 at our hospital down at the Methodist Hospital
12 in the Medical Center, and he is dying from an
13 incurable disease, whatever it might be, and the
14 doctor tells him he has anywhere from two months
15 to perhaps six months to live.

16 She goes down to visit him every day and
17 sleeps in his room at night and talks to him about
18 it. His money that he has saved in the course
19 of his working life is disappearing quickly and
20 they talk and reach a decision, a rational decision,
21 and he asks her to go ahead and take out some
22 life-support equipment and let him pass, just
23 unplug it or pull out some of it, some of the
24 I.V.s or what have you and let him pass. He is
25 going to die anyway, and that way, she will have

1 something left.

2 They talk about it and she decides to do
3 it and they decide that is the best course and
4 he does it one night. What she has done falls
5 within the definition of the offense of murder.
6 She has intentionally, knowingly assisted in
7 another's death.

8 Even though it is still against our law
9 to have assisted in the taking of his life or in
10 helping him pass away, regardless of the
11 circumstances.

12 Let's say some of the relatives on his
13 side are upset by the pass of their daddy, so they
14 manage to present to a grand jury the only reason
15 she did it was because they had some land they
16 owned and knew that if he was dead, she could sell
17 that land and perhaps some builders wanted to put
18 up some condominiums on it and she convinces the
19 grand jury she did it just because she was opposed
20 to the sale, and now she can receive this windfall.

21 She gets indicted and the jury hears that
22 evidence and feels this is the biggest bunch of
23 poppycock ever heard in their lives, and they
24 believe the facts, even though technically it is
25 murder. The jurors talk among themselves, also,

1 and decide that this lady who is in her seventies
2 deserves probation, does not deserve to go to
3 the penitentiary.

4 I hope by that example I have explained
5 not only lesser included offenses but how it
6 is possible for someone to ultimately at one time
7 to be even charged with capital murder and yet
8 the jury feels they are technically guilty of
9 murder and recommended probated sentence to the
10 Court.

11 Do you follow me on that?

12 A I can see that.

13 Q I can give you other examples. The only thing
14 I am trying to ask you -- I am not trying to talk
15 you into anything -- I am trying to see if you
16 are a person who can keep an open mind in the
17 range of punishment if you are a juror on a murder
18 case. If you felt like, after listening to all the
19 facts, it was a proper case for probation, could
20 you recommend probation to the Court?

21 A If it was a proper case.

22 Q If you felt like it was proper, I would expect
23 you to stand up for that in the jury room.

24 You strike me as a person who would be
25 able to recommend it to the Court.

1 A If I felt that way, yes.

2 Q Now, that explains the lesser included offense
3 of murder, and that range of punishment on murder.

4 I want to touch base briefly with you
5 on some of your obligations as a juror, as a
6 prospective juror, and one is with regard to
7 the presumption of innocence.

8 On your other case, I think it was Ned
9 Morris, wasn't it?

10 A Yes. Ned Morris.

11 Q Thinning hair and glasses?

12 A Blonde.

13 Q Real kind of laid-back type of personality?

14 A Yes. Ned Morris.

15 Q At one time when I first came with the District
16 Attorney's office, Ned Morris was the number two
17 man in my court and I was the beginning lawyer and
18 the Judge who is to your right was my chief,
19 the supervisor of both Mr. Morris and myself,
20 so I guess I am telling a story on how old I
21 am, but when you described Ned Morris, that pretty
22 much fit the bill as to who you were talking about.

23 But in any event, I suppose he told you
24 at that time the presumption of innocence is
25 essentially this: The Defendant, as he sits here,

1 is assumed to be innocent. I am not going to assault
2 your intelligence by asking you to assume anything
3 other than the law asks you to assume.

4 A person who is caught, under the law,
5 is as guilty the day he is caught as the day he
6 sits down here waiting for the jury to decide his
7 fault. The only thing the law asks you to do
8 is presume the man is innocent, in other words,
9 keep an open mind.

10 After all the facts go in the jury room,
11 you decide whether the man is guilty or not guilty.

12 Do you follow me on that?

13 A Yes.

14 Q When you judge the credibility of the witnesses,
15 what the Judge will tell you is this: Jurors
16 are not to give the witnesses any more or less
17 believability merely because of the witness'
18 job. A man who is a police officer or the
19 minister of our favorite church we attend, etcetera,
20 is not entitled to any more or less belief because
21 of his or her job than any other witness. You
22 judge a witness after they have testified and
23 taken the stand, based on what they have to say.

24 Do you follow me on that obligation in
25 that regard?

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1 A Yes.

2 Q Okay, the Judge will charge you on the indictment.
3 It is a piece of paper and it is how we get
4 started. It is nothing more than that and is
5 not to be considered as evidence.

6 Do you follow me on that?

7 A Yes.

8 Q The burden of proof always rests on Mr. Bax and
9 myself. We have the burden of proving the
10 Defendant guilty if we can. If we fall on our
11 faces, I expect you to say by your verdict, "not
12 guilty," and come up and tell me and Mr. Bax we
13 have fallen flat on our faces. We will feel as
14 disappointed as anybody, but we don't expect
15 you to make up for us. We expect you to do what
16 the law requires and say by your verdict "not
17 guilty." The burden of proof rests right here
18 with Mr. Bax and myself.

19 The Defense attorney and the Defendant
20 don't have a burden to prove anything, to prove
21 anything. They have the opportunity, but they
22 don't have the burden.

23 The trial is an open proceeding. If they
24 want, they can call whoever they like. The
25 Defendant can take the stand if he wants to. He

1 has the opportunity to get on and speak in his
2 behalf. He doesn't have to and he can remain
3 silent, so that burden of proof you must always
4 hold Mr. Bax and myself to that burden.

5 If the Defendant doesn't testify, the
6 Judge says you must not consider that as an
7 evidence of his guilt. That doesn't mean you
8 would not have wondered why; it merely means you
9 are not to consider his silence as evidence of
10 guilt. Instead, base your decision on what you
11 have heard from the witness stand.

12 Do you follow me on that?

13 A Yes.

14 Q Okay, it seems like there was something else
15 I wanted to talk to you about.

16 Do you have any questions of me so far
17 about anything I have talked with you about at all?

18 A No.

19 Q Well you know what we try to do is, without wasting
20 too much of the juror's time -- I don't consider
21 it a waste of time. I don't mean it in that
22 regard, but without taking up too much of your
23 time, what might be required of you if you were
24 serving on this jury panel. A lot of times I
25 am guilty of doing too much talking and not enough

1 listening. It's the last time I will have a
2 chance to talk to you and the last thing I want
3 to have happen is two or three weeks down the
4 road from now, have you think, "Well, I wonder
5 what the effect of this is," or "I have a
6 disagreement with that, and I wish I could talk
7 with Mr. Moen about it and clear it up."

8 I don't want anyone to go in the jury box
9 in a capital case without knowing what is required
10 of them, and then be unable to do what is required
11 without violating religious or moral scruples they
12 have had all their lives.

13 Do you follow me on that?

14 A Yes.

15 Q Let me ask you questions about your answers on
16 your personal information form.

17 How did both your sons manage to get in
18 the -- excuse me -- I take it all back. I was
19 going to ask how they managed to get in the
20 business of tugboats, but I see that is your
21 occupation.

22 A It is an inheritance.

23 Q Where did your sons go to school at? Here in
24 town?

25 A One of them graduated from high school in

1 Louisiana and another one graduated from high
2 school here, Spring Branch.

3 Q What is the Mission of Wahweh? What is that?

4 A It's a mission that takes in battered women,
5 abandoned children and it's only women, and we
6 take care of them until they can --

7 Q Find a place?

8 A -- find a place for themselves.

9 Q How long have you been doing that type of work
10 outside your regular line of work?

11 A Ever since I have been back to Houston.

12 Q And that is not a work -- it's a -- I would say
13 it's work. I can imagine sometimes even though
14 it starts out as being a labor of love or whatever,
15 it can almost wind up being a second job at times.

16 A Yes.

17 Q I see you list your hobbies as being loafing. How
18 do you interpret that? What do you like to do
19 when you get free time?

20 A Watch football games or lay around the house,
21 tinker around, no primary objective in it.

22 Q Okay.

23 A You could understand if you were in the marine
24 business.

25 Q I have never really had anything to do down at

1 the Ship Channel or with the boats and activities
2 down there, so I can imagine it must be a fairly
3 rough type of business to be in.

4 A It never closes. You don't go home at five o'clock.

5 Q Do you know any of the pilots down there?

6 A Yes. I know some of them.

7 Q Do you know a pilot by the name of, I think his
8 last name is Murry? I can't remember the first
9 name. It's Roy Murry or Lee Murry.

10 A I don't know him.

11 Q Bob Thomas: Is that the same Bob Thomas who is
12 president of the police officer's union?

13 A That's correct.

14 Q Is she -- how is she related to your wife -- or
15 he related how ever?

16 A They are first cousins, I guess it is.

17 Q After we have had a chance to visit, is there
18 any reason, Mr. Rister, you can think of that you
19 couldn't be a fair and impartial juror for either
20 side on this case?

21 A I think I could be fair.

22 Q You know, we have talked about being fair to the
23 Defendant and according him all of his legal
24 rights, and the only thing I would like you to
25 not lose sight of is the fact you will be making

1 a commitment to me, if you can, that you would
2 also be fair to Officer Harris and the family of
3 Officer Harris. I know you will, but I want to
4 be fair about that part of the case, as well.

5 Hold on a second.

6 Okay, the only other thing is, now that
7 you understand it is a capital murder case, I
8 want to be clear on this, your feelings concerning
9 capital punishment or the death penalty would
10 not keep you from being a juror on a capital
11 murder case, right?

12 A Yes.

13 MR. MOEN: Thank you for letting us visit
14 with you. I will pass you to the defense attorney.

15 If you are selected to serve, I will look
16 forward to serving with you.

17 THE COURT: We will take a short recess.

18 (Recess)

19 EXAMINATION

20 Questions by Mr. Hernandez:

21 MR. HERNANDEZ: May we proceed, Your Honor?

22 THE COURT: Go ahead.

23 MR. HERNANDEZ: Thank you.

24 Q (By Mr. Hernandez) Mr. Rister, I will ask you
25 one more time, and please forgive me if I

1 mispronounce your name. Rister?

2 A Rister.

3 Q This portion of the trial is called the voir dire,
4 which literally means to speak the truth, to
5 tell the truth.

6 We are not here, or I am not here and
7 Mr. Elizondo is not here, and of course the District
8 Attorneys are not here to pry into your personal
9 life; however, there are some questions that we
10 must ask you before we can make a full evaluation
11 as to whether to make a determination of whether
12 you can be a fair and impartial juror in a capital
13 murder case.

14 Do you understand that?

15 A Yes, sir.

16 Q And we are not here to embarrass or humiliate you
17 in any way. I will ask you personal questions
18 about your personal beliefs and philosophical
19 ~~beliefs~~ beliefs and moral beliefs, and whatever, your biases
20 and your prejudices, and we will accept the fact
21 ~~that everyone~~ that everyone has biases and prejudices.

22 If you are not able to serve in this jury,
23 it is not because of anything that you have done
24 or that you are not a good citizen, it is just
25 that probably you would be able to serve on another

1 jury, but perhaps not on this jury.

2 So what I am trying to get at: If we
3 could have a sincere and honest and fair response
4 to any questions that I might ask you, then it
5 makes it easier on us to make a determination, or
6 makes it fair for everybody around, including the
7 Defendant.

8 Are you with me on that point?

9 A Right.

10 Q All right. Let me ask you about the death penalty
11 again. Mr. Moen did ask you what you believed
12 or how you believed as to the death penalty. Could
13 you tell me how you feel about the death penalty?

14 A The law has set it up in some instances as being
15 a fair and just penalty for the crime committed,
16 and I can go along with that.

17 Q And the fact that that is the law and the fact
18 that you will follow the law is the fact that you
19 will probably, or more than likely consider the
20 death penalty, is that correct?

21 A The law set it up and we live under it.

22 Q It is not a fact of simply an eye for an eye and
23 a tooth for a tooth?

24 A No. I don't have that attitude, totally that. I
25 have some leaning towards that.

1 Q Uh-huh. Besides the personal questions I will
2 ask you, there are three other points of law
3 or procedures I will go into that Mr. Moen went
4 into, and of course, you already know that since
5 you have past experience in a murder case back
6 in 1978, and of course that is the reasonable
7 doubt and the burden of proof and the presumption
8 of innocence, but before then, let me ask you
9 this: The fact that Mr. Guerra has been indicted
10 by a grand jury and the fact that he is here
11 represented by two attorneys, would that in any
12 way affect your thinking, subconsciously or
13 consciously, as to his guilt as he sits here
14 today?

15 A Under the law, he is innocent.

16 Q So the fact that he is here because of the mere
17 indictment of a grand jury and he is accused or
18 charged with the death or causing the death of
19 a police officer, does that affect you in any way?

20 A No.

21 Q You would probably or more than likely want to
22 hear the evidence before you reach a decision
23 either way, would you not?

24 A Right.

25 Q So you understand, now, that the indictment is

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1 purely a pleading by which, or vehicle by which
2 one is brought to trial?

3 A Right.

4 Q That it's merely -- or an accusation -- that it
5 is not any, not any form of guilty or not guilty?

6 A That's correct.

7 Q Now let's go back to the three concepts or processes
8 that I have told you about: the presumption of
9 innocence, the burden of proof, and the reasonable
10 doubt.

11 Now you understand that he is presumed
12 innocent as he sits here today and you understand
13 that he is presumed innocent until the prosecutors
14 take the guilt of innocence or the presumption
15 of innocence that he has from him beyond a
16 reasonable doubt.

17 Would you agree with me there?

18 A Not the prosecutors. It would be the jury, wouldn't
19 it?

20 Q Well, if it's the prosecutors -- if it's the
21 prosecutor's duty to present to you all the
22 evidence, and as we say, Mr. Guerra is presumed
23 innocent until proven guilty, then it is the
24 prosecutor's duty to prove beyond a reasonable
25 doubt to you and to the other eleven jurors that

1 he is guilty.

2 Would you agree with me on that?

3 A Well, yes.

4 Q Okay, so what we are saying is that you are able

5 to give Mr. Guerra the full benefit of that

6 presumption?

7 A Right.

8 Q And do you agree with me that that presumption

9 can only be removed if the prosecution presented

10 its evidence beyond a reasonable doubt?

11 A If he convinces me.

12 Q Convinces you and the eleven other jurors?

13 A Right.

14 Q Okay, do you have a preconcieved notion of the

15 guilt or innocence of Mr. Guerra as he sits, today?

16 A No.

17 Q Right now, you don't?

18 A I don't know him from Adam, you know.

19 Q So the fact that he is charged with the death of

20 a police officer doesn't affect you in any way?

21 A No.

22 Q If you voted, right now, how would you vote?

23 A I don't know any facts in the case other than what

24 little I read in the paper that a police officer

25 was shot and killed.

1 Q So hypothetically, if you had to vote right now,
2 how would you vote?

3 A The law says he is innocent. Somebody has got
4 to present me the facts.

5 Q All right, now, if he is innocent and he is
6 presumed innocent, do you believe that he would
7 have to prove his innocence?

8 A The law says he is innocent.

9 Q Okay, and let me ask you this: Does he have to
10 prove he is not guilty to you?

11 A These (indicating defense attorneys) have to prove
12 that he is guilty.

13 Q Yes, but what I am saying to you is: do you think
14 that Mr. Guerra has to prove that he is not
15 guilty?

16 A No, he doesn't have to prove anything under our
17 law.

18 Q Do you believe, then, you believe, do you not,
19 that there are two sides to every story?

20 A Well, yes. There are two sides to every story.

21 Q Okay, then, once the prosecution has rendered
22 their side of it, you will of course wish to hear
23 from Mr. Guerra or Mr. Guerra's witnesses, would
24 you not?

25 A Well, I would suppose. I feel like somebody would

1 have a defense.

2 Q Would you expect him to testify?

3 A Well, that is left up to you.

4 Q Wouldn't you want him to testify?

5 A If it was pertinent to the case.

6 Q Would you, if he didn't testify, wouldn't you

7 feel he was some way and somehow hiding something

8 from you?

9 A Not necessarily. As I understand, he don't speak

10 English, so me and him are going to have a hard

11 time talking, anyway.

12 Q Let me ask you about that.

13 Of course, being as funny and amusing as

14 it is, now, but how do you feel, now, knowing that

15 here we have an illegal alien charged with a

16 capital murder crime for causing the death of

17 a police officer? Of course, you being, or your

18 wife being kinfolk to a police officer, how do

19 you feel about that? What will be your feelings

20 about that?

21 A Well, as far as illegal aliens, it doesn't matter.

22 I do business in Mexico, and when I am down there,

23 I am the illegal alien down there. I have no

24 qualms about that.

25 Q Let me put it this way: You don't go down there

1 for substantial periods of time and perhaps find
2 employment there or use the public utilities there,
3 etcetera, etcetera. How would you feel as to
4 illegal aliens here in Houston, and more specifically,
5 how would you feel to have an illegal alien causing
6 the death of a police officer?

7 A Well, I don't think anybody, not only illegal
8 aliens, but citizens, have a right to kill a
9 police officer, kill anybody, your wife, mine,
10 you, the Judge, or anybody else. I don't believe
11 they have that right. I don't believe anybody
12 has that right.

13 Q So, being an illegal alien, per se, does not
14 generate any mixed emotions or emotion in you
15 either way? Correct?

16 A No.

17 Q The fact that he stands here accused of the death
18 of a police officer, whether alien, citizen, or
19 otherwise, is that the only way you will see it?

20 A That is right.

21 Q And you will keep an open mind towards that?

22 A Right.

23 Q Now you understand, also, that the law never
24 imposes upon Mr. Guerra in a criminal case the duty
25 to call witnesses at any time or to testify in

1 his behalf.

2 Do you realize that?

3 A That you do not have to call any witnesses?

4 Q Or Mr. Guerra doesn't, on his behalf?

5 A Yes.

6 Q The burden is not on him.

7 A No, he isn't.

8 Q You agree with me, then, that the burden will
9 always be on the State to prove to you beyond a
10 reasonable doubt that he did commit the death or
11 cause the death of J. D. Harris?

12 A Under our judicial system, it's true.

13 Q And you understand it is a heavy burden as
14 compared with the burden that might exist, say,
15 in a civil trial?

16 A Well, I can see the difference between civil and
17 criminal.

18 Q Let me give you an example: In a civil trial,
19 it is called by a preponderance of the evidence,
20 and basically what it means, whoever puts on the
21 most evidence. It is just a small tilt either
22 to the right or to the left, and that party wins.

23 While in a criminal case, it is a much
24 heavier burden presented upon the shoulder of the
25 District Attorney; that is, that they must prove

1 to you beyond a reasonable doubt, not all doubt
2 or not any doubt, but one doubt, one small doubt.
3 Do you follow me there?
4 A Yes, I understand.
5 Q And would you accept the fact that the burden
6 will never shift throughout the trial?
7 A It is still under the District Attorneys.
8 Q Right, and we could sit and say, for example,
9 if today was the day we went to trial and today
10 was the day that the District Attorney rested
11 its case and we place a partition and we didn't
12 present any evidence and didn't present any kind
13 of cross examination or any testimony, would that
14 affect your deliberations?
15 A No. I would have to go on the facts that were
16 presented.
17 Q Would you consider it against him if he did not?
18 A No.
19 Q Was that no?
20 A No. I don't.
21 Q She is taking it down.
22 A Oh, I am sorry.
23 Q Would you require Mr. Guerra to prove his
24 innocence or offer any evidence before you would
25 be able to return a verdict?

1 A Well, he is innocent as he appears there.

2 Q And to you, he will be innocent until you hit
3 the door of the deliberation room?

4 A I think that is the law, isn't it?

5 Q Could you follow that?

6 A Sure.

7 Q And you know, also, that the Prosecutors must
8 prove the case to your satisfaction beyond a
9 reasonable doubt, to a moral certainty, don't you?

10 MR. MOEN: Excuse me. I object to the
11 phrase "moral certainty." That is Counsel's
12 phrase, not a legal definition.

13 THE COURT: Sustained.

14 Q (By Mr. Hernandez) Now, if after you heard
15 conflicting testimony and the prosecution witness
16 gave conflicting testimony, how would you
17 consider that in deliberating the guilt and
18 innocence?

19 A I have to sort out that in my own mind, of who
20 is telling the truth.

21 Q So what I am trying to get at is the credibility
22 of the witnesses presented to you, either by
23 the prosecution or by the defense. Could you
24 listen and could you weigh the credibility of
25 each and every witness?

1 A When you are cooped up in there, that is the
2 only thing you can do, isn't it?

3 Q Now you understand that this will be more than
4 likely a situation where the witnesses will come
5 in and will be highly emotional and perhaps what
6 they saw and what they have experienced in this
7 incident.

8 If their direct witnesses are to give
9 direct testimony as to what they saw, would you
10 be able to decipher that, say from the emotion,
11 the facts of what really transpired that evening?

12 A I can listen to what they say rather than listen
13 to their emotions.

14 Q Now, being that you wife has kinfolks in the
15 police department, would that affect your judgement
16 in any way?

17 A No. I don't see where it could.

18 Q Well, you could set aside all feelings of bias
19 and decide solely and only on the evidence?

20 A Right.

21 Q Would you be influenced in any way by the fact
22 that the publicity given or that will be given
23 concerning this case or perhaps the latest crime
24 wave that has happened in this city towards police
25 officers?

1 A I think you are asking two questions in one there.
2 Q Okay.
3 A I would like to address them one at a time.
4 Q Okay. Let me ask you -- let me back up --
5 Would you be influenced by the publicity in
6 this case?
7 A We have been instructed not to listen to it.
8 We have been asked to refrain from any portion
9 of it.
10 Q Would you be influenced by the latest publicity
11 of the latest crime wave against police officers
12 in any way?
13 A Not against them.
14 Q Pardon?
15 A No, I am influenced by the crime wave, period.
16 Q You mentioned the fact that Mr. Guerra is an
17 illegal alien would not affect your judgement
18 in this case: is that right?
19 A No more than anybody else.
20 Q Let's go back to what Mr. Moen or when Mr. Moen
21 gave you the hypothetical as to the lesser
22 included offense of capital murder, which is
23 murder, and he mentioned the word "probation."
24 Could you consider probation for someone
25 that intentionally and knowingly caused the death

1 of someone. Could you consider probation?
2 A For intentionally?
3 Q Yes.
4 A No.
5 Q There is no way or instance where you would
6 consider probation where someone knowingly
7 caused the death of someone, murder?
8 A Now when you define "knowingly," was it to the
9 one committing the crime?
10 Q Yes.
11 A When you say "knowingly" --
12 Q Let me rephrase it this way: Could you consider
13 giving probation to someone that's committed a
14 murder?
15 MR. MOEN: I object to the phrase "consider
16 giving probation." I think that stakes him out
17 as to what he should do, and I object to the
18 form of the question because it's not phrased
19 in terms of what he is required to do or might
20 be required to do in connection with the law.
21 Asking whether he would give someone probation
22 where he found someone guilty of murder is not
23 the test as to whether or not he is a qualified
24 juror, whether or not he would consider probation
25 as a possible range of punishment on a case on

1 which he has returned a verdict of guilty.

2 On the phrase "murder," I have no objection,
3 but the way it is phrased now, I do.

4 Q (By Mr. Hernandez) Let me rephrase my question.

5 Say, for example, that given a situation
6 where there is a possibility or there is some
7 consideration of awarding probation to someone
8 who intentionally and knowingly caused the death
9 of someone in a situation where the jury has
10 awarded punishment for a number of years, say
11 ten years or less, could you consider probation?

12 A Probation for -- you said "intentionally" again.
13 You used the word "intentionally," again.

14 Q Murder.

15 A If someone intentionally kills someone, I can't
16 give them probation in my own mind. I never
17 could live with it.

18 Q Could you think of any situation or any set of
19 circumstances where you possibly, in the same
20 hypothetical or the same facts of intentionally
21 or causing the death of someone, which is murder,
22 where the jury has awarded ten years or less.
23 consider probation?

24 A If a jury awards them ten years or less and then
25 probation, I can't --

1 You are going to have to decipher to me
2 what the difference is. If you award somebody
3 something for a period of time, how can you give
4 them probation at the same time? I don't
5 understand.

6 Q Let me -- could you consider probation where
7 someone or where the jury has awarded someone
8 who intentionally and knowingly caused the death
9 of someone, which is murder, after -- let me
10 rephrase that --

11 Where the jury has awarded punishment for
12 ten years or less, that anyone that is qualified
13 for probation and is given by a jury or awarded
14 by a jury ten years or less, then there is
15 a possibility he could be considered for probation.
16 That is what the law states. Could you consider
17 probation for someone that has been found guilty
18 of murder?

19 A Did your question still have the word "intentionally,"
20 in it?

21 Q Yes. Right. That is what a murder is.

22 A No, I can't. Not if they intentionally, and as
23 long as you use the word intentionally.

24 Q And you cannot think of a circumstance or a
25 situation where you could consider it?

1 A Not if it is intentional.

2 MR. HERNANDEZ: We will challenge at this
3 time.

4 MR. MOEN: May I have the witness on
5 voir dire?

6 VOIR DIRE EXAMINATION

7 Questions by Mr. Moen:

8 Q Mr. Rister, let me explain what is being asked
9 of you. He is basically asking you in a little
10 different way what we talked about earlier with
11 the example of the lady in the hospital who
12 intentionally removed some of the equipment
13 supporting her husband's life and intentionally
14 assisted in his death. That action on her
15 part falls technically within the definition of
16 that crime of murder which we all repel from as
17 soon as we hear the phrase, "murder." Naturally,
18 all of us back away as it being the awful crime
19 it is, but there are many technical crimes, if
20 you would, or offenses, or fact situations, that
21 fit into the technical definition of the crime of
22 murder.

23 That example we talked about was a
24 hypothetical example of a crime of murder, yet
25 a crime I would suggest to you, respectfully,

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1 one where the jury might consider as being a
2 proper candidate for probation.

3 See, here is how probation works: When
4 a jury finds someone guilty of the offense of
5 murder, then the jury has to go back and decide
6 what punishment that person ought to receive.
7 If the jury decides that the punishment is to
8 exceed, even by one hour or one day, ten years,
9 if the jury decides the proper range of
10 punishment is ten years and one day up to
11 ninety-nine years or life, the jury never considers
12 probation whatsoever, because no person can
13 receive probation from a jury, who has been
14 sentence by a jury to greater than ten years.

15 Here is how probation works: If the jury
16 finds someone guilty of the offense of murder,
17 then they go back to deliberate on the person's
18 punishment. If all twelve of the jurors
19 unanimously agree that the range of punishment
20 should be ten years or less, then the jury can
21 discuss among themselves and make a recommendation
22 to the Court. They can either recommend that
23 this person's time in the penitentiary be
24 probated -- that is what the term probation
25 means -- although the jury has arrived at a term

1 of years of ten or less, if the jury recommends
2 probation the Defendant does not actually go
3 to the penitentiary. Instead, he is placed
4 on probation for that period of time the jury
5 has recommended. It would have to be ten years
6 or less.

7 Does that -- do you understand that?

8 A If the law defines it that way, I can't change
9 it as a juror.

10 Q See, that is the way it works. Probation is
11 a consideration the jurors discuss among them-
12 selves, and if they make the recommendation to
13 the Court, it is binding on the Court. He must
14 then place the Defendant on probation, and of
15 course he will place them on probation for the
16 number of years the jury has decided.

17 Now let's say you hear a murder case,
18 a man is out in front of Foley's and is shooting
19 down people as they come out because he wants to
20 attract some attention to his political cause,
21 so he shoots down five or six people, women and
22 children, and the jury finds him guilty of
23 murder and decides his range of punishment should
24 be more than ten years.

25 I would suggest the jury ought to find

1 his punishment should be life on top of life on
2 top of life, but in any event, they decide the
3 punishment should be more than ten years, and
4 no one can recommend probation where the
5 punishment is greater than ten years.

6 Do you follow me so far?

7 A Yes.

8 Q Now let's take the hypothetical where the lady
9 assists her husband, she does it intentionally,
10 takes an I.V. out of his arm. Those are
11 intentional acts. She intentionally assists
12 in his death. That is murder, too. But let's
13 say in her hypothetical case, or that hypothetical
14 case, that lady in her seventies for that act
15 should not go to the penitentiary, and the jury
16 decides that the proper verdict in her case would
17 be five years probation and they recommend that
18 to the Judge.

19 Do you see the distinction between both
20 of those crimes, both intentional acts, both
21 meet the definition of murder, but I think you
22 agree with me they are totally different offenses
23 of murder?

24 A Right.

25 Q One is significantly different.

1 A I can understand that.

2 Q What Mr. Hernandez was asking you earlier is:

3 Can you keep an open mind to the range of

4 punishment as it pertains to the offense of

5 murder, not capital murder, but as it pertains to

6 the offense of murder, and if you heard all the

7 facts and if you felt like it was a proper

8 case for probation, would you be able to

9 recommend that to the Judge if you felt it

10 was a proper case after you heard all the facts?

11 A I think I can.

12 Q And if you felt it was a proper case, would you

13 also be able to tell the Judge you don't feel

14 probation is proper?

15 A I think I have that mentality.

16 Q I wasn't sure you understood or not, because

17 earlier you told me that is the type of person

18 you are and the frame of mind you are, and I

19 wanted to clear it up. I hope you don't think

20 we are picking at you.

21 A I don't have qualms.

22 Q You understand how that probation works?

23 A Yes.

24 EXAMINATION

25 Questions by Mr. Hernandez:

1 Q We will still go back to the fact that it is a
2 murder case, and he intentionally or knowingly
3 took the life or caused the death of someone.
4 Could you consider probation?
5 MR. MOEN: I would object to that question,
6 because it does not include the phrase that he
7 would first have to consider it a proper case
8 for probation, if you felt it was not, it was
9 a murder case, and he did not feel probation
10 was proper, he would be expected as a juror not
11 to recommend probation.
12 THE COURT: Rephrase your question.
13 Q (By Mr. Hernandez) All right, in a proper case,
14 or in a proper situation, could you consider
15 probation for someone who has intentionally and
16 knowingly caused the death of someone?
17 A I feel I could.
18 Q Murder?
19 A I believe I could.
20 Q You could?
21 A In a proper case.
22 Q You could or you believe you could?
23 A I could.
24 Q Now earlier, you stated there was no possibility
25 you could and now, with Mr. Moen explaining to

1 you about the proper circumstances and the proper
2 case --

3 Let me ask you one more time: Could you,
4 in a proper situation, if the case warranted
5 or merited it for someone who took the life
6 of another, which is murder, consider probation?

7 A If it's pertaining to that particular case, yes,
8 if you are using pertaining and proper in the
9 same sense, I would say yes, in the definition
10 of the words in my --

11 Q Okay, now, let me ask you this: Looking at the
12 question number one, what would be your
13 interpretation of the word "deliberately," as
14 placed in that question?

15 A You want me to give my definition of the word
16 "deliberately" in that situation?

17 Q Uh-huh.

18 A Deliberate is, to me, that I or an individual
19 went out and had this in mind to kill somebody.

20 Q So you would say that it would be that he
21 premeditated it?

22 A No, no. Premeditated is a different word in my
23 definition.

24 Q What words would you use?

25 A If I take a gun and point it at you and pull

1 the trigger, I think I have deliberately killed
2 you, because I think that bullet is going to kill
3 you when it hits you.

4 Q Uh-huh.

5 A Now premeditation to me is when I come out and
6 hunt you down to do this to you.

7 Q So you don't think the word "deliberately" means
8 that?

9 A Means what?

10 Q To premeditate.

11 A I think there is two different -- premeditation
12 and deliberate are two different words.

13 Q Would you run it in synonymously with intentionally,
14 then?

15 A Deliberately and intentionally?

16 Q Would you say it would be more or less than
17 intentionally?

18 A Oh, I don't know if you can put a degree on it.
19 Can you put a degree on it?

20 Q Well, my intention -- if I intentionally kill you,
21 I would expect to kill you, would I not?

22 A That is right.

23 Q If I deliberately killed you, then I thought about
24 it and I deliberated and I finally came with the
25 assumption I was going to intend to kill you.

1 A Under those, it could be the same, but I can think
2 of some things it probably wouldn't be.

3 Q Well, let me ask you this: If a situation falls
4 where it is done in the heat of quickness
5 situation, say for example, in the heat of
6 battle or under circumstances where it just
7 happened, would that be deliberate to you?

8 MR. MOEN: I object to Counsel trying to
9 stake out the juror on the circumstances in a
10 particular set of facts, and I think we have gone
11 far enough afield, and I object to further questions
12 and to Counsel's interjecting what he thinks
13 the definitions are and his suggestions to the
14 witness by his question what the definition for
15 the word deliberate ought to be as to the
16 questions. I object to those, as well.

17 THE COURT: Sustained.

18 MR. HERNANDEZ: Pass the witness.

19 MR. MOEN: We will accept Mr. Rister.

20 MR. ELIZONDO: Prior to excusing Mr.
21 Rister, I want to reurge our motion to exercise
22 the challenge to the jurors at the end of the
23 entire venire and object to the constitutionality
24 of Article 35.13.

25 THE COURT: That motion is again overruled.

1 MR. ELIZONDO: We will excuse him, again.

2 THE COURT: Thank you very much for your
3 patience and presence.

4 You will be excused.

5 CHARLES A. DECKERT,

6 called as a prospective juror, answered the
7 questions propounded to him as follows:

8 THE COURT: Gentlemen, it's late in the
9 afternoon, and I appreciate your patience with
10 us, and we are going to ask you some questions
11 and ask that you simply give us your feelings
12 about the questions asked of you and not try
13 to give us answers that you think we might want
14 to hear or anything of that nature.

15 You may proceed.

16 EXAMINATION

17 Questions by Mr. Moen:

18 MR. MOEN: Thank you, Judge.

19 Q (By Mr. Moen) Mr. Deckert, I am sorry it's taken
20 so long. What we have to do and are required to
21 do as a matter of law in a capital murder case
22 is to talk to every juror individually. The
23 process of selecting a juror in a capital murder
24 case takes anywhere from three to five weeks.
25 I have spent as long as six weeks in some years

1 picking jurors for a capital murder case. It's
2 a lengthy period of time, and we spend as long
3 as an hour or hour and fifteen minutes examining
4 each juror individually.

5 We apologize, but there is a reason for
6 it. We need to ask you some questions about your
7 feelings in regards to various aspects of the law
8 that may come up during the course of this case,
9 and I also want to encourage you, if you have
10 any disagreements with anything we are talking
11 about or any questions of me, please don't
12 hesitate to ask. I don't care how foolish they
13 may seem to be, I think the thing I live and
14 fear of the most is two or three weeks down the
15 road when the jury is comprised, there will be
16 some member of the jury panel who has some
17 disagreement with the law and they are unable to
18 express their disagreement, so we don't want
19 anyone to go from your position, today, to the
20 jury box, unless they know exactly what is
21 expected of them and what they are expected to
22 do and that it will not violate any of their
23 religious, moral, or conscientious scruples they
24 have held dear.

25 Let me talk to you about the case. It is

1 a capital murder case, a man convicted of a
2 capital murder.

3 In our community, he either receives one
4 of two possible sentences: Either life
5 imprisonment or the death penalty. That is the
6 only possible punishment a man can receive for
7 capital murder.

8 A man who commits the offense of murder has
9 an entirely different range of punishment: five
10 to ninety-nine years or life. Someone who is
11 found guilty of a capital murder can only receive
12 the two possible punishments already mentioned.
13 There is a distinction.

14 The legislature has said when a person
15 commits a murder during the commission of nine
16 different kinds of felonies, that person is
17 going to stand before a jury on charges of
18 capital murder. If he is said to have broken
19 into a man's home, killed a man or woman there
20 in the course of a burglary, to rob and kill, for
21 the rapist to kill his victim, for the kidnapper
22 to kill his victim, the arsonist to kill his
23 victim, for him to kill employees of a penal
24 institution, and convicts escaping kills anyone
25 in a penal institution, that is capital murder.

1 To kill a police officer or a fireman who are
2 about their official duties, if they are killed
3 in their line of work by anyone, that is a capital
4 murder case, and murder for hire.

5 Those are the only instances of capital
6 murder. All other murders, no matter how horrible,
7 or grisly, fall into this range of punishment:
8 five to ninety-nine years or life, and only
9 that, unlike capital murders.

10 With that prelude, let me ask you what
11 your feelings are with regard to capital
12 punishment. Would your feelings on that topic,
13 the death penalty, allow you to seek or allow
14 the death penalty?

15 A Yes.

16 Q How long have your feelings -- or can you, if
17 you would, for me, please, can you try to
18 verbalize your feelings concerning the death
19 penalty? Can I say you favor it or are opposed
20 to it, or exactly how do you feel about it?

21 A Well, it is kind of hard to, you know, to come
22 to a conclusion to do something like that, you
23 know.

24 Q Sure.

25 A But I think there is a place for it.

1 Q Your feelings concerning capital punishment and
2 the death penalty, the ones you have stated
3 to me, are those pretty much the feelings and
4 opinions you have had all your adult life, or
5 have you ever felt different as a result, perhaps,
6 of conversations or articles you may have read
7 or leading a different life reached a different
8 conclusion at some time in your life, or have
9 you always felt pretty much the way you have?

10 A I think I have always felt pretty much that way.

11 Q Is that a product of your adult life or opinion
12 on your own, or the way your dad and mom felt?

13 A I think it would be more mine.

14 Q An opinion you have reached on your own?

15 A Yes.

16 Q Let me explain to you how a person receives the
17 death penalty for having been found guilty of
18 capital murder.

19 The jury doesn't go back and decide among
20 themselves which punishment they are going to
21 agree on and come out and tell the Judge, "Judge,
22 we have found this man guilty of capital murder
23 and we are going to recommend a life or death
24 sentence." The jury doesn't do that.

25 After they have found someone guilty of

1 capital murder, they come and take their seats
2 in the jury box and after hearing whatever
3 additional evidence offered to the jury, they
4 go back and deliberate upon those two different
5 questions appearing to your left, and dependent
6 upon their answers, the Defendant either receives
7 the death penalty or life imprisonment in the
8 Texas Department of Corrections.

9 If both questions are answered, "yes," by
10 the jury, the Judge has no choice. The Judge
11 waits for the jury to tell him what to do. If
12 the jury says "yes," he will have no choice.
13 He will set the Defendant's punishment at the
14 death penalty.

15 If the jury answers one question "no,"
16 one "no" answer to either of the questions, the
17 Defendant will receive life in the Texas
18 Department of Corrections.

19 Do you follow me so far?

20 Okay, before all the questions can be
21 answered "yes," all the jurors must agree that
22 is what their answers must be. It takes twelve
23 jurors in agreement to answer "yes," but only
24 ten of the jurors have to be in agreement to
25 answer the questions "no." There is a two-juror

1 distinction, ten to answer "no," twelve to
2 answer "yes."

3 Now, if you would, I would like you to
4 look at those questions. I want to talk to you
5 about them briefly. If you would, just read
6 those to yourself, and then I want to go over
7 the language that appears in the questions.

8 A Okay.

9 Q That first question would ask you to make
10 a determination about the conduct of the man
11 on trial that you have found guilty of
12 capital murder. Was that conduct on his part
13 that caused the death of the deceased, was it
14 done deliberately and was it done with the
15 reasonable expectation that the deceased would
16 die?

17 I would suggest to you that question number
18 one is a rather straightforward question you
19 could probably answer as a juror based on the
20 offense, itself.

21 Would you agree on that?

22 A Yes.

23 Q The second question asks you to make a different
24 determination. It asks you to make a prediction
25 about what type of person the man on trial is.

1 Is the person a type of person that would
2 probably commit continuing criminal acts of
3 violence that would constitute a continuing
4 threat to society. It is basically to make
5 a future prediction about the man based on the
6 evidence you have heard about the offense, and
7 any additional evidence that might be offered
8 to you.

9 What I would like to point out to you in
10 the second question is some of the words and
11 phrases.

12 The first word is "probability." The only
13 thing I would like to point out in all three of
14 those phrases, I can't give you those definitions,
15 because the legislators didn't send those up, so
16 what you will have to do for the words
17 "deliberately" in question one, and "probability,"
18 and "criminal acts of violence" in society. You
19 will have to use your own definition, own
20 working definition you obtained for those words
21 during your business life and every day living.

22 "Probability" does not mean certain things.
23 It is probability, not possibility. It is not
24 a sixty-forty chance, or any mathematical
25 formula. Use your own definition for the word

1 "probability."

2 "Criminal acts of violence": Before you
3 can answer the second question "yes," you or
4 other jurors, I and Mr. Bax do not have to prove
5 to you and specific type of criminal act of
6 violence, don't have to prove to you a man will
7 commit future murders, rapes, assaults,
8 burglaries, or any other acts of criminal
9 violence we can think of; only is he the type
10 of person that would commit such acts and would
11 those acts constitute a continuing threat to
12 society, whatever society he found himself in,
13 whether prison society or everyday society,
14 in terms we think of in our everyday lives.

15 Do you follow me on that?

16 A Okay.

17 Q Now, the jury can, in a proper case, answer
18 question one and question two "yes" just based
19 on the evidence of the crime, itself.

20 Let me give you an example of a case that
21 comes, I think, immediately to your mind, as
22 being such a case: The Ronald Clark O'Bryan
23 case, the man who gave poisoned Halloween candy
24 to his children in order to collect insurance
25 money on their lives. One lived and one died.

1 That was a case where the facts from the guilt
2 or innocence phase was enough for the jury to
3 answer both questions "yes."

4 Now I only bring that up to point out to
5 you the crime or facts of the crime, itself,
6 was enough evidence, but the law does allow
7 Mr. Bax and myself, at the second phase, to
8 offer other evidence we are aware of concerning
9 the man, himself, or other criminal acts he
10 may have committed.

11 That will be given to the jurors to use
12 in their deliberation on questions one and two,
13 as well.

14 Do you have any questions on one and two,
15 now that we have had a chance to go over them?

16 A I don't think so.

17 Q Just on the language of one and two, themselves,
18 is there any reason you can think of you would
19 not be able to answer the questions demanded
20 on the evidence, just because of the way they
21 are worded?

22 A You said on two, if you answer one "yes," then
23 on two, you could bring up past history?

24 Q You can, whatever evidence we have about the
25 Defendant's past, we are permitted at the

1 second phase of the trial to offer evidence. If
2 we have evidence of extraneous crimes, we can
3 offer that evidence. If we have evidence of
4 past convictions, we can offer it into evidence.
5 It becomes proper at that time.

6 Of course, we may not have other evidence
7 and Mr. Bax may rest and ask you to consider
8 whatever evidence we have at the very end of
9 the trial, before you go back to deliberate on
10 those questions, you will have all the evidence
11 we are aware of and you will take that with
12 you to reach a decision as to what your answers
13 to those questions should be. Okay?

14 Now the only thing I wondered about, just
15 based on the way those questions are worded, is
16 there anything about the wording of those
17 questions that you feel would make it impossible
18 to answer either one of the questions just
19 because of the way they are worded?

20 A I don't think so.

21 Q Okay. I was going to ask you questions about
22 your personal sheet, information sheet.

23 Before I do that, let me explain a
24 couple of things to you. There are some things
25 required of you as a juror during the course of

1 your jury duty there are rights that the
2 Defendant has and rights you must accord to the
3 Defendant. I need to find out if you can, if
4 you have a disagreement. There are rights
5 you must accord to a Defendant during the trial.
6 One of those is the Defendant's failure to
7 testify. His right in that regard is as
8 follows: If the Defendant decides not to
9 testify, not to get on the stand and testify,
10 the law or the Judge will instruct you that --
11 excuse me -- not to consider the Defendant's
12 failure to testify as any evidence of his guilt.
13 In other words, silence is not evidence, and you
14 are not to consider the Defendant's silence as
15 any evidence of the commission of the crime,
16 whatsoever.

17 Instead, look to what you have heard from
18 the witness stand to reach your decision.

19 Do you follow me on that?

20 A Yes.

21 Q Okay, you are to presume the Defendant innocent.
22 That is a legal presumption. That does not
23 mean the Defendant is innocent. I think from
24 your common sense you know that a man caught
25 inside a man's home burglarizing it is just as

1 guilty the day he is caught is just as guilty
2 as when he is coming before a jury. His guilt
3 hasn't vanished. The only thing the law requires
4 of jurors is that they presume the man is
5 innocent because they don't know anything about
6 the man. You must keep the law in mind and
7 hear the facts, and after the facts have come in,
8 deliberate based on what they decide from what
9 they hear from the witness stand.

10 Do you follow me?

11 A Yes.

12 Q As a juror, the Judge will charge you the only
13 thing you are to do in that regard is this: You
14 are not to give a witness more or less belief
15 merely because of a witness' job, and I think
16 you realize from your common sense why that is.
17 The minister or a man who is a doctor or lawyer,
18 merely because of his occupation, is not given
19 any more or greater belief in the eyes of the law
20 than any other witness because of his or her job.
21 The jurors must judge the witness' credibility
22 based on what he is telling them: Does what
23 this man is telling me make sense? What bias
24 or prejudice might this man have to gain by
25 telling what he does? They must base their

1 credibility on what they believe, rather than
2 the witness' job.

3 Do you follow me on that?

4 A Yes.

5 Q Something else: This is by way of explanation,
6 because I notice you have never been on a criminal
7 jury panel before. You have a right as a juror
8 to believe everything a witness has told you
9 under oath, or disbelieve everything a witness
10 has told you under oath. That seems crazy at
11 first grasp that you would disbelieve something
12 that someone has said to you under oath in
13 a courtroom, but I think you realize by common
14 sense -- we wished we lived in a society where
15 there were no people in this world who, after
16 having taken an oath to tell the truth, would
17 tell anything but the truth. I wish all of
18 us were like that. Unfortunately, we are not.
19 There are people, even though they have taken
20 an oath to tell the truth, who will do the
21 opposite.

22 So, the burden will fall on the jurors to
23 decide how much to believe the witness. That
24 is your obligation as a juror, not really an
25 obligation, but it is one of your functions.

1 You have the ability to be able to do that.

2 The Judge will charge you the only thing
3 you should do when you are performing that
4 task is not to give any witness more believability
5 because of his job.

6 The Judge will charge you on the grand
7 jury indictment. That is basically just a
8 piece of paper. That is how we get started,
9 and you are not to consider that piece of paper
10 as evidence of anything, and you will not
11 even look at it. You are not to consider it
12 as any evidence of guilt.

13 Do you follow me on that?

14 A Yes.

15 Q The Judge will charge you on one final thing.
16 As a juror, he will tell you you are to hold
17 Mr. Bax and myself to the burden of proof on
18 the case. We have the burden of proving to
19 you beyond a reasonable doubt -- that is the
20 test -- that Mr. Guerra is, in fact, guilty of
21 this offense.

22 Now, what the burden of proof means,
23 basically, is this: When someone commits a
24 crime in a community, the burden falls on
25 whoever the prosecutor or authority is in a

1 community, whether it be the District Attorney's
2 office or lawyers hired by the citizens of that
3 community to prove to others who make up
4 members of the community that, in fact, the man
5 is guilty of that crime. That is our burden.
6 We have to call witnesses to prove that point.

7 A trial is an open proceeding and both
8 sides have the opportunity to call witnesses
9 if they like. Both sides have the opportunity
10 to examine witnesses if they like, but only one
11 side has the burden, and that is Mr. Bax and
12 myself.

13 The Defense doesn't have any burden to
14 prove or disprove anything, but the trial is
15 wide open to them. They can cross examine any
16 witness Mr. Bax and myself call. They can call
17 witnesses themselves, if they want, or they can
18 choose, if they decide it's the best strategy,
19 to remain totally silent and not cross examine
20 a person. If they decide that is the best
21 strategy, they can do that. They don't have
22 to prove or disprove anything. The trial is open
23 to them, as well.

24 The only one who has the burden, once
25 again, is Mr. Bax and myself. That burden, once

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1 again, is to prove beyond a reasonable doubt.
2 You may leave out the phrases you may have heard
3 on the lawyer television shows. We can leave
4 those where they belong, on television: The
5 phrase beyond all doubt or beyond a shadow of
6 a doubt, beyond any doubt. They just do not
7 apply in a courtroom of law. The test is to
8 prove beyond a reasonable doubt.

9 Now why is that? People who know anything
10 about a crime that has taken place, who have
11 formed an opinion and who are witnesses to the
12 criminal act, cannot be jurors, so the test is
13 not to prove to witnesses to a crime beyond any
14 or all or a shadow of a doubt, not to prove to
15 people who viewed the offense take place, but
16 to prove to people who know nothing about the
17 crime at all, to prove to those people, not to
18 all, any, or beyond a shadow of a doubt, but
19 beyond a reasonable doubt.

20 The same applies to these questions here
21 as well. Before you could answer either one of
22 the questions as "yes," you would have to believe
23 Mr. Bax and I have proven to you that is what
24 your answer should be beyond a reasonable doubt,
25 not beyond a shadow of a doubt.

1 I will tell you right up front: I cannot
2 prove to you beyond a shadow of a doubt that your
3 or any other juror's answer should be "yes."

4 The only person I know who can do that is God
5 Almighty, I suggest to you, not to be blasphemous.
6 He will not be a witness in this case.

7 The proof is not beyond any or all doubt,
8 but beyond a reasonable doubt, and not beyond
9 a shadow of a doubt.

10 All right, also, I want to point out
11 one other thing to you that the Judge will
12 charge you on, and I can't be as positive on this
13 as I want to be. When you are back there
14 deciding which punishment the Defendant ought
15 to receive, the Judge will charge you that you,
16 as a juror must not and no one else on the jury
17 must discuss how long the Defendant might have
18 to serve in the penitentiary in the sentence he
19 might receive. That is in the exclusive
20 jurisdiction of the Board of Pardons and Paroles
21 and you are not to talk about it, how long a
22 man would have to serve on a life sentence. That
23 is in the hands of the Board of Pardons and
24 Paroles, and if anyone does, you would have the
25 obligation to stop it. If they persisted, I

1 would further suggest your obligation goes as
2 far as to knock on the door and let us know what
3 is going on. It is to come to an end immediately.

4 Any questions of me?

5 A I don't believe so.

6 Q Let me talk to you about one final concept in
7 the law, and I will have to give you examples
8 by way of explanation: Two final things, one
9 about the range of punishment for the offense
10 of murder, and what is talked about as a lesser
11 included offense. That is a legal term.

12 The offense of capital murder includes
13 the lesser offense of murder. Why is that?
14 Well, we have talked about capital murder needing
15 two things to make it a capital murder. Not only
16 does a murder have to take place, but the murder
17 has to take place during one of these felonies
18 we have talked about: robbery, rape, arson or
19 burglary, or it has to be a murder of one of
20 these protected classes of individuals: police
21 officers, firemen, or employees in a penal
22 institution.

23 So theoretically, the jury could hear
24 evidence surrounding a man who had been charged
25 with the offense of capital murder of a police

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1 officer, for instance, and the belief without
2 any doubt in the juror's mind that the man, in
3 fact, committed the offense of murder, yet
4 the jury might very well believe that the man,
5 when he killed the person he killed, did not
6 know or could not have known it was a police
7 officer that he killed. In that circumstance,
8 the jury's proper verdict would be guilty of
9 the offense of murder and not capital murder,
10 because both of those elements have to be
11 present.

12 Not only does the murder have to take
13 place, but the other aggravating circumstance
14 has to be present. It has to be proven he was
15 a police officer in the lawful discharge of his
16 duty, or another one of these felonies. Other-
17 wise, the jurors' verdict would be murder,
18 rather than capital murder.

19 Do you follow me so far? That is what
20 is called the lesser included offenses.

21 The reason I point that out to you is the
22 range of punishment for murder is five to
23 ninety-nine years or life, totally different
24 than for capital murder, and in addition, even
25 though the jury has found someone guilty of the

1 offense of murder, the jury can, if all the
2 jurors unanimously agree their punishment would
3 be ten years or less, the jurors can, in fact,
4 if they feel it's a proper case, recommend
5 probation to the Judge, and if they recommend
6 probation, the Judge will, in fact, probate
7 the time the Defendant normally would have had
8 to spend in the penitentiary had no probation
9 been given.

10 Do you follow me on probation?

11 A Yes.

12 Q I don't know if you had any idea of how
13 probation worked before you came down.

14 A No.

15 Q Probation pertains to when the jury finds the
16 range of punishment should be ten years or less.

17 If the jury feels the punishment should
18 be ten years and one day, all the way up to
19 life, if they feel that way, probation does
20 not enter into the picture, because a man does
21 not receive probation from a jury where the jury
22 has arrived at a punishment of more than ten
23 years. It is only where the jury finds out the
24 range of punishment should be ten or less, and
25 secondly, the case is a proper case for probation.

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1 because even if the jury decides the case should
2 be ten years or less, if they feel the case is
3 not a proper case for probation, they do not
4 recommend probation; only where it is a proper
5 case for probation.

6 Let me give you an example of what I am
7 talking about, where a man or woman could
8 theoretically be indicted for murder and yet
9 be a proper case for probation. Let me give
10 you an example, far-fetched, but it's one I
11 have had time to sit in my office and think
12 about, rather than hit you in the face with a
13 question such as: Can you imagine where someone,
14 for the offense of murder could receive probation?

15 I will give you an example and start
16 you thinking along those lines.

17 Imagine a case where a man and a woman
18 have been married for thirty-five or forty
19 years, let's say, and he is over at our medical
20 center down at Methodist Hospital dying of
21 some incurable disease and there is no hope
22 of recovery.

23 The doctors have said he could really go
24 at any moment, but could live as long as six
25 months. We have known couples like this, deeply

1 attached and deeply in love all their lives.
2 They have talked about it all their lives.
3 All their resources to live a good retirement
4 life are dwindling fast, and they make a
5 rational decision to disconnect some of the
6 life support equipment and let him pass, let
7 him go ahead and go, and she decides it is
8 a clear decision, and really more than anything
9 else, you might sum it up as an act of love,
10 but nonetheless, she intentionally and knowingly
11 assists in the taking of his life, and that
12 would technically make it a murder case.

13 Okay, let's say some of his relatives
14 are bereaved and they go to the grand jury and
15 they say, "Look, we think this case is more
16 than just meets the eye. They had a parcel
17 of land together up near one of the lakes and
18 they were going to need that land, one of
19 the builders, to build resort homes on the lake,
20 and she stands to gain substantially. We think
21 this is a murder for money," which would be
22 a capital murder case.

23 Let's say in my hypothetical example, the
24 grand jury indicts her and she comes to trial.
25 This is really hypothetical. She goes to trial

1 for capital murder, murder for hire. The jury
2 hears this and feels like this is the biggest
3 travesty of justice. They don't find her guilty
4 of capital murder, yet the jury looks at the
5 charge from the Judge and finds she has, in
6 fact, assisted in the death of a human being,
7 so they return that verdict to the Court and
8 they tell the Court, "Judge, we acquitted her
9 on capital murder, but we found her guilty of
10 murder," and the jury decides on punishment
11 and decides this seventy-six year old lady does
12 not need to go to the penitentiary under any
13 circumstances, and they come out and tell the
14 Judge, "We feel like she should go on probation."

15 Do you see how that concept of lesser
16 included offenses and that conception of
17 probation might apply even though somebody might
18 be accused of capital murder, ultimately, they
19 would be found guilty of murder and given a
20 probated sentence?

21 I hope in that example, we have managed
22 to tie in everything we have talked about in
23 the last fifteen minutes.

24 Okay.

25 And I feel sure there are other examples

1 where someone found guilty of murder, perhaps
2 the jury would recommend probation.

3 Mr. Deckert, do you feel like if you were
4 a juror on a case where you had found someone
5 guilty of the offense of murder, if you were
6 in a frame of mind after you heard all the
7 evidence this was a proper case for probation,
8 would you be able to say so by your verdict
9 and recommend it to the Court if you felt it
10 was a proper case?

11 A Yes.

12 Q Where does your daughter attend college?

13 A East Texas State Commerce.

14 Q What did your dad do, if he is not still
15 actively employed? When he was actively
16 employed, what was his occupation?

17 A He is deceased, now, and he worked for a pipeline
18 company.

19 Q How about your mom? Did your mom ever work
20 outside a home?

21 A As a cafeteria attendant in a hospital after
22 he passed away.

23 Q Do you have any brothers or sisters?

24 A One brother.

25 Q What is his occupation?

1 A He owns a sheet metal shop.

2 Q Your period of time in the service is what

3 period of years are we talking about?

4 A Two years.

5 Q What years?

6 A '53 to '55.

7 Q Stationed overseas at all?

8 A Yep, Germany.

9 Q Frank Miller: Is he a friend of yours or a

10 casual acquaintance?

11 A He is a draftsman at work.

12 Q And he is also, I take it, a reserve deputy

13 sheriff?

14 A Right.

15 Q Is that with the Harris County Sheriff's office?

16 A Right. I think the Marine division, probably.

17 Q Does he do any skin diving or anything like

18 that?

19 A Yes.

20 Q Okay, Mr. Deckert, we have talked about so many

21 things. Do you have any questions for me at all?

22 I will talk with Mr. Bax to see if he

23 has any questions. We -- it's good we do that.

24 We alternate. Sometimes I forget to ask a

25 juror something.

1 A Sometimes I wonder if the Defendant is a
2 U. S. citizen.

3 Q Let me point out a couple of things to you.
4 I know what I meant to do. Dick Bax is a member
5 of the District Attorney's office. I am, as well.
6 We will be handling this case. The Defendant
7 is Ricardo Guerra. He is accused of killing
8 a police officer by the name of J. D. Harris.
9 It is alleged it took place at the corner of
10 Edgewood and Walker. The main thoroughfare over
11 there is Harrisburg, and I wonder if you may
12 have read or heard anything about this case at
13 all.

14 A Not that I remember.

15 Q He is not a U. S. citizen. I think the evidence
16 will show, ultimately, he is an illegal alien.

17 Okay?

18 He is represented by Mr. Candelario
19 Elizondo, and right next to him, Mr. Joe
20 Hernandez. Both of them are lawyers in Harris
21 County, and they will be handling the defense
22 here in this case.

23 I take it you know none of the parties
24 in the courtroom you can see?

25 A No.

1 A No.

2 Q Would the fact that the Defendant is an illegal
3 alien make a difference, one way or the other
4 in the case?

5 A I don't know.

6 Q I am just checking with you.

7 A Yes.

8 Q It shouldn't, that I know of, make a difference
9 one way or the other, but I want to see.

10 Well, I will pass you to the Defense
11 attorneys and they will have questions of you
12 and I appreciate your letting me talk to you.

13 EXAMINATION

14 Questions by Mr. Elizondo:

15 Q How do you do, Mr. Deckert? How are you doing
16 today?

17 A Fine.

18 Q Let me give you a few of the facts surrounding
19 this case and see if you can recall and refresh
20 your memory about this incident.

21 Around July 13, 1982, a police officer
22 was killed over here, as Mr. Moen said, on
23 the corner of Edgewood and Walker Streets.

24 Shortly thereafter, a bystander was also
25 killed, and then about an hour and a half later

1 a police officer received five bullet wounds.
2 He was seriously wounded.

3 This happened about six weeks ago, seven
4 weeks ago. Do you recall anything of that sort?

5 A No. I possibly read it, but I mean, it didn't
6 stick or anything.

7 Q So you haven't formed any kind of opinion?

8 A No.

9 Q Let me ask you a question. Not to get out of
10 line or out of place, but do you recall reading --
11 I want to say six or eight months ago -- the U.S.
12 Supreme Court said illegal aliens would have
13 free education?

14 A Yes.

15 Q Do you and your wife ever discuss that?

16 A No.

17 Q Did you ever discuss that with anybody else?

18 A I don't believe so.

19 Q How do you feel about that?

20 A I don't think they should, because --

21 Q All we want to know is just how you honestly
22 and truthfully feel. I've got to ask you these
23 questions, now, because once you get in there,
24 I can't talk to you any more. I've got to
25 talk to you now.

1 How do you feel -- and you realize,
2 again, there are no right or wrong answers, but
3 how do you feel about the Defendant being an
4 illegal alien and being tried for capital murder
5 A of a police officer?
6 A The only thing I think about is he is over here
7 illegally.
8 Q Would that, in any way, shape, form or fashion,
9 taint you or bias you in any way you can think
10 of?
11 A Possibly.
12 Q So then you would say, then, that you have a
13 bias against a certain set of individuals such
14 as illegal aliens?
15 A You brought up the deal on education.
16 Q Uh-huh.
17 A I think they are taking something from us that
18 you, you know --
19 Q Right.. My wife and I have the bitterest
20 discussions over that.
21 A Right.
22 Q And you know, right or wrong, I want to find out
23 how you feel.
24 A Right.
25 Q Well, if you are selected on this jury panel and

1 you are sitting right there and listening to
2 the evidence and hearing the interpreter
3 interpret the proceedings to this Defendant,
4 how would you feel about that?

5 A I doubt if that would bother me.

6 Q You don't think it would bother you in any way?
7 You wouldn't have some kind of a resentment or
8 a bias towards this Defendant as it stands right
9 now?

10 A Not knowing anything about the case, I doubt
11 if I would.

12 Q Okay, I've got to go a little bit further, and
13 I don't mean to belabor the point, and I
14 apologize if I do, and I know the answers to
15 some of these questions, but you said you were
16 a little upset about illegal aliens receiving
17 a free education. You don't like that.
18 My wife doesn't like it either.

19 A Yes.

20 Q And we talk about it back and forth.

21 How about taking jobs away from other
22 people?

23 A I think most of the jobs they get, other people
24 don't want.

25 Q Okay.

1 A I mean, I don't believe they take -- I think
2 there is enough jobs, if people would work for
3 the salaries they do, that they could get them.
4 Q Then you don't have any kind of biases against
5 illegal aliens as a group, as a class?
6 A Well, I just don't believe they should be over
7 here to begin with.
8 Q Okay, but your belief they shouldn't be over here
9 to begin with, would that bias you in any way
10 against this man in any way?
11 A I would say yes. Yes.
12 Q It would?
13 A Uh-huh.
14 Q Would it bias you so that it would affect your
15 thinking or your deliberations in this case in
16 any way, shape, form, or fashion?
17 A I think if the evidence presented, you know,
18 proved that he was guilty or if it proved that
19 he wasn't, I could make, you know, a fair
20 judgment.
21 Q Well, do you have a -- would he have a strike
22 against him going into the trial right now
23 merely because he is an illegal alien?
24 A No, not as far as I am concerned.
25 Q So you could afford him all of his constitutional

1 rights of the U.S. Constitution?

2 A I don't see that he has any rights, according
3 to that.

4 Q Well, he's got, you know, certain constitutional
5 rights that are guaranteed to him by the U.S.
6 Constitution and Texas Constitution.

7 Would you agree with me there?

8 A I am not versed enough to know if he does or not.

9 Q Would it surprise you to find out that he does?

10 A Probably. I would think that he doesn't since
11 he is not a U.S. citizen.

12 Q Would you want him to have any rights guaranteed
13 to him by the U.S. Constitution?

14 A No.

15 MR. ELIZONDO: We would challenge,
16 Your Honor.

17 THE COURT: Does the State have
18 questions?

19 MR. MOEN: Yes.
20

21 EXAMINATION

22

23 QUESTIONS BY MR. MOEN:

24 Q Let me ask you, Mr. Deckert, a couple of
25 questions. Mr. Deckert, the only rights this

1 man has, I say, are guaranteed to him by the
2 United States Constitution. No one is quarreling
3 with the way you feel, but the rights are
4 basically the rights accorded to any person who
5 finds himself a Defendant charged with a crime.
6 They are rights guaranteed American citizens and
7 guaranteed Defendants, generally, who are charged
8 with crimes in our community or the United States.
9 The rights that he has are the rights that I have
10 basically outlined: presumption of innocence,
11 the opportunity to remain silent -- you know,
12 if he chooses to -- those types of rights --
13 and that the burden of proof must rest with Mr.
14 Bax and myself.

15 Do you feel you could accord those
16 rights to the Defendant, even though he is an
17 illegal alien? Those are the rights the law
18 affords to him. Do you feel you could accord
19 him those rights, in other words, find him guilty
20 based on the evidence rather than find him
21 guilty based on whether he is an illegal alien?

22 A. Yes.

23 Q. I think you have answered yes, but I need your
24 response for the record.

25 A. Yes.

1 Q And also, when it came down to answering
2 Question No. 1 and Question No. 2, you could
3 consider all the evidence in answering the
4 questions. You can consider the fact that the
5 man is an illegal alien. That might make up your
6 mind in considering it. I only ask you not to
7 answer Question No. 1 or 2 "yes" merely because
8 the man is an illegal alien.

9 Can you assure me you would not do
10 that?

11 A Yes.

12 Q I think I gather you have some feelings concerning
13 illegal aliens and the benefits they receive
14 for being here in our country, but the only
15 thing I want to be absolutely clear on from the
16 standpoint of the record is: You could be fair
17 and impartial to this Defendant and find him
18 guilty or not guilty and answer "yes" or "no"
19 in answer to those questions to your left based
20 on the facts and circumstances as presented to
21 you, and let the chips fall, so to speak, as
22 they may? If we don't prove it to you, Mr.
23 Bax and I don't prove it to you beyond a
24 reasonable doubt, I would expect you to find
25 the Defendant not guilty. If you don't find

1 beyond a reasonable doubt the answers to those
2 questions should be "yes," I expect you to
3 answer "no."

4 Do you feel you would be able to
5 perform those tasks?

6 A Yes.

7 Q Okay. When you said that you -- or at least
8 you said that you had some feeling about illegal
9 aliens, were you talking about illegal aliens
10 as a whole, rather than directing your comments
11 toward this Defendant?

12 A I think as a whole. They take something away.

13 Q We have had the Supreme Court case that directly
14 applied to our Texas system here concerning
15 bilingual education and the right to a free
16 education. That's been in the papers. I wanted
17 to clear that up with you.

18 Thank you, Mr. Deckert.

19 THE COURT: The objection is overruled.

20 MR. ELIZONDO: We will re-urge the
21 challenge.

22 THE COURT: You have more questions?

23 MR. ELIZONDO: I want to make it clear
24 for the record we would re-urge our challenge
25 in that the prospective juror, Mr. Deckert, has

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1 indicated to the Court that he has a bias
2 toward a class of people, and for that reason,
3 we would re-urge our challenge for cause.

4 THE COURT: That will be overruled.
5

6 EXAMINATION
7

8 QUESTIONS BY MR. ELIZONDO:

9 Q Mr. Deckert, let me go back and tell you what
10 this man is charged with. He is charged with
11 capital murder.

12 As in all trials in Texas, the State
13 must prove its case to you beyond a reasonable
14 doubt. It must prove to you on a particular
15 day in Harris County, Texas, this man shot and
16 killed a police officer in the lawful discharge
17 of an official duty, knowing at the time that
18 he was a police officer. They must prove each
19 and every one of those elements to you beyond
20 your reasonable doubt.

21 You might ask yourself: What is a
22 reasonable doubt? Well, the judge won't give you
23 a definition and the prosecutor won't give you
24 one. I can't give you one, because there is no
25 definition of what a reasonable doubt is.

1 Some people have said a reasonable
2 doubt is that doubt that lingers on after
3 reason and logic have failed to displace it.

4 But let me give you an example. Maybe
5 it can clarify the whole thing.

6 Across the street, where they are
7 trying lawsuits for property damages or for
8 personal injuries, sometimes for millions of
9 dollars, all they have to do down there is prove
10 their case by a preponderance of the evidence, the
11 greater weight of the credible evidence.

12 Down here, where a person's life is
13 literally at stake, the State has a more onerous
14 burden, a heavier burden, and rightfully so,
15 and that is proof beyond a reasonable doubt,
16 because I submit to you that if this man is
17 found guilty of capital murder, the State is
18 going to come back in here on the punishment part
19 and they are going to ask you to kill him, and
20 that is why the State is held to a heavier burden,
21 because before anybody can forfeit anybody's life,
22 they better make sure they have the right man.

23 Do you agree with me there?

24 A Yes.

25 Q Let me give you another example of proof by a

1 preponderance of the evidence. Let's assume
2 you want a loan and you go to your banker and
3 give the banker a financial statement and the
4 banker asks you: Where do you work? Does your
5 wife work? How many kids do you have? Are
6 they in college? Are you supporting them? How
7 much money do you make a week, a month? How
8 much are your house payments? How much are your
9 car payments?

10 Based upon all that, he makes his
11 decision, and that decision is probably to say
12 he will loan you the money. Well, I submit to
13 you that he made that decision by a preponderance
14 of the evidence, because theoretically if he
15 had made it on proof beyond a reasonable doubt,
16 he wouldn't be loaning any money, because he
17 would be too afraid of getting defaults, and
18 we know there are defaults when bankers loan
19 money. Right?

20 A Yes.

21 Q How do they go about proving their case beyond
22 a reasonable doubt?

23 First of all, what will happen is:
24 The Court will read the indictment -- I am sorry
25 -- the prosecutor will read the indictment to

1 the jury, and the Defendant will plead not
2 guilty. Then the State will present evidence
3 in the way of witnesses. They will come out here
4 and take the same stand, the same place you are
5 at right now, and they will give their version
6 of the facts. Then after they are through
7 presenting evidence, they will rest their case.
8 That means that is all we have for right now.

9 Then the Defendant can, if he chooses,
10 give evidence. He doesn't have to give evidence,
11 but he can if he chooses.

12 How would that affect you, if he didn't
13 put on any evidence whatsoever, if he didn't
14 testify or anything? Would you want to know what
15 he would have said? Would it kind of affect your
16 deliberations on guilt or innocence, assuming he
17 didn't testify?

18 A I don't think it would.

19 Q Would you want to know what his side of the story
20 was?

21 A I might wonder if he had some evidence that
22 would, you know, prove that he was not there or
23 something. Why, it should be presented, and I
24 am sure he would if he had it.

25 Q Well, would that affect your deliberations in

1 any way?

2 A No.

3 Q You could still base your verdict and base it

4 solely on what you heard from that witness stand?

5 A Yes.

6 Q The burden of proof that you will have in a

7 criminal case is, of course, for the State of

8 Texas -- the State must prove their case to you

9 or to the jurors beyond a reasonable doubt, and

10 the burden never shifts to this Defendant.

11 Do you agree with that proposition of

12 the law?

13 A Yes.

14 Q Now, of course, if he testifies during the guilt-

15 or-innocence stage, then he can be impeached

16 with any prior criminal conduct -- I am sorry --

17 prior criminal convictions.

18 A What do you mean by "impeached"?

19 Q He can be cross-examined and impeached as to his

20 credibility.

21 A Okay.

22 Q And then you can judge his credibility and

23 decide it upon what you heard from that witness

24 stand also? Is that correct?

25 A Yes.

1 Q In a capital murder case, in all cases in Texas,
2 there are two parts. They call it a bifurcated
3 trial.

4 The first part is to determine whether
5 or not he is guilty or innocent. If you determine
6 he is guilty, then we go to the second part, the
7 punishment stage. If you determine he is not
8 guilty, then that is all there is. You go home.

9 Well, on the punishment stage in a
10 capital murder case, there are only two possible
11 verdicts: either life or death.

12 The first question we will ask you to
13 determine is whether or not the conduct of the
14 Defendant that caused the death of the deceased
15 was committed deliberately and with the
16 reasonable expectation that the death of the
17 deceased would result. That is the first question.

18 Would you agree with me there that
19 that really calls for two answers? Number one,
20 was it committed deliberately and with the
21 reasonable expectation that the death of the
22 deceased would result?

23 A Well, I would say if he did it deliberately.

24 Q And with the reasonable expectation that the
25 death of the deceased would result?

1 A Yes. Yes. Like, if I shoot somebody, I expect
2 to kill them. Right?
3 Q Correct.
4 A That is what you are saying?
5 Q Correct. Correct.
6 Now we get to the word "deliberately."
7 That has been underlined up there. Deliberately
8 will not be defined. The legislature, when they
9 decided on these two questions, never saw fit
10 to define any of those words, but would you agree
11 with me that deliberately means to ponder or
12 think about with measurable consideration?
13 For example, you are going to go into
14 the jury deliberation room and you are going to
15 deliberate whether or not this man is guilty or
16 not. You are not going to go in there, I hope,
17 and say, "Fine. He is guilty. Let's go on to the
18 next thing." You are going to ponder and think
19 about it with a measure of consideration, aren't
20 you?
21 A Wouldn't you think that a person's mind would be
22 pretty well made up from what he hears out here?
23 Isn't there a possibility you could go in there
24 and --
25 Q Sure, sure, sure. You could go in there and come

1 out two minutes later or a minute later. That
2 would give you time to pick a foreman and come
3 out --

4 A Yes.

5 Q -- theoretically.

6 But does the word "deliberately" mean
7 in any way it was premeditated to you, if you
8 were to find him guilty of intentionally and
9 knowingly killing a police officer?

10 A I would think "deliberately" wouldn't mean
11 premeditated.

12 Q What do you think "deliberately" means?

13 A That he had intended to do it. I mean, I don't
14 know what he was doing or where he was or
15 anything else, but if he had a gun and he shoots
16 somebody, he deliberately did it.

17 Q So you think, then, that "deliberately" and
18 "intentionally" mean the same thing?

19 A Yes.

20 Q The second question, the question is whether
21 there is a probability that the Defendant would
22 commit criminal acts of violence that would
23 constitute a continuing threat to society. That
24 question is calling for you to predict the
25 future. Would you agree?

1 A Yes, sir.

2 Q Do you have questions in regards to that

3 question? Do you think that a person can change

4 his mode of conduct, mode of operation? Is it

5 possible?

6 A Anything is possible.

7 Q Okay. Do you think a person can change his mode

8 of behavior?

9 A No.

10 Q You don't think he can?

11 A Well, I think if he has gone this way most of his

12 life, that it is hard to change and go to a

13 different direction.

14 Q As Mr. Moen was telling you, in a capital murder

15 case, there are always -- not always, but

16 sometimes lesser included offenses: murder,

17 murder as a lesser included offense of capital

18 murder. It carries a lesser penalty.

19 The penalty range for murder is five

20 to ninety-nine years or life and a ten-thousand-

21 dollar fine can also be imposed. Assuming that

22 in a capital murder case you find the Defendant

23 guilty of murder, that is, you believe that he

24 intentionally and knowingly took the life of

25 someone, and the penalty range, of course, is

1 five to life, and also probation, now can you
2 consider in a proper case, in your own mind, in
3 a murder case, can you consider giving five years'
4 probation as the proper punishment in a murder
5 case where you have found a person guilty of
6 intentionally and knowingly taking the life of
7 someone?

8 A Well, if you used the example like he had given
9 over here, I could.

10 Q After he deliberately did it?

11 A Are we talking about the Defendant or talking
12 about --

13 Q I can't talk about him.

14 A Okay. Okay. I would say the example he gave
15 where the wife intentionally killed her husband
16 and she is seventy years old, I would say yes,
17 that I could see probating the sentence.

18 Q Okay, in that example Mr. Moen gave you, do you
19 believe that the person that unplugged the plug
20 did it deliberately?

21 A Yes, after an agreement with the person that you
22 did it to, but I think it was a deliberate act.

23 Q If you found a person guilty of murdering a
24 police officer, which is a capital offense, would
25 you always assess the death penalty?

1 A That is not up to me to assess it.

2 Q Okay. Let me rephrase the question. Would
3 you always answer those two questions "yes"?

4 A I don't know about the second one. I would have
5 to have some history or something before I could
6 answer it.

7 Q Okay. In some cases, you don't need a history,
8 like in the example Mr. Moen gave you, Ronald
9 Clark O'Bryan. That is just the way it was
10 done.

11 A Yes, in a case like that, I could say "yes" to
12 both.

13 Q What about murdering a police officer? Would you
14 always automatically answer those two questions
15 "yes," irrespective of any evidence whatsoever?

16 A Well, it is hard to say. Yes, I would. Okay.

17 Q You would answer those two questions "yes,"
18 irrespective of what the evidence would show?

19 A No.

20 Q In the punishment questions?

21 A If I believed that he was guilty, I could
22 answer them both "yes" based on the evidence.

23 Q That is why I am getting a little confused.

24 As I said, there are two parts to a
25 criminal case: guilt or innocence, and then the

1 punishment phase.

2 If you have found him guilty beyond
3 a reasonable doubt of murdering a police officer,
4 then we go to the punishment stage.

5 At the punishment stage, you have two
6 questions to answer.

7 Would you automatically answer those
8 two questions "yes" just so you can get the
9 desired result, that is, being death?

10 A. What two questions?

11 Q. Those two there.

12 A. The first one doesn't have anything to do with
13 the punishment, does it?

14 Q. Yes, sir.

15 A. If the jury finds him guilty, that means there is
16 only two things that can happen? Right?

17 Q. Life or death.

18 A. Yes.

19 So what are you asking me, again, now?

20 Q. Okay. I am asking you, on the guilt-or-innocence
21 stage, if you find the Defendant guilty of
22 capital murder, murder of a police officer, then
23 we will go to the punishment stage where those
24 two questions come in.

25 My question, then, is would you always

1 answer those two questions "yes," irrespective
2 of the evidence, just so you will get a desired
3 result of death?

4 A No.

5 It looks like to me, though, that the
6 first one has to do with the guilt or innocence.

7 Q No, no. It has to do with the punishment. That
8 is why I was asking you if the word "deliberately"
9 meant more than "intentionally," because on the
10 punishment stage they are asking if it was
11 committed deliberately as compared to
12 intentionally.

13 That is why I was asking you what
14 you thought about the word "deliberately."

15 A Uh-huh.

16 Q Do you think that just because he is sitting
17 right here, represented by two lawyers and
18 indicted by the Grand Jury, do you think that he
19 is a little guilty of something?

20 A No.

21 Q Otherwise, he wouldn't be here? I mean, my mama
22 always said where there is smoke, there is fire.

23 A Well, I would think there would have to be some
24 reason he would be here.

25 Q Okay.

1 A But I don't know that he is guilty of anything.
2 Q Okay. Well, I've got to go back to my original
3 question. I am sorry. I hate to belabor the
4 point, Mr. Deckert, about the illegal alien, but
5 if you get on that jury, I won't be able to talk
6 to you anymore, and I need to find out answers
7 to my questions.
8 Would you hold it against Ricardo Aldape
9 Guerra in any way during the trial of this case
10 if you found out that he was an illegal alien?
11 A I already know that.
12 Q Well, you know it because he told you, but you
13 would really know it only when it comes off the
14 witness stand.
15 A I think so.
16 Q You would hold it against him?
17 A Yes.
18 Q So he starts off with some kind of strike against
19 him right now in this trial?
20 A Yes.
21 MR. ELIZONDO: We will challenge,
22 Your Honor.
23 THE COURT: Do you have any questions?
24
25

1 EXAMINATION

2
3 QUESTIONS BY MR. MOEN:

4 Q Let me ask you a couple of questions, Mr. Deckert
5 -- I know you have been here for an hour going
6 back and forth like a tennis ball -- you say you
7 would hold it against him? What do you mean by
8 that?

9 A I think he is already guilty of something, being
10 in the U.S.

11 Q You kind of feel like I guess a lot of citizens
12 feel, particularly people in Texas, that they
13 don't have a right to be here? They have a
14 right to be here if they are here legally, but
15 don't have a right to be in the country sneaking
16 across the border just like we don't have a right
17 to sneak into their country without the proper
18 authorities, as well? Is that what you are
19 saying?

20 A Yes.

21 Q Is that all you are saying? Is that all the
22 feelings you have at this time regarding that
23 Defendant?

24 A Yes.

25 Q When it came down to giving him a fair and

1 impartial trial, do you think you could do that?

2 A I think based on the evidence I could make a
3 proper decision.

4 Q Okay. You know we asked already, but I've got to
5 ask it again.

6 You are not telling me you would find
7 him guilty just because he is an illegal alien?

8 A No.

9 Q Would you deny him any rights which our
10 jurisprudence accords our citizens? Would you
11 deny him any of his rights, some of the same
12 rights, perhaps, we may have where we would go
13 on trial in Mexico and find ourselves illegally
14 in the country? Would you deny him any of those
15 rights just because he has illegally entered into
16 our country?

17 A No.

18 Q I don't want to talk you into something. If you
19 feel you can't be on the jury panel, for whatever
20 reason, I am not trying to convince you of
21 anything and no one holds anything against you.

22 Is that the way you feel now, the way
23 you have indicated to the judge here and to the
24 court reporter?

25 A Yes.

1 MR. MOEN: Judge, that is all I have.

2 THE COURT: Let me ask you a question.

3 The fact that he is an illegal alien,
4 would that cause you to automatically answer the
5 questions up there on the board "yes"?

6 THE PROSPECTIVE JUROR: I don't think
7 so, until I hear some evidence.

8 THE COURT: You could base your verdict
9 on guilt or innocence on the evidence presented
10 in this courtroom or another courtroom, and you
11 could base your verdict as to punishment based
12 on the evidence, and is that all that you would
13 base it on?

14 THE PROSPECTIVE JUROR: I think so.
15 Yes.

16 THE COURT: And you would not base
17 it upon the fact he is an illegal alien in any
18 way?

19 THE PROSPECTIVE JUROR: Not if I were
20 picked on a jury.

21 THE COURT: The challenge is overruled.

22 MR. ELIZONDO: Thank you.
23
24
25

EXAMINATION

QUESTIONS BY MR. ELIZONDO:

Q Mr. Deckert, a little while ago, fifteen or twenty minutes ago, you mentioned you had a bias against illegal aliens together as a class. Do you remember that?

A Yes.

MR. MOEN: I object to that as being repetitious. That has been bantered back and forth several times now.

THE COURT: Sustained.

Q (By Mr. Elizondo) Would you regret -- or would you begrudge Ricardo Aldape Guerra because you have to give him certain rights that are guaranteed to U.S. citizens?

A Would I begrudge giving him the same rights as a U.S. citizen?

Q Begrudge his having the same rights?

A I don't think he's entitled to them. He is not a U.S. citizen. I don't believe he is entitled to the same rights that I am.

Q You have a bias against him?

You know, I want to know if you do or don't.

1 A No.

2 Q You don't?

3 A No, not against him personally.

4 Q Just as a class?

5 A Yes.

6 Q So then he should have the same rights as everybody

7 else has in the trial of this case?

8 A That wasn't what I just said, though, was it?

9 Q That is what I am trying to get at. What do

10 you think about that?

11 A I think he is going to have them.

12 Q Well, you need to be a little more precise than

13 just "think."

14 A Whether I believe he is entitled to them or not,

15 he is going to get the rights of a U.S. citizen.

16 Q You can promise him that if you were selected on

17 this jury panel?

18 A I can promise you that what I come up with would

19 be based on the evidence presented here.

20 Q All right.

21 A Whether it is against you or him.

22 Q Irregardless of the fact that you regret that

23 he's got the same civil rights as a United States

24 citizen?

25 MR. MOEN: I object to that, Judge. I

1 object to the form of the question.

2 THE COURT: Overruled.

3 Q (By Mr. Elizondo) You may answer.

4 A Ask it again.

5 Q Let me see if I can.

6 Okay. If you are selected on this jury,

7 you would give Ricardo Aldape Guerra the same

8 civil rights that are guaranteed to any U.S.

9 citizen in a trial of this case?

10 A Yes.

11 Q Let me ask you a few more questions, and I will

12 let you go.

13 Where did you go to school, college?

14 A University of Texas.

15 Q At Austin?

16 A It's written on there, isn't it?

17 Q Sure is. I am sorry. It is right here. Engineer.

18 A Right.

19 Q And you went to high school in Baytown, Robert

20 E. Lee?

21 A Yes.

22 Q And what kind of engineer are you?

23 A Mechanical.

24 Q A mechanical engineer.

25 How long have you lived in Deer Park?

1 A Twelve years.
2 Q You live on Justin street?
3 A Yes.
4 Q Is that anywhere near Second street?
5 A Deer Park is not very large.
6 Q I have been through there. My brother-in-law
7 lives up there.
8 A Main street runs from 225 to Spencer on either
9 side of it, so --
10 Q Do you know where Frank Miller works when he works
11 for the Sheriff's Department?
12 A No. All I know is that he recently went through
13 their training, or whatever it is, and graduated.
14 MR. ELIZONDO: All right. Thank you,
15 sir.
16 MR. MOEN: Judge, we accept Mr. Deckert.
17 MR. ELIZONDO: Judge, we are going to,
18 prior to excusing Mr. Deckert, re-urge our motion
19 to exercise challenges to the jurors until after
20 the entire venire has been examined, and we are
21 also objecting to the constitutionality of 35.13.
22 THE COURT: That motion is overruled.
23
24
25