

— AIdape: Trial Transcript —
(9/82) (voir dire) (v.6)



; **CLOSED**

H NEXT DAY 03/15/2006 3:00pm CST R2
HH254 60654804-000024 For: JAASM
VINSON & ELKINS LLP
1001 FANNIN STREET
SUITE 2240
FLOOR 22
HOUSTON, TX 77002-6760
RECORDS MGMT RECORDS MGMT B06156485
JULIE AASMYR-RECORDS DEPT SR
ZZ0865766036
0865766036
A standard 1D barcode with vertical black bars of varying widths on a white background.
HHY00535211-00002 Return To IRON MOUNTAIN

RICARDO GUERRA

VOL. VI

V.O.

69.081

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CAUSE NO. 359,805

THE STATE OF TEXAS

IN THE DISTRICT COURT

VS.

OF HARRIS COUNTY, TEXAS

RICARDO ALDAPE GUERRA

248TH JUDICIAL DISTRICT

VOLUME VI
STATEMENT OF FACTS
VOIR DIRE EXAMINATION
SEPTEMBER 8, 1982

F2068 0843

I N D E X

Page

VOLUME VI

September 8, 1982

VOIR DIRE EXAMINATION, CONTINUED

Lian-Chuan Peng

Examination by the State (Moen) 824

Randall Lee Woods

Examination by the State (Moen) 831

Examination by the Defense (Elizondo) 865

Philip Dale Alexander

Examination by the State (Bax) 882

Examination by the Defense (Elizondo) 920

Paul Donald Kellogg

Examination by the State (Moen) 930

Examination by the Defense (Elizondo) 965

Thurman Howard Matthews

Examination by the State (Bax) 980

Examination by the Defense (Elizondo) 1011

Examination by the State (Bax) 1021

Examination by the Defense (Elizondo) 1023

F2068-0844

I N D E X

Page

VOLUME VI

September 8, 1982

VOIR DIRE EXAMINATION, CONTINUED

Philip Dale Alexander

Examination by the State (Bax) 882

Examination by the Defense (Elizondo) 920

Paul Donald Kellogg

Examination by the State (Moen) 930

Examination by the Defense (Elizondo) 965

Thurman Howard Matthews

Examination by the State (Bax) 980

Examination by the Defense (Elizondo) 1011

Examination by the State (Bax) 1021

Examination by the Defense (Elizondo) 1023

Lian-Chuan Peng

Examination by the State (Moen) 824

Randall Lee Woods

Examination by the State (Moen) 831

Examination by the Defense (Elizondo) 865

F2068 0845

1 (At this time a jury panel of six
2 prospective jurors were brought into the
3 courtroom, after which the following proceedings
4 were had:)

5 THE COURT: Good morning. My name is
6 Henry Oncken. I am the judge of the 248th District
7 Court.

8 If this doesn't look like a courtroom,
9 it is probably because it is not. We are in the
10 process of trying to select a jury to try a
11 capital murder case, and when we do that, it
12 takes two or three weeks just to pick a jury, and
13 obviously, each court's docket cannot stop and
14 we have visiting judges come in and occupy our
15 courtroom while we are selecting a jury for a
16 capital case, so we have to scamper around for
17 whatever space we can find to pick a jury, and
18 when we get that done, we will go back to the
19 courtroom to try the case.

20 So this is a conference room, and it
21 doesn't lend itself very well to the purpose,
22 but we will have to do the best we can.

23 The individual in this case is Mr.
24 Ricardo Aldape Guerra. He is the Defendant
25 seated in the corner.

1 The lady talking to him is Linda
2 Hernandez, the interpreter. Mr. Guerra does not
3 speak English, does not understand English, and
4 we have an interpreter to let him know what is
5 going on in the proceedings.

6 He stands charged with capital murder.
7 It is alleged he killed a police officer by the
8 name of James Harris on July 13th of this year.

9 The Prosecution in this case will be
10 represented by these two gentlemen, Dick Bax
11 and Bob Moen, and the Defense is represented by
12 Candelario Elizondo and Joe Hernandez.

13 The lady here is Cindy Layne, the court
14 reporter. She takes down every word we say in
15 this room or a courtroom or wherever we find
16 ourselves during the course of our voir dire
17 examinations, so when it becomes your turn to
18 be interviewed, remember she must write down what
19 you say. Every word must be recorded, and she
20 cannot record a nod of the head or anything of
21 that nature. She will appreciate your cooperation.

22 Now, I want you to relax as much as
23 you can. I realize none of you have probably been
24 in this situation before, and naturally, you are
25 apprehensive about it, but please understand what

F2068 0847

812

1 what we are going to do is visit with you about
2 how you feel about certain things, and we will
3 do that with the six of you and then we will
4 interview each one of you individually, which is
5 the way you pick a jury in a capital case. You
6 will come in as a group, and then it takes about
7 an hour to interview each one of the jurors,
8 prospective jurors.

9 During that time, we are very informal
10 and try to relax and be as loose as we can while
11 we are about a very serious business.

12 My purpose at this point is to generally
13 acquaint you with what is going on, what goes on
14 in a criminal case.

15 Regardless of what each individual is
16 charged with, that individual in this country
17 carries with him the presumption of innocence.
18 I will tell you in the charge, which will be given
19 to the jury that is chosen in this case, that any
20 Defendant is presumed to be innocent until his
21 guilt is established by legal evidence beyond a
22 reasonable doubt.

23 If you don't know anything about the
24 law, don't worry about that because that is my
25 function, to tell you what the law is pertaining

1 to this particular case. All we need you to do,
2 and the important function we need jurors to do
3 is to decide the facts in a particular case. So
4 I will tell you in the charge certain things,
5 and other things will be in the charge that I
6 can't talk to you about now because I don't know
7 what issues are going to be raised in the case.

8 The things I am going to talk to you
9 about now are standard.

10 That presumption of innocence is a very
11 important right that each of us as citizens
12 have, and that will be talked about a great deal.

13 The State has the burden of proof. Mr.
14 Bax and Mr. Moen must prove the guilt of this
15 Defendant beyond a reasonable doubt.

16 Mr. Elizondo and Mr. Hernandez do not
17 have to prove anything. They don't have to put
18 on any testimony or witnesses. They don't have
19 to ask any questions. They don't have to do
20 anything. That is the law, and the State must
21 prove his guilt. The Defendant does not need
22 to prove his innocence.

23 There will be certain terms defined
24 for you, and I have used a phrase that will not
25 be defined for you. I can only use the terms

1 the legislature has defined for me. I can't
2 define "reasonable doubt." To me, it means
3 common sense, but that will not be in the charge.
4 To these lawyers it may mean something else, but
5 that is the burden of proof.

6 Likewise, I will tell you in the charge
7 that the indictment, which is a little piece of
8 paper, is just a piece of paper and is no evidence
9 of guilt. The fact that any Defendant is arrested
10 for, charged with, and possibly confined for an
11 offense is absolutely no evidence of his guilt.
12 That guilt must be established if it can be
13 established by evidence brought forward in a
14 courtroom, and you will hear read to you the
15 indictment which is the little pleading that
16 sets out the charges, but you will not have that
17 introduced as evidence for you or anything else.

18 It is the same thing as if you had an
19 automobile accident and you sued somebody for
20 damages to your automobile and to your person.
21 You would file a petition and ask for certain
22 things and set out certain facts, and then you
23 would have to go prove those things.

24 It is the same thing with the State.
25 They have brought charges, and that indictment

1 is the pleading setting out those charges. It
2 is not evidence.

3 I have already told you the Defendant
4 has the right to remain silent, and that, likewise,
5 is a precious right each and every one of us has,
6 and I want you to bear in mind if he does not
7 testify -- I have no idea whether he will or not,
8 whether they will put on evidence -- but if he does
9 not, you are not to take that as a circumstance
10 of his guilt.

11 In any criminal case -- any criminal
12 case is divided into two parts. You will hear
13 the lawyers mention "bifurcated trial." That
14 means divided into two parts.

15 The first part of any criminal trial
16 is to hear facts about an event which occurred
17 and find out whether or not the individual charged
18 with having caused that event is guilty of having
19 caused that event. That is all you hear in the
20 first stage of the trial is facts about that
21 event, and then and only then, if the jury finds
22 the Defendant guilty of having committed that
23 offense, is the second stage of the trial which
24 is punishment, what is going to be done to the
25 Defendant for whatever he is charged with.

1 Now, in a normal criminal case, the
2 jury usually decides -- I give you the range of
3 punishment that attaches to an offense, and the
4 jury simply decides what punishment is going to
5 be attached.

6 In a capital case, there are two
7 possible punishments if you find the Defendant
8 guilty of the offense of capital murder and that
9 is by confinement in the Texas Department of
10 Corrections for life or death by lethal injection,
11 and the jury does not actually have to pronounce
12 that sentence. That becomes the function of the
13 judge. But what the jury must do on the
14 punishment stage of a capital case is to answer
15 those two questions which you find on the board,
16 and I will give you just a second to read through
17 those, and I will mention them briefly. and the
18 lawyers will go through them in great detail.

19 All right. Now, if the jury answers
20 both of those questions yes, then it becomes my
21 function as the judge to assess his punishment
22 at death.

23 If, however, the jury answers one of
24 those questions yes and one of those questions
25 no or both questions no, then it becomes my duty

F2068 085217

1 to assess his punishment at life in the
2 penitentiary.

3 The State, because it has the burden
4 of proof in a criminal case, always gets to go
5 first. These prosecutors will ask you questions
6 first on voir dire, then put on evidence first,
7 and they have the right to open and close the
8 arguments when we get to that stage. That is
9 because they have the burden of proof, and for
10 no other reason.

11 There will be thirteen judges in this
12 case as there are in every felony criminal case.
13 I judge the law or whatever judge is sitting in
14 a case gives the law and rules upon objections
15 and the admissibility of certain evidence and
16 that sort of thing. But it is the jury's function
17 to decide the facts. You listen to the witnesses
18 as they testify and you judge the credibility
19 of those witnesses. You have the right to
20 believe all, part, or none of what any witness
21 tells you. You decide the facts. I give the
22 law. We are equal and we just have separate
23 functions.

24 I obviously have to listen to the facts
25 so I can hopefully rule correctly on the law, but

1 I don't decide those facts. That is for the
2 jury to determine.

3 A couple of other things, and we will
4 move on. During the course of the trial -- you
5 can ask all the questions you want to ask on voir
6 dire while we are visiting with you. If you have
7 a question about something, something you don't
8 understand, please ask those questions. You are
9 certainly entitled to. We want you to understand
10 as much as you possibly can about the process.
11 However, once the trial starts and you are chosen
12 as a juror, sworn as a juror, and take the box
13 and evidence starts, you cannot ask questions at
14 that point.

15 There are many times when I know jurors
16 would like to cross-examine a witness. Many
17 times, I want to cross-examine a witness, but I
18 can't do that either. I can ask to have something
19 repeated if I didn't hear it. Likewise, a juror
20 can.

21 Likewise, you are not permitted to take
22 notes while you are in the jury box because the
23 determination in any case must be based upon the
24 individual decision of each juror, and if you take
25 notes, you might have heard something or perceived

1 something differently than your neighbor did, and
2 if they see you writing something down that
3 you place importance on, it might distract them
4 or force them to place importance where they
5 otherwise might not have done so, so you will
6 not be permitted to take notes.

7 However, if there is, when you go back
8 to the jury room to deliberate this case, if there
9 is a question or a dispute about some fact or
10 piece of evidence that was introduced in the
11 courtroom, the jury may specify exactly what it
12 is they have a dispute about, write it down on
13 a piece of paper. "Judge, we want to hear the
14 testimony of Witness "X" when Mr. Bax was
15 questioning this witness on that point." I can
16 then have this lady read that back to you, get
17 that solved for you. You cannot have the whole
18 testimony of any witness read back. It must be
19 specified exactly what points you are in dispute
20 about. Okay?

21 Now, as I said earlier, it will take us
22 probably two to three weeks to complete the
23 selection of this jury. If you are chosen as a
24 juror today, you will not be required to stay here
25 during that entire period of time. You would be

1 allowed to go about your normal activities until
2 such time as we have the jury completed, and then
3 we will call you back and have you come back on
4 a day certain and place certain to actually hear
5 the case.

6 There may be a time during the trial
7 when the jury will be sequestered. I anticipate
8 the evidence in this case will probably take a
9 week, give or take a day or two. There is no way
10 to know that exactly, but I anticipate it will
11 take about that period of time, and there may be
12 some time there that the jury will be required to
13 stay overnight in a hotel.

14 I want you to be thinking about two
15 things in parting here: first of all, how you,
16 as an individual, feel about the offense of
17 capital murder and the punishment of death as
18 a punishment for a criminal offense.

19 Now, any questions that are asked of
20 you, any discussions that we have during the
21 course of this examination, are not meant to be
22 personal. They are not meant to try to sway
23 your opinions about anything. You have the right
24 to your opinions. We respect that, but these
25 lawyers need to know how you feel so they can

1 make, hopefully, an intelligent decision on who
2 to put on the jury; so however you feel about any
3 issue, you are certainly entitled to have the
4 right to have that opinion, and as I say, we are
5 not going to try to embarrass you about it or
6 change your mind or argue with you about that.

7 The second thing I need for you to
8 think about is whether or not the possibility that
9 you might be sequestered for some short period
10 of time would be of such a burden that you could
11 not participate.

12 Are there any questions at this point?

13 MR. ALEXANDER: Yes, sir. When we
14 leave today, will we know one way or the other
15 whether we will be part of the jury?

16 THE COURT: Yes, sir. You will.

17 Any other questions?

18 Okay. We have a rather tight schedule
19 this morning. We are probably not going to be
20 able to interview more than two jurors this
21 morning, and that will Mr. Peng and Mr. Woods,
22 and if you two will remain, I am going to allow
23 Mr. Alexander, Mr. Kellogg, Mr. Matthews, and Ms.
24 Monroe to be excused until hopefully I can be
25 back by a quarter of 2:00.

1 So those four of you -- you may
2 certainly hang around the courthouse if you like
3 and go about whatever business you would like
4 during that period of time, but let me caution
5 you now, and if you are chosen on a jury, I will
6 make it a little more stringent. This case will
7 receive some publicity at some point. Whether
8 there will be publicity about it today or the
9 next day, I don't know, but if there should be
10 publicity in the newspaper, television, or radio,
11 do not watch, listen to, or read anything about
12 this case.

13 I haven't told you much about it, but
14 you will know a great deal more about it before
15 you leave here, so if there are no further
16 questions, I will see the four of you at a quarter
17 to 2:00, and, Mr. Woods, if you would, simply
18 step out into the hallway and we will be with
19 you very shortly.

20 Mr. Peng, if you will wait, we will get
21 right on with it.

22 Mr. Peng, if you would, have this chair
23 in the middle so everybody can see you.

24 Is everybody ready?
25

1 LIAN-CHUAN PENG,
2 was called as a prospective juror and responded to
3 questions propounded as follows:
4

5 EXAMINATION
6

7 QUESTIONS BY MR. MOEN:

8 Q Mr. Peng? Is that how you pronounce your last
9 name?

10 A Peng.

11 Q Mr. Peng, my name is Bob Moen. I am with the
12 District Attorney's Office here in town.

13 Seated beside me is another lawyer by
14 the name of Dick Bax, also with the District
15 Attorney's Office, and together, Mr. Bax and
16 myself will be handling this case entitled the
17 State of Texas versus Ricardo Aldape Guerra.

18 He is charged with the offense of
19 killing a police officer, James D. Harris, during
20 the course of that police officer's official
21 duty. It is alleged it took place back on July
22 13th of this year, 1982.

23 Do you remember reading or hearing
24 anything about this case at all either on the
25 radio or in the newspapers?

1 A No, I don't remember.

2 Q There is nothing wrong with remembering or not
3 remembering.

4 A Okay.

5 Q The only reason we ask the jurors that question
6 is to see if they have formed an opinion about the
7 guilt or innocence based on anything they may have
8 read or heard about the case.

9 Before I pass off that subject, let me
10 talk about it further. I can't go into the facts
11 in detail, but I can give you a general description
12 of the facts to see if you remember hearing or
13 reading anything about the case.

14 It is alleged that back on July 13th
15 that Officer Harris was shot three times in the
16 head and killed and the man who did this then
17 killed another man seventy or eighty feet down the
18 street who was driving by with his son and daughter.
19 He was shot in the head and killed, and about an
20 hour and forty-five minutes or an hour and a half
21 later when the police were arresting the subjects
22 involved in these killings, another police officer
23 was shot five times, but he survived, and one of
24 the suspects was shot to death.

25 Does that ring anything in your mind?

F2068 0860⁸²⁵

1 A I remember hearing on the radio, but I haven't
2 read the newspaper in detail.

3 Q Let me explain a little bit more than the judge
4 did about this portion of the trial.

5 In a capital murder case, there are only
6 two possible punishments a man can receive who
7 has been found guilty of capital murder. One
8 of the punishments is a life sentence in the
9 Texas Department of Corrections, and the other
10 is the death penalty. Those are the only two
11 punishments a man can receive who is found guilty
12 of capital murder. One of the punishments is a
13 life sentence in the Texas Department of Corrections,
14 and the other is the death penalty. Those are the
15 only possible punishments a man can receive found
16 guilty of capital murder.

17 In a case as serious as a capital murder
18 case is, the law provides we bring in the jurors
19 and talk with them one at a time to see how the
20 jurors feel about some of the aspects of the law
21 that will come up during the course of the trial.
22 If you have any questions whatsoever about anything,
23 I encourage you to ask me. If you have any
24 disagreements about anything, I encourage you to
25 state those disagreements, because we live in the

F2068 0661

1 type of country, Mr. Peng, as you know, where
2 no person, man, or woman, is required to do
3 anything that would violate his religious beliefs,
4 moral convictions, personal beliefs, et cetera,
5 and that includes being on the jury panel.

6 No person is required to be a juror on
7 a capital murder case or any other case if that
8 jury service would violate that person's religious
9 beliefs, et cetera, but the only way we know that
10 is by talking to the individual jurors on a case
11 like this and finding out exactly how they do
12 feel.

13 Because you feel one way and another
14 juror feels another way doesn't mean you are more
15 or less a citizen. The only thing we ask people
16 to do is be fair and honest about how you do feel
17 so we can reach a decision about whether or not
18 they can be jurors in a case of this nature.

19 Do you follow me so far?

20 A Yes.

21 Q I am going to ask you in just a second your
22 feelings about the death penalty and whether or
23 not your feelings about the death penalty, your
24 feelings and beliefs about the death penalty,
25 will allow you to be a juror in a case where the

1 death penalty was being actually sought, and
2 whether your religious convictions would allow
3 you to return a verdict in a case where you know
4 the sentence could be the death penalty.

5 Before you do that, I want to explain
6 to you about capital murders. Not all murders
7 are capital murders. For a man to intentionally
8 and knowingly end another man's life, that is
9 the offense of murder, but the punishment range
10 that a man might receive for having taken another
11 man's life is from five to ninety-nine years or
12 life in the Texas Department of Corrections.

13 Do you follow me? That is the
14 punishment for the offense of murder.

15 Do you follow me so far on that?

16 A Yes.

17 Q Okay. Only murders that take place to either a
18 particular class of individual or that take place
19 during the course of the commission of another
20 type of crime are punished as capital murders.
21 For instance --

22 A Can I say something?

23 Q Yes.

24 A Please. I say, I can't listen too well. I tend
25 to be getting to lose.

F2068 0863

1 Q Do you have a problem -- I don't mean to be
2 disrespectful, but do you have a problem
3 understanding the English language?
4 A I don't have the problem understanding the
5 English language.
6 Q You have a problem listening?
7 A I can't concentrate too long to one person
8 speaking really, because I can catch, you know,
9 the first few sentences you are saying, but you
10 are getting every word, you know, sort of --
11 Q How do you think, if you are on the jury, how
12 do you think that might affect your ability to
13 listen to the facts? Do you think you would be
14 able to listen to the facts or not?
15 A I think it is -- well, because --
16 Q You tell us.
17 A I think it is very hard, because probably I have
18 difficulty for me to listen to all the testimony
19 because I tend to fall asleep during a speech
20 or anything like that.
21 Q How long have you had this type of problem? Have
22 you ever sought medical treatment?
23 A I don't see that it is a problem at all, because
24 I think my attention period cannot stand talking
25 too fast, too steady, or too long, you know. When

1 I listen to some people make a speech or
2 something, I tend to fall asleep up to ten
3 minutes, although I might sit, but I just can't
4 concentrate.

5 Q Okay. You tell us, do you think if you were a
6 member of this case, it might affect your ability
7 to listen to the facts and reach a decision
8 based on the facts? Do you think that might
9 affect your ability to do that?

10 A Well, I think this is an important case, different.

11 Q It is. It is.

12 A Somebody, you know, must be aware of what is going
13 on in there, and I would miss some important
14 situation, and it is going to be trouble.

15 MR. MOEN: Judge, I think both sides
16 are going to excuse Mr. Peng.

17 MR. ELIZONDO: We agree.

18 THE COURT: Mr. Peng, thank you very
19 much for bringing that to our attention. You
20 will be excused.

21 THE PROSPECTIVE JUROR: All right.

22 THE COURT: Thank you.

23 THE PROSPECTIVE JUROR: I am sorry.

24 THE COURT: No problem. I am glad you
25 brought it to our attention.

1 RANDALL LEE WOODS,
2 was called as a prospective juror and responded to
3 questions propounded as follows:
4

5 EXAMINATION

6
7 QUESTIONS BY MR. MOEN:

8 THE COURT: Mr. Woods, we got to you
9 a little quicker than I anticipated.

10 Just relax and we are going to visit
11 informally here a minute.

12 Mr. Moen, you may proceed.

13 Q (By Mr. Moen) Mr. Woods, my name is Bob Moen.
14 I am a member of the District Attorney's Office,
15 and seated beside me is Dick Bax, also a member
16 of the District Attorney's Office, and Mr. Bax
17 and myself will be representing the District
18 Attorney's Office in the prosecution of this case
19 styled the State of Texas versus Ricardo Aldape
20 Guerra.

21 Now, Mr. Guerra is charged with the
22 offense of having killed a police officer by the
23 name of J. D. Harris back on July 13th of this
24 year.

25 Let me give you a general description of

F2068 0856

1 the facts. Although I cannot go into the facts
2 of the offense, the law allows me to give a
3 general description to see if you have read or
4 heard anything about the case.

5 It is alleged on July 13th, Officer
6 Harris was killed after making a routine traffic
7 stop, killed and shot three times in the head, and
8 another man was shot in his automobile driving by
9 with his two children, and then an hour and a half
10 to an hour and forty-five minutes later, while
11 the police officers were trying to arrest the
12 suspects, another police officer was shot five
13 times and he survived and a suspect died. This
14 took place on the corner of Edgewood and Walker,
15 which is in the Harrisburg area which is the main
16 thoroughfare, Harrisburg and Dumble, in the
17 southeast part of Houston.

18 Does that ring a bell?

19 A I heard about it during the media coverage on
20 the radio and television at the time it happened.

21 Q Obviously, there is absolutely nothing wrong for
22 a juror to have read or heard anything about a
23 case in which a juror might serve on that case.

24 The only reason I go into it and bring
25 it up in the first place is to find out whether

1 or not you formed any opinion about what you read
2 or heard about the guilt or innocence of the man
3 on trial, or would you be able to decide that
4 question as to whether the man is guilty or not
5 guilty based on what you heard from the witness
6 stand rather than what you heard on radio or
7 television?

8 A I haven't formed an opinion, and I think I could
9 decide from the evidence I heard.

10 Q Let me talk about something else, and that is
11 concerning your feelings about the death penalty.

12 Before I ask what your feelings are on
13 that topic, let me explain a couple of things to
14 you. That is what we tell every juror that comes
15 in. If you have any questions about what the
16 judge says or anyone says, we encourage you to
17 ask questions.

18 Later on, when you are selected for the
19 jury panel, it will be too late. I will have no
20 opportunity to answer any questions you might have,
21 and all questions after that period will have to
22 be in writing and addressed to the Court.

23 Some questions the judge can answer, and
24 some questions the judge can't answer. The judge
25 has to tread on eggshells, so to speak, to be

1 sure it is an answer he can answer.

2 We encourage the jurors to discuss
3 questions now to clear it up, or at least talk
4 about it.

5 Not all murders that take place here
6 in our community are punished as capital murders.
7 Back in 1974, our legislature passed a death
8 penalty statute, again pursuant to the holdings
9 of the Supreme Court, in regards to -- for a
10 while, I think you are aware, we had a hiatus
11 where the death penalty was held to be cruel and
12 unusual punishment, primarily because of the way
13 our death penalty was being applied, so the
14 legislature redirected the death statute. They
15 have said that in a select few cases, a person who
16 commits a particular type of crime can be subject
17 to answering to that crime from the jury, and if
18 the jury sees fit, he can stand to receive the
19 death penalty as a possible punishment for that
20 crime. They said the death penalty will apply to
21 nine different types of homicides. Five of those
22 involve criminal offenses. If a criminal is
23 committing one of those offenses, such as rape,
24 and he is killing his rape victim; kidnapper,
25 killing the kidnap victim; robber, killing the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

There is no page numbered 835;
it was inadvertently left out by
the typist.

F2068 0870

1 robbery victim; burglar, killing the burglary
2 victim; arson-murder, they have said in those
3 crimes, if the man is in the course of committing
4 one of those offenses and intentionally takes
5 another's life during the course of those crimes,
6 that is capital murder.

7 The legislature has also tried to
8 protect a class of individuals and they have
9 protected employees of penal institutions, police
10 officers, and firemen, and they have said to
11 kill a police officer or firemen during the course
12 of his or her official duties is a capital felony,
13 is a capital murder case; also, they have said
14 for a convict to kill an employee of a penal
15 institution is a capital murder or to kill anyone
16 while escaping from a penal institution is capital
17 murder.

18 I am sure you are familiar with the Pat
19 case. That is a criminal case also, the Pat case.

20 Also, murder for hire is another example
21 of capital murder.

22 To kill someone for money, that is
23 capital murder as well.

24 All other murders fall into an entirely
25 different range of punishment.

1 For me to walk to the bailiff to end
2 his life is murder, and the range of punishment
3 for that crime, however horrible it might be, is
4 five to ninety-nine years or life, a totally
5 different range of punishment for murder as from
6 capital murder.

7 With that explanation in mind, I would
8 like to find out what your feelings are concerning
9 capital punishment.

10 Do you have -- or would your feelings
11 about the capital murder punishment allow you to
12 sit on a jury and return a verdict knowing it
13 might result in someone getting the death penalty
14 or not allow you to?

15 A I think I could be objective about it as long as
16 the evidence warranted it. I feel that to me,
17 the big part of capital murder, as I see it, is
18 the intent, the intent to commit the murder, and
19 I have no objection to the death penalty as long
20 as the evidence warrants it.

21 Q Okay. Let me explain to you how the death
22 penalty is supplied in our capital murder case,
23 but before I do that, let me touch on the death
24 penalty just a couple of seconds longer.

25 Is that pretty much the way you have

1 felt pretty much all of your adult life about the
2 death penalty, or have you been of a different
3 feeling because of what you have read or heard
4 or conversations you have had with your friends
5 and reached that opinion?

6 A I think that opinion was formed early in life.
7 I don't think friends or recent occurrences or
8 anything like that has influenced it.

9 Q Let me explain to you how the death penalty is
10 applied in a capital murder case. It basically
11 involves these two questions. The way the death
12 penalty is applied is by answers to these two
13 questions.

14 In the first phase, all the jury hears
15 is evidence about whether the Defendant is guilty,
16 and then he decides is the Defendant guilty of
17 capital murder.

18 If they find he is guilty, they come
19 in and take their seats and we start the trial
20 all over again.

21 At the second stage of the trial, the
22 jury can hear evidence for the first time,
23 evidence to answer these questions, such as: Has
24 the Defendant committed other crimes that are known
25 to society and can be shown to the jury, committed

1 any other offenses that can -- that are known
2 and can be shown to the jury.

3 Any character witnesses can be called
4 at that time, and after the jury has all that
5 evidence, evidence concerning the crime itself
6 and evidence concerning the man on trial, then
7 the jury goes back and decides what their answers
8 to these two questions might be, because dependent
9 upon the jury's answers, a particular type of
10 punishment is handed down by the judge. The
11 judge waits for what the jury decides.

12 If both answers are yes, the judge
13 must assess the punishment of death. If there
14 is a no, yes to either one, he must assess the
15 punishment at a life sentence in the Texas
16 Department of Corrections rather than a death
17 penalty.

18 Do you follow me? One no answer, the
19 Defendant gets life; two yes answers, the
20 Defendant gets death. Before answering a question,
21 all twelve jurors have to unanimously agree. It
22 only takes ten jurors to unanimously agree to
23 answer a question no. Ten have to agree to answer
24 a question no. All twelve must agree to answer
25 a question yes. There is a slight distinction

1 between the yes and no answers.

2 What I would like you to do is go
3 ahead, if you will, and read those questions to
4 yourself, and I want to talk to you about some
5 of the words and language that appears in the
6 questions. Okay?

7 A Okay.

8 Q Okay. That first question asks you to make your
9 determination about the conduct of the man on
10 trial, the man found guilty of capital murder.
11 Was the conduct on the part of this man that
12 caused the death of the deceased, was his conduct
13 done deliberately and was it done with the
14 reasonable expectation that the deceased would
15 die?

16 Let me give you an example of how that
17 applies in a capital case. Let me give you a
18 hypothetical murder.

19 A man goes in to a convenience store,
20 and a lady is working there as a cashier. He
21 demands the money. She gives it over to him and
22 it is taken. There are no witnesses other than
23 she. He is an ex-convict and decides to kill
24 her, the only witness he suspects.

25 As he runs out, unbeknownst to him, he

1 has triggered an alarm system, and there are the
2 police. He shot her to death and the police
3 are standing outside the store. He is found guilty
4 of capital murder by the jury. Then the jury
5 would have to decide whether or not the conduct
6 of that man, the pointing of the pistol at the
7 woman, the firing of the gun into her body and
8 causing her death, was that deliberately done
9 and done with the reasonable expectation she
10 would die, and the jury basically answers that
11 question on the facts of the case, and then the
12 jury makes a decision about that man on trial.
13 What kind of person is he? Is he probably the
14 type of person that would continue to commit
15 criminal acts of violence that would constitute
16 a continuing threat to society?

17 To know about the man, the jury would
18 have to know about any other information, any
19 other crimes the man might have committed or any
20 past record he had. Of course, in our hypothetical,
21 the jury would know he was an ex-convict for
22 some type of felony offense, and then they would
23 be called upon to make a decision on what type
24 of man the man is. Is he the type of man that
25 would in all probability commit criminal acts of

1 violence that would constitute a threat to
2 society.

3 The second question basically asks you
4 to make a prediction about the person on trial.
5 I don't know how else to sum it up than that,
6 but I would like to direct your attention to the
7 word "probability," and you will notice that the
8 word is "probability" and not "certainty,"
9 and I think the reason the word is not "certainty"
10 is the only person in the entire world who could
11 answer Question No. 2 to a certainty is the
12 Almighty himself, and you are not asked to play
13 God.

14 You will be asked to determine, as
15 best you can, what type of person the man on
16 trial is and whether or not there is a probability
17 he will engage in criminal acts of violence,
18 given the opportunity again that would constitute
19 a continuing threat to society.

20 "Criminal acts of violence" is a phrase
21 that includes all criminal acts of violence.
22 Before you could answer Question No. 2 yes, you
23 don't have to believe nor do Mr. Bax and I have
24 to prove to you he will commit robberies, rapes,
25 kidnappings, or anything else, but is he the type

1 of person that would probably engage in such
2 acts, and would he be a continuing threat to
3 society.

4 That brings me to the word "society."
5 You will have to use your own definition about
6 that word. You will realize from your common
7 sense once a man is found guilty of capital
8 murder, the only society a man will find himself
9 in is the prison society, so then you will have
10 to reach the decision about whether the man,
11 in regards to No. 2, is the man the type of
12 person that would probably commit criminal acts
13 of violence that would constitute a continuing
14 threat to the society we live in, and prison is
15 a part of our society.

16 Do you agree?

17 A. Yes.

18 Q. It is an unfortunate part, but nevertheless, it
19 is a part of our society, and I hope you agree
20 with me. There are other people in our prison
21 society who work to maintain our prison system,
22 who work to maintain our prison society.

23 Would you agree on that?

24 A. Yes. I agree.

25 Q. I wanted to point something out in regards to

1 Question 1, and that is the answers to Question
2 1 and 2 are not automatically answered yes or
3 no depending upon the jury's perception of the
4 facts surrounding the crime itself. I am going
5 to give you an example of what we are talking
6 about rather than speaking in generalities, give
7 you a specific.

8 The reason the answer is not automatically
9 answered yes to No. 1 is there are different
10 fact situations that may result in a man being
11 charged with capital murder.

12 Let's take the hypothetical and add
13 something to it. Let's say the man who killed
14 the cashier is an ex-convict and he has talked
15 a seventeen-year-old boy into going with him.
16 He puts a gun in this boy's hand for the first
17 time in his life. He goes to the store knowing
18 they are going to commit a robbery, but during
19 the course of the robbery, there is no agreement
20 anyone would be shot to death.

21 The boy, after the development of the
22 shooting of the woman, he dropped his gun and
23 fled the store in as much panic as anybody else
24 who would have been in the store at the time.
25 He flees, and let's say he turns himself over to

1 the police.

2 However, under our law of parties,
3 people who act together to commit a crime can't
4 say, "I am surprised." That boy would be as guilty
5 of capital murder as the man who fired the shot
6 under the law of parties. That is the way our
7 law is written.

8 I think you can see when it came down
9 to that boy being tried for capital murder, if it
10 did, when the jury came to that question, the
11 jury might find out there was no conduct on the
12 part of the seventeen-year-old that caused the
13 death of the deceased. The conduct that caused
14 her death was on the part of the ex-convict, and
15 they might very well, even though they found him
16 guilty of capital murder, as they should under
17 our law of parties, they might very well answer
18 the first question no, and when they hear he is
19 a seventeen-year-old with no prior record
20 whatsoever and didn't fire the shot that killed
21 the cashier, they might answer them both no.
22 It depends upon the facts. It just depends upon
23 what type of crime it is, what part the man
24 played in the crime, what type of person the
25 jury perceived him as being as to what the

1 answers are to 1 and 2.

2 Do you follow me on that?

3 A Yes.

4 Q However, let me point this out to you. I don't
5 want to mislead you by making you think you are
6 going to hear evidence in the punishment phase of
7 the trial. You may not. But the law says the
8 jury may answer both questions yes based on the
9 evidence they have heard and the crime they have
10 found the man guilty of.

11 Let me give you the classic example of
12 that that comes to my mind right away, and that
13 is the Ronald Clark O'Bryan case, and that is
14 the one where for money, he poisoned his children
15 with Halloween candy, killed his natural son,
16 almost killed his natural daughter. That is a
17 capital murder case where the jury was well
18 warranted with answering both questions yes,
19 just from the facts surrounding the circumstances
20 of that crime itself, and the man in that crime.
21 The jury answered both those questions yes just
22 based on the crime itself.

23 The answers are not automatically yes,
24 but based on the crime and the man and the
25 evidence the jury hears about them.

1 Do you follow me so far?

2 A Yes.

3 Can I ask a question?

4 Q Sure.

5 A When these questions are asked, are they asked
6 separately? Are we asked the first question, and
7 then you hear evidence as to --

8 Q What happens is this. We start the second phase
9 of the trial, and either side has the opportunity
10 at the second phase to present whatever evidence
11 they want to the jury, and after both sides close,
12 that second portion of the trial which is called
13 the punishment portion, the jury takes the
14 evidence they have heard and the judge puts those
15 questions in writing on a piece of paper, and
16 taking those questions along with other
17 instructions, they take them back to the jury
18 room and that's how they do the deliberation,
19 and they will sit down and discuss among
20 themselves the evidence they heard and decide
21 how does the jury feel about Question 1, and the
22 jury will discuss that among themselves, and
23 after Question 1, pass on to Question No. 2 and
24 discuss that among themselves what the answer
25 to Question 2 should be, and after both questions

1 are answered and the verdict page signed by the
2 foreman, the jury deliberations are returned in
3 court and their answers are read in open court,
4 and depending upon the jury's answers, punishment
5 is assessed.

6 Do you understand?

7 A Yes, sir.

8 Q The judge will put those in writing for you after
9 the close of the evidence, and the foreman, whoever
10 is elected foreman, will take the charge and the
11 jury will start talking about the questions based
12 on what they have heard.

13 Is there anything about these questions,
14 now that we have had a chance to talk about them,
15 is there anything about the way these questions
16 are written that makes you think you would be
17 unable to answer the questions, depending upon the
18 evidence, or do you feel you would be able to
19 answer either yes or no depending upon the
20 evidence you hear?

21 A Yes. I think I could.

22 Q It seems like there was something else I wanted
23 to talk to you about.

24 Let me pass on to some obligations you
25 have. Let me see.

F2068 0883

1 You have served on a D.W.I. case
2 before? Let me talk to you about some of your
3 obligations as a juror on a criminal case. Let
4 me tell you what is going to be expected of you.
5 The judge covered some of these things briefly,
6 but I want to go over them in a little more
7 detail and see if you can abide by those
8 obligations during the course of your tenure.

9 There are four or five obligations,
10 the way the jury must conduct themselves, basically,
11 their conduct, in order to hear the evidence and
12 do the things a jury has to do.

13 The judge will charge you in regard to
14 the Grand Jury indictment. He will tell you that
15 the Grand Jury indictment is just a piece of
16 paper and he will put this in writing, just like
17 we talked about the questions being in writing.

18 At the guilt-or-innocence phase of the
19 trial, the judge will give you what is defined
20 as the charge of the Court. The judge will define
21 the offense of capital murder. He will define
22 what he means by "knowingly and intentionally"
23 committing a crime, and you will, based on the
24 charges, apply to those facts the charge given to
25 you by the judge, and that charge will include

1 a paragraph by which the judge will state the
2 indictment is no evidence of guilt, and you are
3 not to consider that Grand Jury indictment as
4 evidence. It is just an opinion, and you are not
5 to give it any more significance than that, and
6 if anyone were to mention, "Let's find the man
7 guilty because the Grand Jury has indicted him,"
8 you are told to look at the charge that it is no
9 evidence of guilt.

10 Do you feel you could abide by that?

11 A. Yes.

12 Q. The judge will also charge you about the
13 presumption of innocence and he will basically
14 tell you you are to presume the Defendant innocent.

15 Let me, without insulting your
16 intelligence, try to tell you something about
17 the presumption of innocence. It does not mean
18 a person is not guilty. The man who killed the
19 lady at the convenience store is just as guilty
20 today as he was the day he committed that crime.
21 However, the juries are to presume the man to be
22 innocent because jurors who know absolutely
23 nothing about a criminal offense are the people
24 we take from the community to decide these crimes,
25 and the way they learn about the crime is from

1 what they hear from the witness stand, and they
2 are to base their decision based on the law given
3 them by the judge and what they hear from the
4 witness stand and then decide, and they are to make
5 a decision based on the evidence they have heard.

6 Do you feel you could make your
7 decision on that and afford the Defendant his
8 right to presumption of innocence, and base your
9 decision on that evidence and the law as given to
10 you in the charge?

11 A Yes.

12 Q The judge will also charge you that the burden
13 of proof -- and he will put this in writing --
14 that the burden of proof in any criminal case --
15 I know you are probably not familiar with that
16 phrase, but when someone commits a crime in
17 Harris County, Texas, the burden falls on people
18 in Harris County to prove to other people in the
19 community that make up a jury that that man
20 committed a crime in Harris County.

21 Obviously, we don't ask citizens who
22 are not trained, not lawyers, pull them off the
23 street to come in and prosecute somebody. That
24 duty is with the District Attorney's Office, but
25 that burden rests with Mr. Bax and myself.

1 Our burden is to prove to you beyond
2 a reasonable doubt, not beyond all doubt, any
3 doubt, or a shadow of a doubt, as so often used
4 on lawyer shows, but to prove beyond a reasonable
5 doubt. Okay? That is the burden of proof.

6 The burden of proof never shifts to the
7 Defense. They don't have the burden of proving
8 anything. They can. The trial is open to them
9 in the proceedings, and if they want to, they
10 can subpoena witnesses. The facilities of issuing
11 subpoenas and bringing witnesses down is as
12 available to the Defense as it is to the
13 Prosecution at no cost. A subpoena can be issued,
14 witnesses can be called to the courtroom, and any
15 defense they have can be presented, but they don't
16 have a burden to do that.

17 If, for whatever reason, they decide
18 they want to be totally silent and not call
19 witnesses, they can rest right after Mr. Bax and
20 I do, and they don't have any burden if it
21 backfires. We have the burden of proof, and you
22 must always hold it to Mr. Bax and myself, hold
23 it to proof beyond a reasonable doubt. That is
24 the phrase.

25 The charge will charge you in writing

1 "beyond a reasonable doubt."

2 Okay. Before you can answer either
3 one of these questions yes, Mr. Bax and myself
4 have the burden of proof applying to these
5 questions, too. We have to prove to you beyond
6 a reasonable doubt, not any, all, or a shadow
7 of a doubt. I am telling you up front I cannot
8 prove to you Question 2 beyond any or beyond
9 a shadow of a doubt. Like I say, there is only
10 one person that can meet that burden of proof and
11 he will not be called as a witness. I am not
12 trying to be blasphemous.

13 Our burden is to prove beyond a
14 reasonable doubt.

15 The same thing applies to the Defendant.
16 Our burden is to prove beyond a reasonable doubt,
17 not any, all, or a shadow of a doubt. The judge
18 will charge you that is our burden.

19 There is no definition for that term
20 "reasonable doubt," so use your own common sense.
21 Frankly, does common sense tell you we have met
22 our burden or not? Frankly, there is no legal
23 definition I can give you.

24 Now, he will charge you also in writing
25 on the Defendant's failure to testify. If the

F2068 0688

1 Defendant does not testify, the judge will tell
2 you that you are not to consider the Defendant's
3 failure to testify as any evidence of his guilt.
4 Why is that? Well, silence is not evidence. The
5 jurors should base their decision on what they
6 have heard from the witness stand rather than on
7 what they have not heard, so the Defendant has
8 the ability and he has the opportunity if he wants
9 at his trial to testify, and I don't know from the
10 D.W.I. case you were a juror on if that Defendant
11 got on the stand or not, but if that Defendant
12 had decided he wanted to remain silent at his
13 trial, he could, and the only thing the judge
14 had to instruct you on was that if the Defendant
15 did not testify, you were not to consider his
16 failure to testify as evidence of guilt. Instead,
17 you were to base your opinion on what you have
18 heard rather than what you haven't heard. That
19 doesn't mean you wouldn't wonder why he failed
20 to testify, but the judge tells you you are not to
21 base your decision on the Defendant's failure to
22 testify, but on what you have heard from actual
23 witnesses in the trial.

24 Do you follow me on that?

25 A Yes, I do.

1 Q Finally, the judge will tell you you have an
2 obligation in regards to the judging of the
3 witnesses, and this will be in writing as well.

4 Everything we have talked about, Grand
5 Jury indictment, presumption of innocence, beyond
6 a reasonable doubt, credibility of witnesses,
7 failure to testify, will all be in writing as
8 part of the judge's charge.

9 He will tell you this, that you are not
10 to give any witness any more or less belief
11 when a witness testifies just because of the job
12 a witness has. In the eyes of the law, no person
13 because of his or her job is recognized as being
14 a more truthful person than anybody else because
15 of the job a person has chosen to follow. Even
16 your favorite minister of your church is not
17 recognized down here at the courthouse as being
18 an automatic truth-teller just because he is a
19 minister.

20 The jury might choose to believe
21 everything because he looks like and sounds like
22 a truthful person, but a police officer, doctor,
23 lawyer, whoever it might be, no person is given
24 more or less belief in the eyes of the law because
25 of his or her job.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Do you follow me?

A Yes, I do.

Q Finally, the judge will charge you on this, but one of your jobs as a juror is to judge the credibility of witnesses. What does that mean? You have the ability as a juror to believe part, disbelieve all, or believe everything a witness tells you under oath. That sounds crazy, doesn't it, to think that someone will get on the stand and take an oath to tell the truth and not do that. It not only sounds crazy, but from a standpoint of what we read in the newspaper every day, I think you understand it happens more at the courthouse than we like.

I wish we lived in the type of world where no one would ever tell a lie after they have taken an oath. I would suggest to you we probably wouldn't need jurors, but unfortunately, we do not. One of your obligations as a juror and one of the functions you will serve is to judge the credibility of the witnesses, and you do have the ability, if you choose, based on what a witness has told you, to believe or disbelieve any portion or all of what a witness has told you even if they were under oath.

1 That applies to the Defendant, too.

2 If he decides to testify, judge him like anybody

3 else, what bias, motivation he has in telling

4 what he is telling, does his story make sense,

5 et cetera, the same you would ask of any other

6 witness on the stand as well.

7 Okay. Let me talk to you about one

8 other aspect of the law, and I am about through,

9 and I want to talk to you about probation as that

10 applies to the range of punishment for murder, and

11 I want to talk to you about a concept in law called

12 lesser included offenses.

13 A Okay.

14 Q The offense of capital murder includes the lesser

15 offense of murder.

16 Let me give you a hypothetical of what

17 I am talking about rather than try to explain it

18 in legalese type of language.

19 Imagine the store we talked about earlier

20 where the man went into the convenience store and

21 was charged with robbery-murder. Imagine at his

22 trial, take a little different set of facts. He

23 is charged with capital murder. The jury hears

24 the evidence at a trial, and the jury decides that

25 what really happened, because there were other

1 witnesses present, what really happened is that
2 the cashier was in fact a girl friend of this
3 man on trial and that he didn't shoot her during
4 the course of the robbery but he murdered her
5 as a result of a continuing argument that they
6 had had earlier in the day and some words had
7 passed, and this could be shown to the jury, and
8 perhaps the police misperceived this at the time
9 the offense took place or one of the other
10 witnesses mistook it as a robbery-murder, but
11 what the jurors really heard is that this was
12 just a girl friend-boyfriend dispute where he
13 took her life as a result of an argument they had
14 earlier in the day, and he's got a nasty temper
15 and he took a gun out and shot her as a result of
16 their argument earlier in the day and it is not
17 a robbery, but murder.

18 You see, in that particular case, the
19 jury's proper verdict would be not capital. The
20 jury's proper verdict would be guilty of the
21 lesser offense of murder.

22 The reason I say murder is a lesser
23 offense than capital murder is because murder
24 does not have as serious a punishment range as
25 capital murder. The range of punishment is five

1 to ninety-nine years or life, and in addition,
2 even though the jury has found someone guilty
3 of capital murder, the jury can, if they assess
4 a term of years at ten years or less as a proper
5 punishment and the jury believes when they find
6 someone guilty of the offense of murder, they should
7 only receive ten years or less, the jury can
8 recommend probation in the court.

9 I am sure you have heard the term
10 "probation." That means he is released by the
11 judge, didn't have to go to the penitentiary
12 and he is put on probation for a term of years
13 the jury has decided on and given conditions he
14 must follow. Don't violate the laws; work
15 faithfully at suitable employment; remain at a
16 designated place in the county; if you are going
17 to move, notify your probation officer; avoid
18 persons or places of harmful or disreputable
19 character; avoid vicious habits, such as narcotics
20 or drugs. Those are basically the terms and
21 conditions of probation.

22 With that in mind, let me give you a
23 hypothetical example of how all this applies:
24 capital murder, lesser included murder, possible
25 probation for a person found guilty of murder.

1 Let ~~me~~ give you an example and try to tie it in.

2 * Imagine a situation where a man and
3 woman married for forty or fifty years find
4 themselves -- and it is probably not all that
5 much of a hypothetical, really, but probably a
6 situation that occurs to elderly people more
7 often nowadays -- but anyway, imagine he is in
8 the hospital dying. He is in his seventies, and
9 his wife is in her seventies as well, and he is
10 dying of a terminal disease, whatever it might
11 be, and he is in the hospital and his last years
12 are supported by life-support equipment, modern
13 medical technology, and she is in the hospital
14 with him, like two people in love for that many
15 years would be.

16 They talk among themselves about their
17 being in the hospital. They realize it's draining
18 all the money they have saved for their
19 retirement all their lives. The only thing that
20 is going to happen, his life is going to be
21 prolonged and she is going to be destitute,
22 surviving by social security or whatever goes on
23 after your savings are gone, and they talk among
24 themselves and they do it with a clear mind.
25 She decides and he decides and they decide to

1 remove some of his life-support equipment so he
2 will pass during the course of the night and just
3 end it, and she does it and he dies.

4 Under our definition of the offense of
5 murder, she has committed that offense. She has
6 intentionally and knowingly assisted in the
7 death of a human being. It doesn't make any
8 difference if he is going to die anyway. Nobody
9 has a right to participate in mercy killings under
10 our law. There are no exceptions. So, technically,
11 she is guilty of the offense of murder.

12 Let's say some family members on his
13 side, brothers and sisters, elderly brothers and
14 sisters, are so bereaved at their brother's passing
15 that they are able to convince the Grand Jury that
16 the only reason the wife did that to him, removed
17 his life-support equipment was, unbeknownst to
18 everyone, he had property in a retirement
19 community at a resort and a builder wanted that
20 half acre to build some resort condominiums or
21 whatever on it, and now that he has passed, they
22 are able to convince the Grand Jury she would
23 stand to make a lot of money from the sale of that
24 land and they are able to convince the Grand
25 Jury their brother was opposed, but now she could

1 profit by the money. Capital murder.

2 Let's say in this hypothetical situation
3 she gets indicted for capital murder, but the
4 jury sees the facts and they think, "That is
5 impossible. It's an act of love. It may be
6 murder, but if anything, it is an act of love."

7 They find her not guilty of capital
8 murder and find her guilty of the offense of
9 murder because technically, that's what she is
10 guilty of, but the jury decides there is no way
11 this lady should go to the penitentiary and that
12 is not the place for her to serve out the last
13 few years of her life for what she has done, and
14 they recommend probation.

15 I hope by that example I have tied
16 together all the various ranges of punishments,
17 the lesser included offense of capital murder,
18 murder; capital murder.

19 Do you follow me on that?

20 A Yes, I do.

21 Q The only thing I wanted to ask you is this: If
22 you were a juror and find someone guilty of
23 murder, do you feel you could keep an open mind
24 and could consider probation if you felt like it
25 were a proper case for probation? Would you be

1 able to do so and say so to the Court?

2 A Yes.

3 Q Let me look at your personal information sheet.

4 What does your dad do? If he is not

5 still actively employed, what type of occupation

6 was he in?

7 A He was a carpenter.

8 Q Any brothers and sisters in your family?

9 A Two brothers and four sisters.

10 Q I am not going to exhaust your knowledge as to

11 their occupations, but what about your mom? Did

12 she work outside the home or was she a housewife?

13 A She was a housewife.

14 Q What school do your children attend?

15 A Carpenter Elementary School.

16 Q In Deer Park?

17 A Right.

18 Q In '69 when you were a victim of a car theft, was

19 the person or persons who stole your car

20 apprehended?

21 A Not to my knowledge.

22 Q Is there anything about the way that case was

23 handled by the police or District Attorney's

24 Office that left a bad taste in your mouth?

25 A Well, I was a little bit surprised. I had never

1 been involved with anything like that before.

2 I made the calls to the police, and it was while
3 I lived in a duplex apartment. It had a driveway
4 in front, and I went to go to work and the car
5 was missing and I guess I expected a police car
6 to come and do some investigation, but we handled
7 it by telephone, but I did not know that was the
8 way it was handled.

9 Q It still is.

10 A Unless you want them to come to the house, they
11 take the report on the telephone.

12 Q Okay, and is there anything about -- I take it
13 there is nothing about your jury service on the
14 D.W.I. case when you served that would make it
15 impossible for you to be fair and impartial today?

16 A No.

17 Q Are you a member of any civic clubs or organizations,
18 the Masons or Knights of Templar or anything like
19 that?

20 A No.

21 Q Let me also ask you this, something else. I was
22 getting ready to pass you to the Defense. I know
23 they have some questions they want to ask you.

24 The evidence in this case might show
25 the Defendant in this case is an illegal alien.

1 Is there anything about the fact the
2 evidence might show the Defendant is an illegal
3 alien that would make it impossible for you to
4 give him a fair and impartial trial?

5 A No.

6 Q Mr. Woods, I appreciate visiting with you. I am
7 sorry I took so much time. I thank you for your
8 attention and responses and pass you to the
9 Defense.

10
11 EXAMINATION

12
13 QUESTIONS BY MR. ELIZONDO:

14 Q How are you?

15 A Fine.

16 Q My name is Candelario Elizondo. This is Joe
17 Hernandez; this is Linda Hernandez, the interpreter
18 for the Defendant, Ricardo Guerra.

19 The Defendant is charged with capital
20 murder. As in all capital trials in Texas, the
21 State has the burden of proving their case to
22 you, of proving the elements of the case to you
23 beyond a reasonable doubt, and the elements in
24 any capital murder would be that it occurred in
25 Harris County on a particular day and this

1 Defendant shot and killed a police officer in the
2 lawful discharge of an official duty knowing at
3 the time he was a police officer. They must
4 prove all those elements to you beyond a reasonable
5 doubt.

6 As Mr. Moen told you, there is no
7 legal definition of what a reasonable doubt is.
8 The judge won't give you one. It won't be in the
9 charge. You will never see one. I have never
10 seen one, but all I can tell you is: Across the
11 street at 301 Fannin where they are trying
12 lawsuits for personal injuries for sometimes
13 millions of dollars, the burden of proof over
14 there is by a preponderance of the evidence,
15 proof by the greater weight of the credible
16 evidence.

17 Over here in the criminal courthouse,
18 the legislature said, "Wait a minute. Before you
19 go ahead and forfeit somebody's life, literally
20 in this case, the State has to prove their case
21 to you beyond a reasonable doubt." So it is a
22 higher burden than there is across the street.

23 Do you follow me there?

24 A Yes, sir.

25 Q And rightfully so, because before the State will

1 come to you, if he is found guilty, and ask you
2 to answer those two questions yes, you better
3 make sure they have the right man.

4 Do you agree with me there?

5 A Yes, I do.

6 Q How do they go about doing that?

7 First of all, they call witnesses and
8 they will come down here and give their versions
9 of the facts and after they are through, they
10 will rest their case which means that is all we
11 have.

12 At that point in time, the Defendant
13 can, if he chooses, present evidence. He doesn't
14 have to.

15 Let's assume for a minute that the State
16 has presented evidence and you are up there in the
17 jury box and have been thinking about the case,
18 the evidence in the case, and you say, "Well, I
19 think he did it, but for some reason, the State
20 hasn't proven their case to me beyond a reasonable
21 doubt," and the State then rests their case and
22 we rest our case, too, don't put on any evidence
23 whatsoever.

24 Okay. In that hypothetical example,
25 what would your verdict be?

1 A It would have to be not guilty based on that, if
2 I had a reasonable doubt about the Prosecution.

3 Q So you see where you can think somebody else is
4 guilty, you know, just think that he is guilty,
5 but they haven't proven it to you beyond a
6 reasonable doubt.

7 Do you follow what I am saying?

8 A Yes, I do.

9 Q Then the Defendant can, if he chooses, present
10 evidence. He can call witnesses. He can take
11 the stand himself. At that point in time, if you
12 are in the jury box, you will probably hear
13 two diametrically opposed stories, and then it
14 will become your job as a juror to decide from
15 the facts, because if you are a juror, you will
16 be the judge of the facts. Judge Oncken will be
17 the judge of the law. He will rule on all the
18 objections that the lawyers will voice an
19 objection to, but as far as the facts go, you
20 twelve people will be the judge of the facts.

21 So basically, your job will then be to
22 judge the credibility of the witnesses.

23 And you have been around -- I believe
24 you are a maintenance superintendent?

25 A Right.

1 Q And you can tell where somebody might fudge on
2 the truth a little bit and while they might have
3 a reason for fudging?

4 How many employees do you have?

5 A About a hundred.

6 Q And where do you work?

7 A The location is Shell Development, out on Highway
8 6 and Westheimer.

9 Q Highway 6?

10 A Yes.

11 Q I didn't know Shell had a plant out there.

12 A It's a research facility. They do small-scale
13 operations.

14 Q Is that the new plant?

15 A Yes.

16 Q They have an old one?

17 A On Bellaire Boulevard.

18 Q O.S.T.?

19 A Bellaire.

20 Q Are they moving that plant to Highway 6?

21 A No, there are two separate facilities. This has
22 been six or seven years.

23 Q You've got a drive.

24 A I do.

25 Q My brother lives in Deer Park. What side do you

1 live in?

2 A I live on the west side.

3 Q He lives on the east side right near Deer Park
4 High School.

5 So anyway, right back to this element
6 or elements, the State has to prove them to you
7 beyond a reasonable doubt, so after you have
8 heard all the evidence, it will become your job
9 to go into the jury deliberation room and
10 deliberate, ponder and think about whether the
11 State has proven their case to you beyond a
12 reasonable doubt, and if they haven't, then it
13 will be your job, under your oath as a juror, to
14 come back with a verdict of not guilty.

15 Can you do that if you believe that the
16 State has not proven to you its case beyond a
17 reasonable doubt?

18 A Yes, I could.

19 Q Even though you are thinking in your mind, "Well,
20 he might have done it. There is a possibility
21 that he did it, but I don't think the State has
22 proven its case to me beyond a reasonable doubt,
23 so therefore I am going to vote not guilty"? Can
24 you do that?

25 A Yes. I think I could.

1 Q Okay. In a capital murder case, if you find
2 the Defendant guilty, then you have to go back
3 to the punishment stage and answer two questions.
4 Once you have found a person guilty of capital
5 murder, there are only two possible punishments,
6 life or death, and of course, that is determined
7 by how you have answered Questions 1 and 2.

8 The first question is going to ask you
9 whether the conduct of the Defendant that caused
10 the death of the deceased was committed
11 deliberately and with the reasonable expectation
12 that the death of the deceased would result.

13 The word "deliberately" is underlined
14 there. Deliberately, I have been told, means to
15 ponder on or think about with measurable
16 consideration, such as when you go into the
17 jury deliberation room; or another way of saying
18 it is, "Was it premeditated?"

19 MR. MOEN: I object to counsel
20 interposing his definition of the word
21 "deliberately" as being premeditated.

22 THE COURT: Sustained.

23 Q (By Mr. Elizondo) Some people say it would be
24 premeditated.

25 Would you agree with me there?

1 A I am not sure.

2 Q It is a difficult concept.

3 A It would be based on what I have heard.

4 Q The Defendant is charged with killing a police
5 officer. Is there anything about that aspect
6 of the law that would bias you against this man?

7 A A police officer is a human being just like
8 everyone else.

9 Q So you could base your verdict, base it on what
10 you hear from the witness stand, aside from any
11 emotions that might be aroused?

12 A Yes.

13 Q The second question is asking you to determine
14 beyond a reasonable doubt whether there is a
15 probability that the Defendant would commit
16 criminal acts of violence that would constitute
17 a continuing threat to society.

18 Question No. 2 is, in effect, asking
19 you to predict the future.

20 Would you agree there, whether there is
21 a probability that he will commit future acts of
22 violence?

23 A Yes. That is true.

24 Q Do you think that a person can change his mode
25 of behavior or his mode of conduct?

1 A Yes, I do.

2 Q As Mr. Moen was telling you about the robbery,
3 you know, the two-time ex-con that went to the
4 Seven-Eleven and robbed them with a seventeen-
5 year-old, let me give you a hypothetical on that.

6 Let's assume the robber goes in and
7 along goes the seventeen-year-old. The seventeen-
8 year-old is going to buy a loaf of bread. The
9 robber is going with the intent of robbing the
10 Seven-Eleven. The seventeen-year-old goes in there
11 and buys a loaf of bread and stands right next to
12 the robber or the two-time ex-con and sees this
13 guy shoot the cashier. The seventeen-year-old
14 gets scared and runs out the store, you know, and
15 leaves the loaf of bread behind. He runs. He
16 is scared. The robber also runs. The seventeen-
17 year-old did not aid or abet or assist this other
18 guy in the commission of any robbery.

19 Q Do you think in your own mind the
20 seventeen-year-old is guilty of anything?

21 A Probably guilty of being in the wrong place at
22 the wrong time would be the only thing, if he did
23 not know a robbery was being committed and it was
24 proven he was in no way involved in it, then I
25 don't feel like he was a part of the robbery or

1 the murder, but it would depend on the evidence.

2 Q And assuming he was tried for a robbery-murder,
3 then your verdict would be, if you believed he
4 did not aid or assist or abet in the robbery,
5 then your verdict would be not guilty?

6 A Yes, if I believed it.

7 Q As Mr. Moen was telling you a while ago, there is
8 the lesser included offense of capital murder, and
9 that is murder. That is when you intentionally
10 and knowingly take the life of somebody period,
11 by shooting him with a gun. That is all.

12 The range of punishment for that offense
13 is five to ninety-nine years or life and a fine
14 of up to ten thousand dollars can also be
15 imposed.

16 I believe you told Mr. Moen you could
17 consider probation in a proper case in your mind
18 for a murder case?

19 A Right.

20 Q I believe you told Mr. Moen if the evidence shows
21 this Defendant is an illegal alien, you would not
22 hold that against him in any way, shape, form,
23 or fashion?

24 A No, sir. I have mixed emotions about illegal
25 aliens. I work around them in my business

1 construction. Normally, our company policy is
2 not to hire them, but we base that on people
3 having a social security card.

4 Q Yes.

5 A And depending on what they can get and when they
6 get hired. I am really not -- as far as their
7 being in this country illegally, I think that is
8 wrong, but I have been to Mexico. I was down
9 there in April at a fishing resort, and I can well
10 see why they come over because of the poverty
11 level, and it was the first time I had been down
12 there, and it opened my eyes.

13 Q Which fishing resort?

14 A Lake Guerrerro.

15 Q Did you catch any bass?

16 A Oh, yes.

17 Q There are a bunch of them out there.

18 So then the fact, if the evidence would
19 show he is an illegal alien, you would not hold
20 that against him?

21 A No.

22 Q You would guarantee then he would get a fair and
23 impartial trial if you were a juror in this case?

24 A Yes. I feel like he would.

25 Q Jesse Jones High School? Is that in Garden Villas?

F2068 0910

1 A Now it is Martin Luther King Boulevard. It used
2 to be South Park Boulevard. I guess it's two
3 miles out off the South Loop headed back south.

4 Q Yes. A friend of mine went to Jesse Jones.

5 Did you ever know Tip Scrubbs?

6 A Yes.

7 Q He played football.

8 A I knew him. I didn't know him personally.

9 Q Billy Atestas?

10 A Yes. I -- I am not sure.

11 Q It is a Greek name.

12 Did you play ball for Jones?

13 A No, I didn't. I didn't know either one of them
14 personally, just that they were both football
15 players and everyone knew them.

16 Q And what did you major in at the U. of H.?

17 A Electronic technology.

18 Q You got a degree in that?

19 A No.

20 Q Right here on this -- where you have an interest
21 in criminal cases, it is kind of, not Xeroxed
22 correctly, and it says the Hinkley case, Eva
23 Lott.

24 A That was just a recent case that came to my mind
25 when I was filling out the form, and the interest

1 is mainly just what I have heard on that, and I
2 have formed, based on what I have heard through
3 the media coverage, certain opinions about how
4 it was handled, and I was reading a magazine
5 before I came in here that had a section about
6 the Hinkley case, and I am just aware of them
7 more than anything else.

8 Q What about the Hinkley case? How do you feel
9 about that?

10 THE COURT: What does that have to do
11 with this case?

12 MR. ELIZONDO: Just curious, Judge.

13 Q Insanity will not be our defense.

14 A I didn't hear the same evidence that the jury
15 heard, so I don't know why they decided what they
16 did.

17 Based on the media coverage, I think
18 they were crazy for arriving at that. Probably
19 something brought out in the trial.

20 Q You didn't hear the evidence, so you can't form an
21 opinion?

22 A No, I can't form one.

23 Q As to whether the jurors voted a certain way?

24 A That is right.

25 Q A little while ago, you told Mr. Moen you had

1 heard about this case. How did you hear about
2 it?

3 A Over the radio driving to work. I spend about
4 two to two and a half hours in a car, so listening
5 to the radio, I hear the news reports.

6 Q And when you heard about it, did you form any
7 kind of opinion as to the guilt of the perpetrator?

8 A No, I did not. At first, I heard that the crime
9 had been committed, and then it was a while later,
10 I heard they apprehended a suspect in the case,
11 and that was -- I don't recall a name being
12 mentioned. I do recall that it was stated he was
13 an illegal alien, and that was it. That is all
14 I can recall about the case.

15 Q You didn't form any kind of opinion about the
16 suspect's guilt or innocence?

17 A No.

18 Q Who do you play softball for?

19 A We've got a league at work that we play in.

20 Q Let me ask you another question -- I am sorry --
21 you are a maintenance supervisor, right?

22 A Right.

23 Q At the Shell Development Company?

24 A Right.

25 Q We estimate the case might take maybe a week,

1 week and a half. We don't know for sure at this
2 time about the actual case.

3 Would that hurt you at your job in any
4 way?

5 A No, it wouldn't. Brown & Root or my company
6 is civic-minded, and they consider it a
7 responsibility to serve on a jury. They pay us
8 for the time that we spend in here, whatever it
9 may be.

10 Q Can you promise us if you hear the evidence in
11 this case and if you don't believe Mr. Guerra
12 committed the offense, and regardless and
13 irrespective of any kind of pressure you may hear
14 from anywhere, can you vote and say not guilty
15 for Mr. Guerra?

16 A Yes, I can.

17 MR. ELIZONDO: We will pass him, Your
18 Honor.

19 MR. MOEN: The State will accept Mr.
20 Woods, Judge.

21 MR. ELIZONDO: Judge, we will accept
22 him.

23 THE COURT: All right, Mr. Woods, you
24 will be a member of the jury on this case, and I
25 would like to give you a few instructions.

1 First of all, raise your right hand
2 and be sworn.

3 (Mr. Woods was sworn.)

4 THE COURT: As I told you, I am going
5 to excuse you now, and between now and the time
6 you are called back down here on this case, you
7 are not to watch or listen to any media coverage
8 concerning this case, and of course, that
9 admonition will carry over during the course of
10 the trial.

11 Also, I am going to -- we had a form --
12 there it is -- give you these numbers. This is
13 the number of the court you will be in. This is
14 my name. This is where the courtroom is located,
15 and Scott Gordon is my coordinator. If you have
16 any problem and if you have to leave town or
17 anything of that nature, please keep in touch with
18 us and let us know where you are.

19 Periodically, we will check with each
20 member of the jury to give them some idea as to
21 when we think the case may begin.

22 Is there anything else y'all can think
23 of?

24 MR. MOEN: Judge, I can't.

25 MR. ELIZONDO: No, Your Honor.

1 THE COURT: It may be two to three
2 weeks before we do get started. You are the
3 third juror selected, and we have actually nine
4 more to go, and I am going to select one
5 alternate juror, so there are actually ten more
6 jurors.

7 MR. WOODS: About how much notice will
8 I get? I need to tie up things at work.

9 THE COURT: I will try to give you
10 three to four days' notice.

11 If we complete jury selection on
12 Tuesday or Wednesday, it will probably be Monday.
13 I will try to give you at least a couple of days'
14 advance notice.

15 Do you have any questions?

16 MR. WOODS: No.

17 We will be notified by telephone when
18 to come?

19 THE COURT: Yes.

20 MR. WOODS: Thank you very much.

21 MR. ELIZONDO: Thank you.

22 THE COURT: Go ahead and ask Mr.
23 Alexander to come in.
24
25

1 PHILIP DALE ALEXANDER,
2 was called as a prospective juror and responded to
3 questions propounded as follows:

4
5 EXAMINATION

6
7 QUESTIONS BY MR. BAX:

8 THE COURT: Mr. Alexander, as I told
9 you earlier, we are going to be very informal.
10 If you would like to, loosen that tie and leave
11 your coat off and relax and visit with us a bit.

12 You may proceed.

13 Q (By Mr. Bax) Good afternoon, Mr. Alexander.

14 A Good afternoon.

15 Q Are you a little cold in here?

16 A Yes.

17 Q All right. As the judge told you, my name is
18 Dick Bax. I am an Assistant District Attorney.

19 To the right is Bob Moen, also with
20 the District Attorney's Office.

21 Bob Moen and I will be representing the
22 State of Texas against Ricardo Guerra. We will
23 be representing the State of Texas and the family
24 of Officer J. D. Harris.

25 We are not allowed at this time to go

F2868 0917

1 into ~~the~~ specific facts of the case, and this
2 whole examination and the questioning of you will
3 be primarily done on hypothetical types of
4 questions. Okay?

5 A. Yes.

6 Q. There is one area I do need to talk to you about,
7 and that is pre-trial publicity to determine
8 whether or not you have formed any type of
9 opinion about this case from news accounts, either
10 on TV or radio or in the newspaper such as would
11 cause some people to form an opinion as to guilt
12 or innocence just from what you have read in the
13 paper.

14 I am allowed to tell you this offense
15 took place back on July 13th of this year and
16 Officer J. D. Harris made a routine traffic stop.
17 After getting out of his patrol car vehicle, he
18 was shot three times in the head. It occurred
19 at Edgewood and Walker streets, which is on the
20 east side of Houston. Harrisburg is the main
21 thoroughfare in that area.

22 Shortly after Officer Harris was shot,
23 a civilian was driving down the street with his
24 two children and he was also shot and he died as
25 a result of that wound.

1 About an hour and thirty-five minutes
2 later or an hour and forty minutes later when
3 the police were attempting to apprehend the
4 suspects, another police officer was shot five
5 times and he survived. One of the suspects was
6 shot by the police.

7 With those facts in mind, do you recall
8 reading or hearing anything about this case prior
9 to today?

10 A. Other than news, hearing it on the television,
11 but as far as details, I don't recall them.

12 Q. Would it be fair to say at this point in time
13 you have formed no opinion as to whether or not
14 this Defendant seated at the counsel table to my
15 left, whether he is guilty or not guilty?

16 A. No, I have no opinion.

17 Q. And basically, that is what the law requires,
18 that the people who sit on the jury, whoever those
19 twelve people may be, they have no preconceived
20 ideas before they come into the courtroom to listen
21 to the facts. That is basically why I asked you
22 that question or those series of questions.

23 As you know, the judge informed you we
24 would be talking about a death-penalty case.
25 Should a jury of twelve people find this Defendant

1 guilty of the offense of capital murder, Mr.

2 Moen and myself will stand before you and ask you
3 to answer these two questions yes, which would
4 then require Judge Oncken to sentence the
5 Defendant to death. Okay?

6 Before I get into your personal feelings
7 about the death penalty, let me give you a little
8 bit of a background and let you know a few things.

9 The reason we conduct voir dire individually
10 is because of the serious nature involved in the
11 death penalty. We have many different views in
12 our society as members of our society as to
13 whether people are in favor of or opposed to the
14 death penalty.

15 At this point of the trial, of course,
16 no one has to agree with the law or agree that
17 they can, in fact, participate in a case which
18 may ultimately result in the death of another
19 human being. Certainly anyone who takes that
20 stand where you are right now has the perfect
21 right to feel however they choose about the death
22 penalty. What we are trying to avoid ultimately
23 is putting a person in a place where they may
24 have a conflict about what their religious,
25 conscientious, and moral scruples are about the

1 death penalty and the oath they may take to
2 follow the law.

3 Do you follow me?

4 A Yes.

5 Q And there is no way anyone can be forced to sit
6 on a jury where they would have to come in
7 conflict with what their religious, moral, or
8 conscientious scruples might be.

9 In other words, if someone were to come
10 before us and say, "Look, I can understand in
11 certain cases the death penalty may be appropriate,
12 but I personally because of my upbringing or
13 philosophy, I could not participate in that, be
14 able to wake up and look at myself in the morning
15 and face that; someone may be able to do that,
16 but I personally couldn't participate in that
17 type of trial. Okay?

18 There is nothing wrong with that
19 opinion. No one would say, "Wait a minute. Let
20 me tell you the process about capital punishment.
21 Let me tell you what is good about it."

22 Okay. No one is going to try to change
23 any opinion you may have, but we do need to know
24 how you honestly feel and whether you feel in a
25 case such as this you would be able to participate

1 and give both the State and the Defense a fair
2 trial.

3 Do you follow me?

4 A Yes.

5 Q With that in mind, could you tell us briefly what
6 your feelings are about the death penalty and
7 capital punishment and how it fits into our
8 society, if it does?

9 A Generally speaking, I feel like the death penalty
10 is appropriate in some cases. I would say
11 generally.

12 Q What type of cases do you have in mind? In a
13 minute, I am going to go over some with you, but
14 just now, what type of cases?

15 A I have glanced at No. 2, and if I felt in my mind
16 the individual had committed the crime and had
17 a probability of committing that crime again, or
18 injuring society, well then, certainly it would
19 be an alternative in my mind.

20 Q Do you feel it has a proper place, let's say, as
21 a deterrent to the person receiving it? Do you
22 think that person would be deterred from committing
23 criminal acts of violence in society so it would
24 be fair to say in your mind as a deterrent, you
25 feel it might be proper?

1 A Yes.

2 Q Have you ever had discussions concerning the
3 death penalty with another person, either
4 informally or formally?

5 A Back in college days, you know, brainstorm.

6 Q Have you always held this opinion that in certain
7 types of cases with certain types of questions
8 asked to the jury as the judge explained to you
9 earlier, have you ever had a different opinion,
10 and because of personal experience or what you
11 have read in the newspaper about crime and the
12 increasing crime rate, has that ever changed
13 your opinion as to what it is?

14 A I was never too opinionated one way or the other.
15 I don't remember changing that much, but I know
16 my thinking now, I hold it as a viable option,
17 so I don't think it has changed.

18 Q Does your wife have any specific opinion?

19 A I have never discussed it with her. I would be
20 interested to know, but we have never talked about
21 it.

22 Q I know it is something you don't do, sit around
23 the dinner table and say, "Let's talk about the
24 death penalty," but I know people may have read
25 something in the newspaper or had a set of facts

1 presented and said, "That is the type of person
2 the death penalty would be the proper punishment
3 for."

4 A We have only been married ten months, and haven't
5 discussed it.

6 Q Let me tell you the type of crimes that the death
7 penalty becomes a possible punishment for in
8 Texas. There are only a few.

9 First of all, you have to have a murder.
10 There has to be an intentional or knowing taking
11 of another person's life without justification.
12 All right?

13 But murder alone -- and I don't mean to
14 minimize murder. It is a very serious offense in
15 and of itself -- but simply the taking of another
16 person's life is not enough in itself to raise
17 the death penalty issue. There has to be another
18 element tied to it. I think you might think of it
19 as an aggravated situation if there is such a
20 thing.

21 You have to commit a murder during the
22 course of several offenses, or if you kill a
23 specified or classified type of person. For
24 example, if you kill a person during the course of
25 a robbery, the hijacking of a Utotem; in the course

1 of a burglary, breaking into someone's home and
2 the owner is killed in that burglary; or during
3 a rape, arson, or kidnapping, in any of those
4 cases, murder plus one of those crimes is
5 elevated to capital murder.

6 If you kill a police officer and you
7 know he is a police officer in the lawful
8 discharge of his official duty --

9 A Yes.

10 Q -- it elevates it to capital murder or a fireman
11 under the same circumstances.

12 If you kill for hire or hire someone
13 to kill for you, and the killing has actually
14 taken place, or if an escapee from a penal
15 institution kills a guard or someone in the course
16 of his escape, that is elevated to capital murder.

17 Those are basically the areas in Texas
18 where someone becomes subjected to the death
19 penalty, and knowing those are the types of
20 cases, would you agree those are appropriate types
21 of cases where the death penalty could apply?

22 A I agree.

23 Q In any of these cases, should a person be found
24 guilty of murder-robbery or murder of a police
25 officer, the death penalty is not automatically

1 assessed. Then the two questions that you see
2 before you are submitted to the jury, and
3 depending upon the jury's answers to those two
4 questions, the judge will either assess life or
5 death.

6 If all twelve jurors -- let me get
7 over here where I can look at them at the same
8 time -- if all twelve jurors answer Question No.
9 1 yes and Question No. 2 yes, then the judge must,
10 by law, sentence the Defendant to the death
11 penalty.

12 If either Question 1 or 2 is answered
13 in the negative, then the judge must, by law,
14 assess life imprisonment. Okay?

15 Now, to answer a question yes, as I
16 said, all twelve jurors must agree that the answer
17 is yes. All twelve must say yes.

18 To answer no, it takes only ten to
19 agree. It takes all twelve to agree to answer
20 a question yes.

21 Although the jury doesn't go in the back
22 and say, "Judge, we have decided this Defendant
23 deserves the death penalty. We think the death
24 penalty is appropriate," the way you answer these
25 two questions, you really know what the judge will

1 or will not do after you return your verdict.

2 Do you have any questions as far as
3 about the types of cases and how the death penalty
4 comes into play at this point?

5 A The judge would not give the death sentence unless
6 all twelve jurors said yes to 1 and yes to 2?

7 Q That's right.

8 A And if all twelve said yes to 1, how many would
9 --

10 Q Let's say all twelve said 1 is yes. We all agree
11 the answer to No. 1 should be yes.

12 You start talking about No. 2, and ten
13 say yes, and the other two say no. It would be no
14 because all twelve have to have a unanimous
15 verdict to answer either question yes.

16 A What happens on Question 2 if nine jurors say
17 yes and one says no?

18 Q It would probably depend on the judge. You would
19 send out a note saying, "We can't reach a verdict,"
20 and the judge would probably say, "Continue your
21 deliberations."

22 A Okay.

23 Q Under the law, they would have to be answered
24 yes or no.

25 Let's stop for a second and go to the

1 content of the two questions, and let me tell
2 you, first of all, these questions are not
3 specific to this case.

4 In 1974, the death penalty was
5 reenacted in Texas, and since 1974, every capital
6 jury who reached the punishment stage of the
7 trial has had to answer these questions. There
8 is nothing about this case or this judge or these
9 lawyers involved that is different.

10 The first question really appears to be
11 straightforward. It is really asking two questions
12 in one. Was the conduct of the Defendant done
13 deliberately, and was it done with the
14 reasonable expectation that someone would die as
15 a result of that conduct?

16 That question, of course, calls upon the
17 jury to look back upon the evidence in determining
18 whether the person was guilty or not guilty.

19 Would you agree with me there?

20 That question is not automatically
21 answered yes because the person is guilty of
22 intentionally causing the death of another person.

23 All right?

24 At this stage of the trial, let's assume
25 you have reached the punishment stage of the trial

1 and you have had to find at that point that a
2 person intentionally and knowingly took the life
3 of an individual. A lot of people say
4 intentionally and deliberately mean pretty much
5 the same thing. The judge will not define
6 deliberately for you. That will be something
7 the judge will tell you to use your common,
8 everyday meaning of that term. It does not stop
9 at the word "deliberately," and it continues on
10 and says, "Was it done with the reasonable
11 expectation that the death of the deceased or
12 another would result?"

13 So if you find someone intentionally
14 acted, to find him guilty, does not mean I is
15 automatically answered yes.

16 Let me see if I can give you an example
17 to go over there.

18 A. Okay.

19 Q. The law says to engage in the conduct, if you
20 consciously and objectively engage in certain
21 conduct that causes the death of someone, you have
22 acted intentionally.

23 Assume with me someone goes into a
24 Utotem, and while he is inside, he's got his gun.
25 He goes up to the cashier and demands the money.

1 She turns it over, and he's got his car running
2 outside, and he doesn't want the clerk to follow
3 him out to get his license number, so consciously,
4 he shoots the person in the leg. Okay? And
5 he runs out of the store.

6 It severs an artery as he leaves the
7 store, and she dies and we have a capital murder.

8 He was engaging in the conduct, and
9 therefore, the jury, if they believe that to be
10 the evidence, would believe him to be guilty of
11 capital murder.

12 When you get to this question, you would
13 say, "Yes, he acted deliberately, but when he shot
14 her in the leg, I don't know if the Defendant had
15 a reasonable expectation that someone was going
16 to die."

17 You can see the fact situation shows this
18 question could be answered yes or no depending
19 upon the facts and not because someone was found
20 guilty.

21 Do you follow me there?

22 A I do.

23 Q Question No. 2 is more difficult to deal with
24 because of, I guess, the way it is worded. Is
25 there a probability that the Defendant on trial

1 would commit criminal acts of violence that
2 would be a continuing threat to society?

3 We've got a few terms underlined also
4 there, and those will not be defined for you. You
5 will have to use your everyday meaning in defining
6 Question No. 2. The reason "probability" is
7 underlined is to point out to the jury the State
8 does not have to prove there is a certainty the
9 Defendant will have to act a certain way in the
10 future.

11 Of course, there is no way I could prove
12 to a jury what is certain to happen in the future,
13 and there is only person that could probably
14 answer that question for us, and that person will
15 not be a witness and give us guidance, but the
16 question is, is there a probability, more likely
17 than not that a Defendant would commit criminal
18 acts of violence. You have agreed that is a good
19 criteria to determine whether a person could
20 receive the death penalty or life imprisonment.

21 I would like to point out to you criminal
22 acts of violence include other capital murders,
23 but that is not the only thing they include. A
24 burglary, forcefully breaking into someone else's
25 home or car, a rape, a robbery, or just slapping

1 people around. Those are acts of violence,
2 assault or conduct against other persons.

3 There is no way I can prove that someone
4 will commit one specific crime. There is no law
5 -- the law requires I prove he is a person likely
6 to commit future acts of violence.

7 Do you feel you could answer Question
8 2 yes if you felt a person was apt or likely to
9 commit criminal acts of violence, although not
10 another capital murder, or would you require that
11 we prove the person would commit future acts of
12 violence such as murder or capital murder?

13 We are assuming the answer to 1 was
14 yes. Let's do that. You have answered 1 yes.
15 You now know if you answer 2 yes, the judge will
16 assess the death penalty, and he has no choice
17 in that matter, and let's say after hearing all
18 the evidence, you were convinced beyond a
19 reasonable doubt that the person was likely to
20 commit criminal acts of violence. He might
21 go around beating up people or commit criminal
22 acts of violence of other sorts. You weren't
23 sure he would go out and kill again.

24 Would you be able to answer Question
25 2 under those circumstances, or would we be

1 required to show he was likely to kill again?

2 A No. I would be able to decide from that.

3 Q And his continual acts of violence must constitute
4 a continuing threat to society.

5 Society, as you and I probably think of
6 it most times, is where we raise our families and
7 do our shopping and what not.

8 Would you agree there is also a society
9 within the penitentiary which includes not only
10 the inmates but also the guards, wardens, medical
11 aides, librarians, and what not who also deserve
12 a right to be protected?

13 A Right.

14 Q Is there anything about the way Questions 1 or
15 2 are worded or phrased that you feel you wouldn't
16 be able to answer them?

17 A No.

18 Q Another thing before we leave the two questions.
19 When we reach the punishment stage, we still must
20 have the burden of proof. We must prove the
21 answers should be yes. If not, the answer is no
22 in that case.

23 The law says as far as Question 2 is
24 concerned, a jury can decide Question 2 based
25 solely on the facts that they have heard before

1 them.

2 A All right.

3 Q Just on the facts of what a person's conduct was
4 in one specific transaction, that can provide
5 enough evidence for a jury to answer Question 2
6 yes.

7 It also says you can offer other
8 evidence if you choose to to help the jury, other
9 convictions or other criminal episodes a man
10 might have been involved in to answer Question 2,
11 but that is not required.

12 Let me give you an example where it has
13 been upheld. It involved a man named Ronald
14 Clark O'Bryan who poisoned one of his children
15 and attempted to poison his daughter on Halloween
16 back in, I think it was '74 or '75 for insurance
17 money. He poisoned his own children, and the
18 only evidence the jury heard was about that one
19 specific act, and the jury upheld the yes answer
20 saying anyone who would do that would probably
21 commit future criminal acts of violence.

22 Can you see where this would be answered
23 yes on the facts?

24 A Yes.

25 Q Do you have questions on Questions 1 and 2?

1 A No.

2 Q I guess these are rather clear questions, and I
3 guess clinical ones on determining whether a
4 person should receive life or death. Do you agree?

5 A I do.

6 Q Let me go over some of your duties and
7 responsibilities you would have if you were to be
8 on this jury, or really, any jury, whether a
9 capital murder case or driving while intoxicated
10 case.

11 First of all, the judge, at the
12 conclusion of the trial, will give to the jury,
13 both at the punishment and at the guilt-or-
14 innocence stage, the law of the case. It will be
15 written on legal-size paper containing certain
16 definitions telling you what capital murder is,
17 what intentionally is, what a peace officer is,
18 and will contain any definitions that apply to the
19 case.

20 It will also have in there certain
21 general instructions and will tell you first off
22 that the fact that a Defendant has been indicted
23 for the offense gives no rise to inference of his
24 guilt, and the jury cannot consider the fact that
25 a person has been indicted as any evidence of his

1 guilt. Okay?

2 A Yes.

3 Q An indictment is simply a means by which we have
4 all ended up here today. Number one, it puts the
5 Defendant on notice of what he is charged with.

6 Secondly, it tells the State what they
7 must prove to a jury to be entitled to a guilty
8 verdict. But the fact he has been indicted is
9 no evidence in telling the jury in deciding
10 whether he is guilty or not guilty.

11 The law requires the jury themselves
12 to hear the evidence and not rely on what another
13 individual's verdict is.

14 Would you have trouble in finding a
15 Defendant guilty that way and not holding the
16 fact that he's been indicted against him?

17 A I guess the reason I am hesitating, I take it is
18 I would think -- my assumption would be that there
19 is some substantial evidence against the
20 Defendant or else why am I here or the Defendant
21 here?

22 Q I don't think anyone would be expected -- I don't
23 guess anyone would say you sit down here and we
24 will get a case against you to prove you had
25 personally killed this police officer. Okay?

1 A Okay.

2 Q That is a natural feeling anyone would have in
3 your position that obviously there must be
4 something these people are going on; otherwise,
5 we wouldn't be wasting our time. We didn't pick
6 this person out in front of the courthouse and
7 decide we will try him.

8 You are the only person that can answer
9 this for us. Can you put this out of your mind
10 and decide this case on the facts you hear from
11 the witness stand and not use that fact that
12 he's been indicted for evidence of guilt, for your
13 part?

14 A I think I could.

15 Q In a minute, Mr. Elizondo and Mr. Hernandez will
16 question you, and when you use a term like "I
17 think I can," it scares lawyers.

18 Let me tell you why. Suppose you had
19 a big mallet in your hand and I say, "Are you
20 going to smash my hand with that mallet," and
21 you said, "I don't think I will." I would be
22 leery to put my hand over there on the table in
23 that situation. Okay?

24 A Okay.

25 Q I hate to pin you down, but we need to.

1 Can you tell me whether or not you
2 would be able to follow the law in that regard
3 and not consider that indictment as evidence,
4 but just follow the law and look to the evidence
5 before you?

6 A I would follow the law.

7 Q That goes hand in hand with what we call presumption
8 of innocence.

9 Every Defendant brought into the
10 courtroom is presumed to be innocent. The judge
11 will also tell you that in the charge.

12 The law requires, as I said earlier,
13 that the twelve people taking the jury box do
14 so with an open mind with no preconceived notions
15 of guilt, innocence, or anything, and that way,
16 it really affords both sides a fair trial and
17 fair hearing before the jury.

18 Again, I am not going to try to insult
19 your intelligence by telling you someone committed
20 an offense back on July 13th and put in the
21 courtroom today, somehow they are magically
22 innocent. If they were guilty at the time of the
23 offense, they are guilty now, and they will be
24 guilty at the time they die.

25 The law requires, however, the jury make

1 an independent decision on a person's guilt
2 depending on the evidence.

3 Q Can you sit before this Defendant and
4 afford him that presumption of innocence?

5 A I can.

6 Q The easiest way to think about that is, if I
7 read to you the indictment and you have heard me
8 read for twenty minutes or so and I said, "Mr.
9 Alexander, go in the hall and let me hear about
10 what we have talked about, about whether Mr.
11 Ricardo Aldape Guerra is guilty or not guilty."
12 You would have to return a not guilty verdict,
13 because you haven't heard the evidence, and we
14 ask that you be in that courtroom and continue
15 that state of mind until the State proves its
16 case to you. If you disagree, fine.

17 A I am following you so far. Fine.

18 Q The judge will instruct you that the Defendant
19 has what we call a Fifth Amendment right. A
20 Defendant in a criminal case does not have to
21 testify. I can't call him to the stand. The
22 judge can't call him to the stand. The jury
23 can't say, "I want to hear from the Defendant."
24 His lawyers can't force him to take the stand.

25 That decision of whether or not a

1 Defendant testifies is solely by the Defendant.
2 They can advise him one way or the other, but
3 it would be his decision as to whether he testifies.

4 If a Defendant does not testify, the
5 judge would instruct the jury that you can't use
6 that; you can't use silence as evidence as to a
7 person's guilt. All right?

8 A Okay.

9 Q Now I know again your natural instinct is, "Wait
10 a minute. If I were charged with an offense and
11 I didn't do it, I would be the first guy on the
12 stand to say, 'Wait a minute. You've got the
13 wrong guy. I didn't do it.'" That is a natural
14 instinct, and there is nothing wrong with a jury
15 wondering why didn't the Defendant testify, and
16 the judge will tell you if he doesn't testify,
17 you can't use that as evidence.

18 In other words, if you heard the
19 evidence and the State rested and the Defense
20 rested without putting on evidence and you went
21 back and said, "Bax and Moen were good, did a good
22 job, but they can't convince me beyond a reasonable
23 doubt, but that Defendant didn't get on the stand
24 and we'll get the State over the hump because the
25 Defendant didn't testify." That would be wrong.

1 Can you follow that law, and if the
2 Defendant chooses not to testify, not consider
3 that as evidence?

4 A I can.

5 Q If a Defendant chooses to testify, he is like
6 any other witness. Your most important function
7 as a juror will be to judge the credibility,
8 believability of the witnesses as they testify.

9 You can as a juror believe everything
10 a witness says. You can believe one portion and
11 disbelieve another portion, or you can choose to
12 disbelieve all of that testimony as being
13 untrustworthy and untrue.

14 Of course, you do that like you do your
15 everyday decisions. You look to a person's
16 demeanor, bias, motive, prejudice, what they are
17 saying, look to the reasonableness of what they
18 are telling.

19 Is that reasonable, and can you make
20 that decision? The judge doesn't make that for
21 you. That is the jury's job to decide who is
22 being honest with you and who is not, and when
23 the Defendant takes the stand, he is the same as
24 any other witness. Simply because he is presumed
25 to be innocent is no assumption he is a truth-

1 taller, but you must go over his testimony with
2 the same scrutiny as any other witness' testimony.

3 A Okay.

4 Q One thing, whether it be a minister, lawyer,
5 doctor, or plumber, no witness takes the stand
6 with automatic believability simply because of
7 their occupation. The law requires you to judge
8 their credibility before deciding whether they
9 are right or wrong. It is wrong to say, "Here
10 comes a police officer," and automatically believe
11 everything he is going to say.

12 Do you feel you could do that, judge
13 the credibility of witnesses and make a
14 determination as to whether they are credible,
15 regardless of their occupations?

16 That doesn't mean you can't believe a
17 police officer has more experience or is more
18 of an expert witness in certain areas where he may
19 give his testimony in one area, but the simple
20 fact of what they do, be it a preacher or whatever,
21 does not give them automatic believability or
22 credibility.

23 A Right.

24 Q I have used a few times the words proof beyond
25 a reasonable doubt. I don't know what that is.

1 I have never been on a jury and never had to
2 deal with it on those terms.

3 Judge Oncken will never supply you with
4 proof beyond a reasonable doubt. That is
5 something individual to each and every juror, and
6 the jury, after listening to the facts, if they
7 are convinced it has not been proven to them
8 beyond a reasonable doubt, if they are not
9 convinced, they should find a person not guilty.
10 That is based on the facts and the judges and
11 lawyers can't agree on a definition.

12 I can tell you what it is not. It is
13 not proof beyond all doubt or any doubt or a
14 shadow of a doubt. That is what we hear on TV
15 lawyer shows. Those terms need to be left
16 there. There is no way I can prove anything
17 beyond all doubt or a shadow of a doubt. The
18 only way I could do that is if you were an
19 eyewitness to each and every transaction.
20 You could be waiting at home for a phone call
21 saying, "We have twelve people. Come on down.
22 It's time to tell the jury what happened," and
23 again, I may have twelve people who saw the same
24 thing and they have seen it from a different
25 respect.

1 Do you follow me there?

2 A Yes.

3 Q Do you feel that is a fair burden, proof beyond
4 a reasonable doubt?

5 A I do.

6 Q And that is why the burden of proof is the same
7 in any criminal case, whether a driving while
8 intoxicated case or a capital murder case.

9 Do you feel you could follow that
10 principle of law if I proved my case to you
11 beyond a reasonable doubt and find this
12 Defendant guilty of capital murder?

13 A Yes.

14 Q And you could answer those questions yes if I
15 proved it to you beyond a reasonable doubt?

16 A Yes.

17 Q One other concept I need to talk to you about
18 briefly is what we call "lesser included offenses."

19 As I told you earlier, you have to
20 have murder and some lesser crime, either a
21 certain crime or a certain class of people.

22 Let's say you, as a juror, believe that
23 a person knowingly took the life of another
24 person, but you have a reasonable doubt as to
25 whether the aggravated portion was proven to your

1 satisfaction.

2 For example, what appears at first blush
3 to be a robbery of a Utotem store, it turns out
4 from the evidence that the man who went into the
5 Utotem was the lover of the girl and he was not
6 after the money but mad because he heard she had
7 been cheating on him. The person says, "I've
8 got a reasonable doubt as to whether a robbery
9 was taking place." You would find him not guilty
10 of capital murder because you don't have both
11 of them, and you would find him guilty of murder.

12 Okay? Murder carries a different
13 punishment range. It is no longer life or
14 death. If a person is convicted of murder, the
15 range is five years in the penitentiary to a
16 maximum of life or ninety-nine years, and in
17 addition, a fine can be given up to ten thousand
18 dollars, and you can see, it is a very wide
19 range of punishment, from five years up to
20 life.

21 If a jury hears a fact situation
22 involving a murder case, and if the jury believes
23 then the case is worth -- I use the term "worth"
24 -- the case is worth ten years or less under the
25 facts, the punishment should be ten years to five

1 years, and if the Defendant has never before been
2 convicted of a felony, the jury could recommend
3 probation to the judge.

4 Probation means release upon certain
5 conditions of release.

6 Do you feel there are certain cases
7 when you could consider probation for the
8 intentional taking of another person's life?

9 A For the intentional --

10 Q For the intentional or knowing taking of a
11 person's life?

12 A No.

13 Q Let me see if I can give you one fact situation
14 which will take us through lesser included
15 offenses and take us to probation.

16 A Okay.

17 Q It is not right for us to sit down and say, "Can
18 you think of a fact situation for probation for
19 a murder case?" That is putting you on the spot.

20 Let me see if I can give you a fact
21 situation and deal with that.

22 Suppose there is an elderly couple in
23 their seventies and eighties, and they have had
24 a happy life, raised their children and grand-
25 children, and perhaps have great-grandchildren.

1 The woman becomes terminally ill. There
2 is no question she has two to six weeks to live,
3 and the only reason she is alive is she is
4 attached to some life-support equipment in the
5 hospital. The savings are slowly and quickly
6 dwindling, taking care of medical expenses.

7 The husband and wife have a discussion,
8 and she says, "Look, we have had a good life.
9 You have been good to me. I want to die. I
10 have been in pain. It hurts, and I don't want
11 you to be broke when I am gone. Can you pull
12 the plug and end it?"

13 He says, "No, I can't do that," and
14 she goes on and on, and finally in a moment of
15 weakness, he reaches down and pulls the plug.
16 She dies.

17 Under the law, he has caused her death.
18 It is murder.

19 After he has done that, there are
20 family members of her family who know the two
21 own property up around Lake Conroe that she had
22 never wanted to sell, but he had wanted to sell
23 it. Now that she is gone, it is open to sell,
24 and the family somehow convinces the Grand Jury
25 that the reason he pulled the plug was not out

1 of love, but because he wanted to get the sale
2 of that property.

3 It goes to a jury and the jury says,
4 "That is preposterous. That man no more killed
5 her for that property than we would do so." They
6 find him not guilty of capital murder; it was not
7 done for money. But they find him guilty of
8 murder under the law, although they find him not
9 guilty of capital murder, and in that case, they
10 could, if necessary, recommend probation.

11 That -- I hope that one example gave
12 you capital murder, murder, and possible
13 probation.

14 Can you see now where there are possible
15 cases where probation for the intentional taking
16 of another life would be proper?

17 A Yes, I can.

18 Q Do you have any questions?

19 A Not yet, no.

20 Q The judge will also tell you one of your
21 obligations as a juror will be that you, during
22 your deliberations on punishment, not discuss
23 or allude to or comment upon the length of time
24 a person might have to serve on any specified
25 sentence he might receive.

1 In other words, you can't discuss
2 the ~~parole~~ law as part of your deliberations.
3 The ~~judge~~ will tell you that that area of the
4 law, when a person is paroled, how long they
5 must spend in prison, lies within the exclusive
6 jurisdiction and discretion of the Board of
7 Pardons and Paroles, and that the jury is not
8 to consider parole when they decide the number
9 of years or life or death as their punishment,
10 but their punishment must be based on the
11 evidence.

12 Can you follow that area of the law
13 and not consider parole and restrict your
14 deliberations on punishment on the evidence before
15 the jury? You will be so instructed.

16 The judge will tell you in the charge
17 you can't do it, even though you have taken an
18 oath saying you will follow the law.

19 I am not saying you have to like parole
20 or enjoy parole because you keep that out of your
21 deliberations.

22 A. If I felt like a person should be sentenced to
23 life imprisonment and I knew that there was a good
24 chance that people with that sentence would get
25 paroled in five or ten years or fifteen years, I

1 could not tell you it wouldn't influence my
2 decision.

3 Q First of all, let me ask it this way. Do you have
4 then a preference as to either the death penalty
5 or life imprisonment? Would you prefer one --
6 assuming, again, you found a person guilty of
7 capital murder -- would you have a preference as
8 to either a life sentence or a death sentence?

9 A I guess life.

10 Well, the awkwardness I am having right
11 now is that I don't know how often people who are
12 assigned life sentences get on parole, but I have
13 heard some of that, so I would like to find out
14 about that. I would have some conflict in
15 deciding.

16 See what I mean?

17 Q Just because of that, that is why the law says you,
18 as a juror, must take an oath to promise you would
19 not do that. Okay?

20 A Okay.

21 Q Suppose you and the other eleven are sitting back
22 there and say the answers should be no. It
23 hasn't been proven the answer is yes. Okay. See,
24 this would be wrong for you to discuss with the
25 other jurors, "If we give him life imprisonment

1 and that is what the evidence calls for, he is
2 going to get let out and given five, ten years,"
3 whatever y'all decide on.

4 Would you go ahead and answer the
5 question yes, which would impose the death penalty?

6 A No, I would follow the law.

7 Q Okay. That is why we are going over these things,
8 to see if you could follow the law. You are the
9 only one who can tell us. You are not the
10 minority. When people come before us and we
11 talk about the parole law, people say, "If we
12 assess him sixty years, he should serve sixty
13 years, and if we assess him life, he should serve
14 life." You are not in the minority and there are
15 a lot of people in the same frame of mind, but
16 the law requires you may feel that way, but could
17 you set that aside and follow the law and make
18 your decision based on the evidence and not make
19 your decision based on the feelings you have?

20 A I would be able to.

21 Q Let me ask you just a few questions from your data
22 sheet.

23 At one time, you attended a theological
24 school?

25 A That's correct.

1 Q How long ago was that?

2 A '65 through '68.

3 Q And were you studying for the ministry at that

4 time?

5 A To be a youth counselor and church-related work.

6 Q So that really didn't have anything to do with

7 the training as far as a missionary, to be a

8 missionary or reverend or anything like that?

9 A People at the same school were training for

10 ministerial vocations and so on, but in terms of

11 my own training, the degree I received was not

12 geared specifically for that. I am not sure what

13 you were asking.

14 Q What denomination was that?

15 A It was nondenominational, but close to Baptist

16 in theology.

17 Q Anything about that background or educational

18 background that would affect you in any way in

19 listening to this case?

20 A No.

21 Q What type of bottles do you collect?

22 A I work for an airline and get to fly free all

23 over the place and get to collect the miniature

24 liquor bottles.

25 Q Do you collect them full or empty?

1 A Full.

2 Q It states you had an interest in the Cullen Davis
3 case.

4 Were you dissatisfied with what you may
5 have read in the newspaper or TV accounts?

6 A It confirmed a suspicion that if a person has
7 enough money to buy good lawyers, that certainly
8 can weight the case at least. I didn't have any
9 reason to be dissatisfied.

10 Q As you can see, Mr. Guerra has an interpreter next
11 to him and she is interpreting all we are saying
12 to him today. The evidence may, in fact, show
13 he is an illegal alien.

14 The first question is: Would the fact
15 he is an illegal alien cause you to be biased or
16 prejudiced in any way?

17 A Not as it relates to murder.

18 Q Now, it is obvious, I think to you, and I mean no
19 insult or anything to Mr. Elizondo or Mr. Hernandez,
20 but he is not represented by "Racehorse" Haynes
21 today.

22 Would that cause you to bend over the
23 other way in such a case as this when you know
24 that Cullen Davis and other people with money are
25 able to buy themselves out by the high-powered

1 lawyers?

2 A I think it would be more equal in representation
3 rather than have somebody --

4 No.

5 Q You worked with the customs agency. Where is that
6 at?

7 A At the Montana-Canadian border. They have a lot
8 of summer jobs, summer traffic up there.

9 Q In the wintertime, there are no people up there
10 except residents?

11 A Mainly. In fact, many customs -- the port is
12 open in the wintertime, but only open for travel
13 in the summer, so that is what I was doing.

14 Q And how were you assigned when you were in the
15 Army in '69 and '70?

16 A Drafted.

17 Q Were you a product of the lottery system?

18 A Number 16 out of 65.

19 Q I was 235. I felt lucky.

20 Where were you stationed?

21 A Basic training at Fort Ord in New Jersey and
22 New York City, and finally assigned permanently
23 to Fort McClellan, Alabama.

24 Q Do you have questions about anything we have
25 talked about for the past forty-five minutes?

1 A No.

2 Q I will check with Bob Moen to see if he has
3 questions.

4 Thank you very much. He has no
5 questions.

6

7

EXAMINATION

8

9 QUESTIONS BY MR. ELIZONDO:

10 Q Good morning. How are you doing?

11 A Fine.

12 Q As the Prosecution was telling you, this is a
13 capital murder case.

14 In a capital murder case or in any
15 criminal case here in Texas, the State has the
16 burden of proving this case to you or any
17 prospective juror beyond a reasonable doubt.
18 They must prove certain elements beyond a
19 reasonable doubt, that number one, in Harris
20 County, Texas, on a particular day, this man shot
21 and killed a police officer in the lawful discharge
22 of an official duty, knowing at the time that he
23 was a police officer. He must prove all those
24 elements beyond a reasonable doubt.

25 The prosecutor is right. There is no

F2068 0955

1 legal definition of "reasonable doubt." The
2 judge will not give you one and they can't give
3 you one and I can't give you one. All I can say
4 to you is, across the street at 301 Fannin where
5 they try lawsuits over personal injuries,
6 sometimes for millions of dollars, the burden of
7 proof over there is by a preponderance of the
8 evidence, the greater weight of the credible
9 evidence.

10 A Yes.

11 Q In other words, the side that's got the most
12 evidence wins.

13 Over here on this side, the legislature
14 says before you can put this man, before you can
15 forfeit his life, take away his life, the State
16 is going to have a pretty heavy burden, a harder
17 burden than across the street, and that will be
18 proved beyond a reasonable doubt, so I hope you
19 can gather by that analogy that the proof they
20 have is pretty heavy burden, and they should
21 accept that.

22 Do you follow that?

23 A I do.

24 Q How do they go about proving their case beyond
25 a reasonable doubt? They go out here and call

1 witnesses and they sit where you are sitting right
2 now and they will give their rendition of the
3 facts, and then after they get through presenting
4 evidence or presenting the witnesses, they will
5 go ahead and rest their case, which means that
6 is all we have.

7 Then the Defendant can, if he chooses,
8 present evidence. He doesn't have to. He can
9 just stand mute during the whole proceedings.

10 How would that affect you if he stood
11 mute throughout the whole proceedings?

12 A If he did not testify? Is that what you mean?

13 Q Correct, or present any evidence by way of other
14 witnesses?

15 A Well, it would seem to weight it in the other
16 direction.

17 Q Would you hold it against this man if he didn't
18 testify, let's say, or put on any evidence
19 whatsoever?

20 A If the only evidence that was presented to the
21 court was against the witness -- is that what you
22 are saying?

23 Q Correct. If you believed it beyond a reasonable
24 doubt.

25 A If I believed that he was guilty beyond a

1 reasonable doubt?

2 Q Correct.

3 A Would I hold it against him?

4 Q I am sorry.

5 Let me rephrase the question.

6 The State will put on evidence, right?

7 Then they will go ahead and rest their case, and
8 let's assume that they rest their case and you are
9 sitting back there and you are saying to yourself,
10 "Well, I don't know. I think he did it, but I
11 am not sure beyond a reasonable doubt."

12 A Okay.

13 Q The Defendant does not testify and we don't put
14 on witnesses or evidence.

15 What would be your verdict in that type
16 of situation?

17 A Under the oath I took, I would have to say
18 innocent.

19 Q Not guilty? You could do that?

20 A Right.

21 Q You can see you might reach a point in the
22 deliberations where you might think he is guilty,
23 but you haven't had it proved to you beyond a
24 reasonable doubt.

25 Do you hear what I am saying? Can you

1 see where you might get at that point where you
2 can think, "Maybe he did or maybe he didn't. I
3 am not sure. The State hasn't proven their case
4 beyond a reasonable doubt"?

5 Can you see where you might get put
6 in that position?

7 A Yes, I can.

8 Q And if you got put in that position, can you
9 promise Ricardo Guerra you would find him not
10 guilty if it were not proven to you beyond a
11 reasonable doubt?

12 A I would have to, right?

13 Q The Defendant can, if he chooses, put on evidence.
14 He can testify. He can call witnesses to the
15 stand, and if he does testify or present evidence,
16 I could almost guarantee you there would be
17 two diametrically opposed stories, and it will
18 become your job, your function as a juror to
19 decipher the facts.

20 You see, you twelve people back there
21 are the judges of the facts. Judge Oncken is the
22 judge of the law. He will rule on all the
23 questions of law.

24 You, as the jury, will be the judge and
25 rule on the questions of fact, so when you go back

1 in the jury deliberation room, it will be your
2 job to decipher the facts. Correct?

3 A Right.

4 Q If a person is found guilty of capital murder,
5 then and only then we go to the punishment stage,
6 and at that point in time, there are only two
7 possible punishments, life or death, and of course,
8 that is determined by how you answer those two
9 questions.

10 Question No. 1 has a word underlined,
11 and the word is "deliberately," whether the conduct
12 of the Defendant that caused the death of the
13 deceased was committed deliberately.

14 Deliberately will not be defined for
15 you either. The judge won't define it. The D.A.
16 won't define it. I won't define it.

17 All I can say is what I have been
18 told it could mean. It could mean to ponder on
19 or think about with measurable consideration, or,
20 for example, you will go into the jury deliberation
21 room and you will ponder or think about this man's
22 guilt or innocence.

23 Some people think that deliberately
24 means the same thing as intentionally. How do
25 you feel about that?

1 A I think they could be acquainted.

2 Q So if you were to find the Defendant guilty of
3 intentionally and knowingly killing a police
4 officer, would you automatically answer Question
5 No. 1 yes?

6 A With the reasonable expectation that the death of
7 the deceased --

8 Right. I would.

9 Q Can you see where Question No. 1 is asking for
10 whether the conduct of the Defendant that caused
11 the death of the deceased was committed
12 deliberately and with the reasonable expectation
13 that the death of the deceased would result?

14 An example I might give you to try to
15 clarify that whole thing -- I hope I can -- let's
16 say you have two robbers. One is seventeen and
17 one is thirty-five. The one that is thirty-five
18 has been in the penitentiary two times before.
19 They both planned and conspired to go into a
20 Seven-Eleven and rob the Seven-Eleven, and while
21 they are out there robbing, unbeknownst to the
22 seventeen-year-old robber, the thirty-five-year-
23 old shoots the cashier and they all run. They are
24 scared.

25 Under our definition, that would be

1 capital murder, robbery-murder, so if you believe
2 beyond a reasonable doubt that he committed that
3 robbery-murder, you would then go to the punishment
4 stage and you would answer Question No. 1, whether
5 the conduct of the Defendant, the seventeen-year-
6 old, that caused the death of the deceased was
7 committed deliberately and with the reasonable
8 expectation that the death of the deceased would
9 result.

10 Would you answer that question
11 automatically yes?

12 A Specifically about the seventeen-year-old?

13 Q Yes, sir.

14 A The thirty-five-year-old pulled the trigger?

15 Q Yes.

16 Under the law of parties -- I am sorry --
17 let me backtrack a little bit.

18 Under the law of parties, a person who
19 aids, abets another in the commission of an
20 offense is just as guilty of that offense as if
21 he himself had done it.

22 A Okay. So an accomplice is guilty is what you
23 are saying?

24 Q Correct.

25 A Following that logic, I would have to say yes, if

1 he is as guilty as the thirty-five-year-old,
2 the way the law defines it.

3 Q So then if you were to find Ricardo Guerra guilty
4 of --

5 A Uh-huh.

6 Q -- of intentionally and knowingly killing a
7 police officer in the lawful discharge of his
8 official duty knowing he was a police officer,
9 then you would go to the punishment stage and
10 automatically answer Question No. 1 yes?

11 A All right. Looking at what you are saying, once
12 I have identified the thirty-five-year-old with
13 having deliberately, with reasonable expectation
14 of having shot the police officer --

15 Q No, no. I am sorry.

16 Let's do it with a hypothetical.

17 Strike that.

18 Back to the murder of a police officer.

19 A Okay.

20 Q The Defendant is charged with intentionally and
21 knowingly killing a police officer.

22 A Okay.

23 Q If you find him guilty beyond a reasonable doubt
24 that he killed a police officer intentionally
25 and knowingly --

1 A Uh-huh.

2 Q -- and then we go to the punishment stage --

3 A Uh-huh.

4 Q -- at the punishment stage, would you automatically

5 answer Question No. 1 yes?

6 A Yes.

7 Q Then you will go to Question No. 2, and if you

8 find him guilty of intentionally and knowingly

9 killing a police officer, would you automatically

10 answer Question No. 2 yes?

11 A I wouldn't automatically. I would have to look

12 to see if there was a probability that in the

13 future he would be a, you know, menace to

14 society and a threat.

15 Q So then there is no difference in your own mind

16 between finding him guilty of the offense of

17 intentionally and knowingly killing a police

18 officer and answering Question No. 1 yes?

19 A Right. There is no difference.

20 Q And you are saying they are one and the same

21 then?

22 A Right.

23 MR. ELIZONDO: Your Honor, we would

24 respectfully challenge.

25 MR. BAX: May we have a moment, Your

1 Honor?

2 No objections, Your Honor.

3 THE COURT: All right, Mr. Alexander.

4 Thank you very much for your patience with us.

5 We appreciate it very much. You may be excused.

6 MR. ALEXANDER: Thank you.

7
8
9
10 PAUL DONALD KELLOGG,

11 was called as a prospective juror and responded to
12 questions propounded as follows:

13
14 EXAMINATION

15
16 QUESTIONS BY MR. MOEN:

17 THE COURT: All right, Mr. Kellogg,
18 please relax with us and we will visit with you
19 a little bit and get your opinions about certain
20 things.

21 Bear in mind that I told you earlier
22 today if you don't agree, tell us about it.

23 Mr. Moen, you may proceed.

24 MR. MOEN: Thank you, Judge.

25 Q (By Mr. Moen) Mr. Kellogg, we apologize for

1 all the time you have done waiting around here
2 today, and I think you are entitled to an
3 explanation of why you had to wait.

4 As the judge mentioned to you earlier,
5 all the selection is done one at a time. The
6 law requires it be done that way. I think it
7 will become obvious to you in the next thirty
8 minutes I need to talk to you about why that is.

9 There are a number of things I need to
10 explain and cover on capital voir dires.

11 Capital cases are different from the
12 regular trials, and those things need to be
13 covered to find out what your feelings are.

14 Whenever you are talking about a case
15 where the death penalty is being sought, one of
16 the two possible punishments a person can receive
17 is the death penalty.

18 I think you realize from your own common
19 sense and from the many people in the world, that
20 there are many different opinions about the death
21 penalty.

22 Sometimes we run across people who,
23 because of their feelings about the death penalty,
24 could not serve on a capital murder case, maybe
25 on another case, but not a capital murder case.

1 But the first question we hit everybody
2 in the face with when they come down and find
3 themselves in the position you are in is to find out
4 what their feelings or opinions are concerning --
5 your feelings or opinions concerning the death
6 penalty, and would your opinions on that topic
7 allow you to serve as a juror where the death
8 penalty were one of the possible punishments,
9 or would you feel you would be unable to?

10 A Well, I do not feel I would be completely
11 comfortable having to bring in such a verdict,
12 but as a concept of law and a punishment, yes,
13 I feel the death penalty is legal.

14 Q Well, I think that is a natural reaction. I
15 don't think anyone would like you to or expect
16 you to like what had happened or to feel really
17 good about it. It is, perhaps of all the
18 obligations we have as citizens, the most serious
19 one, and I don't think that is anything other
20 than just an absolutely normal reaction.

21 So let me explain something to you
22 about the type of cases where the death penalty
23 is a possible punishment.

24 The range of punishment for a murder
25 case in our state has an entirely different range

1 of punishment than the offense of capital murder.
2 For someone to take another human being's life,
3 and if that person were found guilty by a jury,
4 he could receive a punishment range of from
5 five years in the penitentiary all the way up to
6 ninety-nine years or life, depending upon what
7 the jury thought was proper.

8 Our legislature has said that murder
9 that occurs during the course of certain felonies
10 and for an individual to murder a certain class
11 of people, we are going to categorize these murders
12 as capital murders.

13 So, in other words, to give you an
14 example: Our legislature has said that if a
15 person commits a murder during the course of one
16 of five felonies, for the rapist to kill his
17 rape victim; for the kidnapper to kill the
18 kidnap victim; robber to kill the robbery victim;
19 burglary-murder; arson-murder; those are the
20 five examples where if a person commits murder
21 during the course of committing one of those
22 felony crimes, he has committed the offense of
23 capital murder.

24 The legislature has said also in four
25 other instances a person can stand before a jury

1 for the offense of capital murder: If they
2 commit murder to a police officer or fireman
3 during the course of their official duties, or
4 if they murder a person who is employed at a
5 penal institution or if a convict attempting to
6 escape from a penal institution kills anybody,
7 and finally, murder for hire or murder for money.

8 Those are the only examples in our
9 state in which a person can be convicted of the
10 offense of capital murder.

11 Only if he murders one of those
12 protected individuals or commits a murder during
13 the course of the commission of one of those
14 felonies I have mentioned.

15 Every other murder falls into this other
16 range of punishment. I don't care how horrible
17 it might be.

18 It could be someone standing out in
19 front of Foley's and killing men and women as they
20 come out so he can attract attention to his
21 political cause. That is murder.

22 Capital murder has nothing to do with
23 the circumstances surrounding the death of the
24 victims.

25 Now, the way that the punishment is

1 assessed in a capital case is not by the jury,
2 after they have found someone guilty of capital
3 murder, going to the jury room and saying, "Should
4 we give this person life or death," and then coming
5 out and telling the judge what decision they have
6 reached.

7 The jury takes a look at those two
8 questions on your left in the jury room, and
9 depending upon the jury's answers to those
10 questions, a particular type of punishment is
11 handed out by the Court.

12 Since the jury, by their answers to
13 the questions, decides on the penalty, the judge
14 doesn't have discretion, and the way the jury
15 tells the judge what to do is by these questions.

16 If the jury answers both of these
17 questions yes, the death penalty is assessed to
18 the Defendant. If a no answer is given to either
19 one of the questions, it is life in the Texas
20 Department of Corrections rather than the death
21 penalty, so the judge waits for the jury to tell
22 him what to do.

23 The judge tries to hide nothing from
24 the jury. You know and you all know exactly what
25 the effect of your answers is. No one is trying

1 to hide anything from you. You will know up
2 front what is going on.

3 Before they can be answered yes, all
4 twelve jurors have to unanimously agree. It takes
5 all twelve in agreement to answer yes, but only
6 ten have to be in agreement before a question
7 can be answered no. There is a slight distinction.
8 Ten have to agree to answer a question no. All
9 twelve to answer a question yes.

10 Do you follow me so far?

11 A Yes.

12 Q Have you had a chance or did you have a chance
13 a while ago this morning -- I know you have had
14 a chance to glance at the board, but if you
15 haven't had an opportunity to look at the questions,
16 I want you to take a moment to look at them.

17 Okay. Let's talk about that first
18 question first. That question is a rather
19 straight, up front question, I would suggest,
20 because it is asking you to make a determination
21 about the conduct of the man on trial found
22 guilty of capital murder.

23 You see, the way these questions come
24 into play is like this: The first stage of the
25 trial, all the jury hears is evidence about

1 whether the man is guilty or not guilty, and
2 they come back with a verdict and tell the judge
3 through their foreman what their verdict is
4 through their foreman. "Judge, we find him guilty
5 or not guilty."

6 Then we start what is called the
7 second stage of the trial or the punishment
8 phase. At that phase of the trial, either side
9 can again offer testimony concerning what type
10 of man is on trial, what type of person is he?
11 Has he committed any other acts of violence that
12 would be pertinent to the jury's deliberations
13 on these questions? Has he been convicted for
14 any other felonies that would be pertinent to
15 answer these questions?

16 Character witnesses that know of his
17 character and can testify to his character as
18 good or bad and as being a law-abiding citizen
19 can testify to help answer these questions, and
20 after all the evidence is completed, the jury
21 takes the evidence from the trial itself, any
22 additional evidence heard at the punishment stage,
23 and ultimately, the judge will have these typed
24 on a piece of paper and they will take them back
25 to the jury room and deliberate on what their

1 answers should be.

2 Now, this first question asks you to
3 make a determination about the conduct of the
4 man on trial found guilty of capital murder.
5 Was it that man's conduct that caused the death
6 of the deceased and was it deliberately done and
7 was it done with the reasonable expectation
8 the deceased would die?

9 Let me give you an example of what we
10 are talking about in regards to Question 1. A
11 man goes into a convenience store and robs the
12 woman cashier, says give me all the money, and
13 she turns it over. It is late at night. He
14 thinks there are no other witnesses. He is an
15 ex-con and doesn't want to risk a lineup a couple
16 of weeks later, so he shoots her to death.

17 Unbeknownst to him, she has triggered
18 an alarm that calls the police and they are
19 waiting outside and he is arrested. That man has
20 committed capital murder. During the course of
21 a robbery, he has caused a death.

22 Okay. After the jury has found him
23 guilty of capital murder, they would have to
24 answer this first question. Was the conduct on
25 the part of that man that caused the death of

1 the cashier, the firing of the gun, the portion
2 of her body at which she was struck by the bullet,
3 was that conduct deliberate and done with the
4 reasonable expectation she would die?

5 Do you see where that is a rather
6 straightforward question based on the offense of
7 the criminal himself?

8 A Yes.

9 Q However, this question is not automatically
10 answered yes just because someone has been found
11 guilty of capital murder because there are other
12 cases and other fact situations -- I guess as
13 many fact situations as the mind can think of --
14 where the jurors' answers might be no.

15 Let me give you an example. Imagine
16 the same situation we have talked about except
17 this time, the ex-con goes in and asks a
18 seventeen-year-old to go with him. Let's say
19 the ex-con provides this seventeen-year-old with
20 a weapon. The seventeen-year-old owns no such
21 pistol or loaded gun, but he is given one by the
22 ex-convict.

23 They go to the Seven-Eleven store. The
24 seventeen-year-old is outside watching as a
25 lookout. He doesn't know the ex-con is going to

1 kill a woman, and the ex-con kills the woman.
2 However, under our law of parties, they can't
3 come and say they were surprised by something
4 another person did. By committing the crime
5 together, they agreed to commit it. Our law
6 says if you act together to commit a crime and
7 other felonies are committed, that should have
8 been anticipated by you during the course of
9 committing that crime, then all the parties are
10 responsible regardless of the parts they played
11 in the commission of the crime.

12 So that seventeen-year-old could be
13 tried and convicted for the offense of capital
14 murder even though he did not pull the trigger
15 that caused the death of the cashier, but I
16 think you could see in that case when the jury
17 is getting ready to answer that question, they
18 could see there was no doubt the answer to the
19 question for the ex-convict should be yes, but
20 when it came to the answer for the seventeen-year-
21 old, they very well might feel when the question
22 came to his case, it should be no because the
23 conduct that caused her death was not on his
24 part.

25 There could be different circumstances

1 that could require different answers to Question
2 1, even though someone were found guilty of the
3 offense of knowingly and intentionally killing
4 another person, and in capital murder.

5 A Yes. That is clear.

6 Q Now, the second question asks you to make a little
7 bit different determination. It asks you to make
8 a determination, not so much about the facts of
9 the case, although they are very important in
10 making this determination, but it asks you to make
11 a determination about the man on trial, what kind
12 of person is he? It asks you to find out, if
13 you can, in answering the question, if you can,
14 whether or not the person on trial, the man on
15 trial is the type of person or there is the
16 probability that he would commit criminal acts
17 of violence that would constitute a continuing
18 threat to society, and we have underlined that
19 phrase and these words here to help draw the
20 juror's attention to these questions we talk
21 about.

22 This first word is "probability," and
23 I would like to point out all this question
24 requires of you as a juror is to believe there is
25 a probability -- not a certainty, and I think you

1 realize why. The legislature who drew these
2 questions up did not require the jurors to put
3 themselves in the position of God, and he is
4 the only person I know of who could answer
5 this question or predict what any person could
6 do to a certainty, and you are not asked to place
7 yourselves in the position of God. Probability
8 is not a certainty -- that the man would engage
9 in this type of conduct, criminal acts of
10 violence.

11 Before you answer this, you do not
12 have to believe nor does it have to be proven to
13 you the man would have to commit any particular
14 type of violence, whether they be assaults,
15 kidnappings, robberies, rapes, burglaries, or
16 any other type of criminal act of violence we
17 can think of.

18 That phrase includes the whole works.
19 Is the man the type of person where there is a
20 probability he would engage in that type of
21 conduct, and would that conduct constitute a
22 continuing threat to society.

23 And the word society is all-inclusive.

24 Okay?

25 A Yes, sir.

1 Q I think you realize, after a man is found guilty
2 of capital murder, the society he is going to
3 find himself in is the prison society, but I
4 hope you would agree with me -- maybe you would
5 disagree -- but I hope you would agree that there
6 are people who work in the prison system. They
7 have a right to serve out their time and hopefully
8 make a better life for themselves if they want to
9 or choose to.

10 Do you follow me on that portion?

11 A Yes.

12 Q Now that I have had a chance to go over both of
13 those questions with you, do you have any questions
14 of me about Questions 1 or 2 that we can talk
15 about now?

16 A I believe not, sir.

17 Q Okay. Is there anything about the way the
18 questions are worded, just the way they are worded
19 -- not about the evidence you might hear -- that
20 you feel like would make it impossible for you
21 to answer 1 or 2 because of the wording these
22 questions contain?

23 A No.

24 Q Or do you feel like you could answer them based
25 upon the evidence you will hear?

1 A I believe so. Yes, sir.

2 Q Now, let me point one final thing out in regards
3 to these questions, and I will get off of those.

4 The jury does not have to hear
5 additional evidence other than the evidence
6 surrounding the crime itself. In a proper case,
7 the jury can answer these questions yes based on
8 just the evidence of the crime itself, and I
9 guess the classic example of that that comes
10 immediately to all of our minds is the case of
11 Ronald Clark O'Bryan, the man who poisoned his
12 children on Halloween for insurance money. That
13 is a case already affirmed in the Court of
14 Criminal Appeals. The jury can answer these
15 without additional evidence. There is no
16 requirement of that. I just want to point that
17 out to you.

18 However, your answers are not automatically
19 yes just because the man is found guilty. Just
20 because a jury has returned a guilty verdict is
21 not a reason to automatically answer either one
22 of the questions yes.

23 Do you follow me on that?

24 A Yes.

25 THE COURT: Excuse me.

1 Mr. Kellogg, I have a cup of coffee.
2 Would you like some?

3 Excuse me, Mr. Moen.

4 MR. MOEN: That is fine, Judge. I
5 need to catch my wind anyway.

6 We have been doing this for a couple
7 of weeks and there was one time when I stayed
8 until 11:30 at night picking jurors, and they were
9 as happy as I was about that.

10 THE COURT: You might point out that
11 was not in this case.

12 MR. MOEN: That was not this judge, but
13 in any event, let's talk to you about -- I
14 noticed you have been a character witness in a
15 case and served once on a civil jury.

16 Q Let me talk to you about the obligations that
17 will be required of you as a juror in a criminal
18 case. They would be no different in a capital
19 case from any other case, but I want to point
20 out some things required by your jury service
21 to see if you agree or disagree.

22 I didn't tell you this, and you strike
23 me as being the type of person I wouldn't have
24 to say it to, but if you have any disagreements,
25 let me know. If you have any questions anytime

1 I am talking, don't hesitate to interrupt me as
2 to whatever is on your mind so we can clear it
3 up now.

4 There are rules that govern a lawyer's
5 conduct after jurors are selected, and if you had
6 any questions, you know -- it's the thing I guess
7 I live in the most fear of -- that after three
8 or four weeks of trying to get a jury together on
9 a case like this, there would be one question
10 a jury wanted to ask that inhibits their ability
11 to reach a verdict, and as a result, the jury
12 doesn't reach a verdict and we have to go through
13 the whole process again. That, I think, is a
14 recurring nightmare I have in the practice of
15 law in cases like this.

16 I encourage jurors, if you have any
17 disagreement, please do not hesitate to ask so
18 we can clear it up now.

19 A All right.

20 Q The judge will tell you in writing -- the judge
21 used the phrase earlier this morning -- in his
22 charge of the Court, and I know I have talked about
23 it.

24 The charge of the Court is a legal
25 paper like this, and the judge will set out in

1 legal writing for you and for the jurors as to
2 exactly what the law defines as capital murder.
3 He will define intentionally and knowingly and
4 he will define the legal definition of the
5 phrase of murder and what a police officer is
6 and other facts pertaining to the case, and you
7 will all take the facts you have heard from the
8 witness stand and apply those to the law the
9 judge gives you and see if those fit the
10 definitions, and that is how you decide the case.

11 The judge also with the legal
12 instructions, also will include admonitions as
13 to what jurors should do, and the judge will tell
14 you first off you are not to consider the Grand
15 Jury indictment as any evidence of anything
16 whatsoever. Basically, in legalese, he will talk
17 about what it means, and the Grand Jury indictment
18 is not evidence at all. It is kind of like a
19 starter's pistol in a race. Until the gun goes
20 off, you can't have a race, and until the Grand
21 Jury indicts him, we cannot go to trial. You can-
22 not consider it as evidence.

23 Do you feel you can abide by that?

24 A Yes, sir, I could.

25 Q The judge also talked about this, this morning:

1 As the Defendant sits here, you have to presume
2 he is innocent. I don't want to insult your
3 intelligence and say that just because a man is
4 presumed to be innocent, he is not guilty. I
5 think you realize that a man caught in an act is
6 just as guilty when he is caught as when he comes
7 to the jury. However, the law says when jurors
8 don't know anything about a crime a man has
9 committed, they should base their verdict on what
10 evidence they hear in the courtroom. That is
11 basically what the presumption of innocence is
12 all about.

13 Do you feel you could afford the
14 Defendant the presumption of innocence and base
15 your verdict on what you hear from the witness
16 stand?

17 A Yes, sir.

18 Q The law will also tell you if the Defendant fails
19 to testify, you are not to consider his failure
20 to testify as evidence of his guilt, but on what
21 evidence they have heard from the witness stand
22 rather than from the fact the Defendant has
23 decided that at his trial, he wanted to remain
24 silent. That is called the Defendant's failure
25 to testify.

1 You see, the Defendant can, if he
2 wants to, get on the stand at his trial. Any
3 person can. But as crazy as it may seem, if a
4 person doesn't want to testify, he can remain
5 totally silent. At one of the most important
6 days of his life, he can remain seated at the
7 counsel table and never get on the stand to
8 testify if he decides, for whatever reason, that
9 is what he wants to do.

10 The only thing the judge tells you is
11 that if he chooses to remain silent, you are not
12 to consider that as evidence of his guilt.

13 Do you agree on that?

14 A Yes.

15 Q I do anticipate he will testify, but I must tell
16 you and the judge will charge you if he does not,
17 that is no evidence of his guilt.

18 The judge will also tell you that the
19 burden of proof in a criminal case rests right
20 here with Mr. Bax and myself. Before you can say
21 by your verdict, Mr. Kellogg, that the Defendant
22 was guilty, you would have to say Mr. Bax and I
23 have proved it to you beyond a reasonable doubt.
24 That is the phrase. You have to believe we have
25 proved it to you beyond a reasonable doubt.

1 If you feel we haven't, if you have
2 any doubt, you would have to look at me and say,
3 "You did the best job you could, but that is not
4 enough. You didn't meet your burden of proof.
5 You didn't prove it beyond a reasonable doubt,
6 and therefore, I find the Defendant not guilty."
7 That would be the proper thing.

8 Do you follow me on that?

9 A. Yes, sir.

10 Q. Both sides are wide open. All right?

11 If the Defendant wants to subpoena a
12 witness, the clerk will give the subpoena to a
13 process server. It doesn't cost a thing but the
14 taxpayers' money. Both sides can offer whatever
15 evidence they want to, but only one side has
16 the burden of proof, and that is this side here,
17 Mr. Bax and myself. We have to prove to the
18 jury beyond a reasonable doubt. That is not to
19 prove, as we hear on the lawyer shows now and
20 then, "beyond all doubt," "any doubt," "a shadow
21 of a doubt."

22 When I was a kid growing up, Perry Mason
23 was one of the must shows in my family, and as
24 a kid growing up, I can't tell you how many times
25 Mr. Burger was bested by Perry Mason because he

1 had not proved his case beyond a shadow of a
2 doubt. That is on the lawyer shows.

3 Here in the courtroom, the test is
4 beyond a reasonable doubt. Why is that? The
5 law recognizes, and I think we do, that for anyone
6 to be convinced beyond a shadow of a doubt or
7 beyond all doubt or any doubt, they would have to
8 be present when the transaction or offense took
9 place themselves.

10 Now, our law says that witnesses can
11 never be jurors on a criminal case. Only people
12 who don't know anything about the crime that
13 took place, who find out about it for the first
14 time inside a courtroom from witnesses who are
15 telling them about it can be jurors, and I think
16 the law realizes the inconsistencies that can
17 occur even between eyewitnesses who viewed the
18 same transaction take place.

19 Although the burden of proof is not
20 beyond a shadow of a doubt or all doubt but
21 beyond a reasonable doubt -- and there is no
22 definition for that phrase, beyond a reasonable
23 doubt. That definition applies to the second
24 phase of the trial as well.

25 Before you can answer those questions

1 yes, you have to believe beyond a reasonable
2 doubt that Mr. Bax and I have proven it yourself.

3 I want to tell you there is no way
4 beyond God himself that Question 2 can be proved
5 beyond a shadow of a doubt. Therefore, the proof
6 is also to those questions not beyond all doubt
7 but beyond a reasonable doubt.

8 Do you follow me on the burden of
9 proof?

10 A Yes, sir.

11 Q Let me tell you about judging the credibility of
12 witnesses, and the only thing I want to say in
13 that regard, and I think you understand one of
14 your functions as a juror is to make a judgment
15 call and decide if you are going to believe what
16 a witness has told you or disbelieve what a
17 witness has told you.

18 You may find it crazy to believe, but
19 there are people who have sworn to God to tell
20 the truth, but let me assure you there are many
21 people who visit the courthouse and get on the
22 stand and swear to God to tell the truth in front
23 of people who have come to watch the trial, and
24 they swear to tell the truth and don't do it.

25 Unfortunately, it happens more often

1 than we would like, and that is why it falls
2 on the jurors during the course of a trial to
3 decide whether they are going to believe or
4 disbelieve any or whatever part of what a witness
5 has told them, even though they have been under
6 oath.

7 The only thing the judge will tell you
8 in that regard is this: When you are judging
9 the credibility of a witness, you are not to
10 give the witness more belief or less belief
11 because of a witness' job.

12 If a witness' job enters into their
13 testimony, it is perfectly permissible for you,
14 as a juror, to consider that witness' occupation,
15 such as doctors testifying about medical experiences,
16 police officers with twenty-two years' experience
17 telling you what information he gained as a result
18 of his experience and training. That would be
19 proper.

20 I am only talking about before a
21 witness gets on the stand and testifies, the law
22 does not recognize any witness as being an
23 automatic truth-teller just because of the job.

24 Do you follow me on that?

25 A Yes, sir.

1 Q The judge will put that in writing as well.

2 Let me talk to you about two final
3 things. We mentioned the range of punishment
4 for the offense of murder, and the only reason
5 I mentioned that range of punishment in the
6 first place was by way of explanation, and also
7 to reach this point that I am at right now.

8 Every offense of capital murder includes
9 the lesser offense of murder. Now the reason
10 I say "lesser offense" is because murder carries
11 a lesser range of punishment than the offense
12 of capital murder. The person who commits the
13 offense of murder, the maximum punishment he can
14 receive is ninety-nine years or life in the
15 penitentiary. For someone to commit capital
16 murder, he can receive the death penalty, so
17 murder is a lesser included offense, a lesser
18 offense than the offense of capital murder.

19 Let me explain to you how that pertains
20 to your jury service or might be important to
21 your jury service. If you were a juror in a
22 capital murder case where a man, let's say in
23 the hypothetical situation we have used, the
24 robbery-murder of a convenience store cashier,
25 if that man were charged with capital murder

1 and you were a juror and you heard the evidence
2 surrounding the death of that cashier but yet
3 you learned during the course of the trial that
4 really a robbery didn't take place, that the
5 reason the man killed her was not to steal
6 money, but he had had a relationship with her and
7 they had been girl friend and boyfriend living
8 together off and on and they had had an argument
9 earlier in the day and it was not for money,
10 and that argument culminated in her death, along
11 with the pistol he brought into the store, and
12 some of the witnesses were actually mistaken that
13 it was really a robbery, and you were convinced
14 of that, in that case, your obligation as a
15 juror and the rest of the jurors would be to say
16 not guilty of a capital murder because this man
17 did not commit the murder during the felony offense
18 of robbery, but the lesser offense of murder.

19 You see, unless the murder takes place
20 to one of those protected classes of individuals
21 I have mentioned or unless the murder takes place
22 during the course of one of the felonies I have
23 talked about, the man is only guilty of murder
24 but not capital murder.

25 Now, our law also applies or says,

1 excuse me, that where a person is convicted of
2 the offense of murder, if that person makes
3 application to the Court, he can be given a
4 probated sentence for the offense of murder.

5 Are you familiar with the phrase
6 "probation" at all?

7 A Yes, sir.

8 Q It means released by the Court under conditions
9 imposed by the Court, is basically what probation
10 means.

11 But the way probation applies to
12 felony cases is as follows. The jury can only
13 recommend probation for a Defendant where they
14 feel like it is the proper thing to do, first of
15 all. If a jury doesn't feel probation is
16 proper, nobody gets probation, only where the
17 jury arrives at a sentence of ten years or less.
18 In other words, where the jury agrees that the
19 proper punishment is ten years or less, then the
20 jury, if they feel it is a proper case, can
21 recommend probation to the Court.

22 Now, if they recommend probation to the
23 judge, he must give him probation.

24 Let me explain to you and give you a
25 hypothetical situation about how in a capital

1 murder case the lesser included offense of
2 murder and probation might apply to a particular
3 hypothetical, and I hope this might explain all
4 the things we have talked about so far.

5 Imagine a case where a man and woman
6 have been married for forty or fifty years. They
7 are in their seventies. They find themselves
8 in the hospital, and he is dying. He has some
9 kind of incurable disease, and the best they can
10 do is make him as comfortable as possible and
11 prolong his life as long as possible. She's
12 got a cot she sleeps on down there. They have
13 loved each other for a number of years. They
14 have talked about it, and all their family
15 resources are dwindling. The only end result of
16 his lingering is she is going to be destitute,
17 on food stamps or what have you.

18 They decide the best thing is to let
19 him pass, and she intentionally or knowingly
20 disconnects the life-support system and he passes
21 on during the night.

22 Technically, she commits the murder.
23 She nonetheless has technically committed the
24 murder, has intentionally and knowingly taken a
25 person's life or assisted in the taking of a

1 person's life. That is murder.

2 Let's say some of the brothers and
3 sisters on his part are really upset when they
4 find out how their brother died, and they are
5 convinced the only reason she did this is because
6 they own a little piece of property out there,
7 a half acre they may have bought years ago up
8 in the north of town. They were going to save
9 perhaps to retire on or put a home on sometime,
10 but there is a builder up there who wants that
11 piece of property and he pays her quite a bit
12 of money to get her to sell him that land for
13 one of those condominiums that seem to spring up
14 more and more all the time. A Grand Jury finds
15 she has committed capital murder, murder for money.
16 She has taken his life so she could sell that
17 piece of property he was opposed to selling, to
18 get that money she thought he was going to spend
19 for further medical treatment. She gets indicted
20 and the jury says, "This is the most preposterous
21 thing we have ever heard of," yet they follow
22 their oath and find her guilty of murder.

23 You see, from those facts, that is what
24 their verdict ought to be, and then when the
25 jury decides what punishment this woman ought to

1 receive for what she has done, even though they
2 believe it was an act of love, they assess a
3 punishment in this case, and perhaps that might
4 be a proper case for probation.

5 I am not trying to find out what you
6 would do in that case, but I hope I have managed
7 to explain that term, "lesser included offense,"
8 and how you can wind up with a decision of murder
9 and ultimately even wind up with a verdict
10 arriving at probation.

11 The only thing I want to ask you is
12 this: If you were a juror in a murder case, can
13 you imagine a set of circumstances in your own
14 mind where you might feel probation was a proper
15 verdict for someone, even though you had found
16 someone guilty of the offense of murder?

17 A I would have to say it would have to be an extreme
18 exception from the general run.

19 Q I don't quarrel with that statement whatsoever.
20 Again, that probably puts you in the 99.9 percentile
21 of people who come in here and make statements
22 along those lines. That is what I want.

23 Is there in your mind, even though an
24 extreme case you can think of, some facts in
25 your mind where the probation would be proper

1 even though the person had committed the
2 offense of murder?

3 A I think so, yes.

4 Q Do you have any questions of me, Mr. Kellogg, as
5 far as -- about anything we have talked about?

6 A No, sir.

7 Q Thank you.

8 And Mr. Bax -- did you ever see the
9 picture "Animal House" with the devil on one
10 shoulder and the angel on the other?

11 I don't mean to imply he is the devil,
12 but without him, I wouldn't be able to function.
13 He whispers things in my ear I might forget.

14 This is important. The judge will
15 charge you on one final thing when you are
16 deliberating on what your answers to 1 and 2 would
17 be if you were selected on this jury panel. He
18 will tell you how long a person would have to
19 serve in the penitentiary on any given sentence
20 the jury would assess is a matter best left to
21 the Board of Pardons and Paroles and the jury
22 must not consider it. It would be grounds for
23 a mistrial and we would have to start the trial
24 all over again. No one wants to see that happen
25 at all, and it is the reason I tell you.

1 I take it you would abide by what
2 the judge tells you to do? I need your commitment
3 that if anyone talks to you like that, you will
4 let us know. I think they will listen to you
5 if they take a look at your size. If you would
6 do that, that would help all of us out in the
7 long run.

8 I want to ask you about your service
9 experience. I take it you were stationed in
10 Vietnam during '71?

11 A I was stationed with a bomber outfit.

12 Q Strategic air command?

13 A We had reflex maintenance missiles where we
14 carried some cargo into Saigon just on a temporary
15 basis.

16 Q You were a character witness at a -- is this
17 a soliciting of prostitution case?

18 A Yes. Uh-huh.

19 Q Was that for a friend of yours or acquaintance?

20 A Yes.

21 Q He wasn't one of those individuals caught up in
22 one of those sting operations around town?

23 A No. As a matter of fact, in this particular case,
24 it was a girl from Vietnam we felt got a little
25 bit of a rush on this, because she didn't

1 understand English very well, and she was working
2 in one of those clubs off Broadway.

3 Q Off Broadway?

4 A Yes.

5 Q It seems that entire area has been taken over by
6 Asiatics or Koreans. Funny how those clubs go
7 through different ownerships over the years.

8 What type of hunting do you like to
9 do? Bird hunting? Deer hunting?

10 A I have done a lot of bird hunting. I haven't
11 done much deer hunting or big game hunting.
12 I haven't found any big deer to go after.

13 Q Not a whole lot.

14 Okay. I see you knew Mr. Newburg back
15 when you were living in Portland, Oregon, for
16 five years, and he was a member of the police
17 force there?

18 A Yes.

19 Q The only reason I cover that is to mention to you,
20 with regards to the credibility of witnesses,
21 even a police officer is not accorded in the eyes
22 of the law any more or less belief than any other
23 witness.

24 Certainly, if his job or experience
25 enters into his testimony, certainly his job

1 can enter into his testimony, but unless he
2 testifies as a police officer, you are not to
3 believe him any more or less than any other
4 witness.

5 Do you follow me on that?

6 A Yes.

7 Q It seems like there was something else I wanted
8 to ask you.

9 Oh, let me check with Mr. Bax and see
10 if he has any --

11 I know what I wanted to bring up to you.
12 I anticipate the trial will probably last about
13 a week, and how is that going -- what is that
14 going to do to your job? What is your employer's
15 position, you know, as far as employees being
16 down here on jury service?

17 A We are lucky in that our contract pays for time
18 or hours missed while serving on a jury.

19 Q The only other thing in addition to that -- we
20 check with people about their jobs -- the only
21 other thing is this may or may not happen, but
22 the law provides when the jury is deliberating
23 about and making a decision about whether or not
24 a man is guilty or not guilty or deliberating on
25 the punishment in the case, the jury not be

1 separated. The jurors have to remain together
2 until they have reached a decision about the
3 fact of whether the man is guilty or not guilty,
4 and after they have reached their decision, they
5 can separate and go back to their homes until
6 they are deciding what their answers to Questions
7 1 and 2 will be, and then they have to be kept
8 together while they are deliberating, and on a
9 working day, they will be sequestered, taken to
10 a hotel, given rooms, and kept together until
11 they come back to their deliberations in the
12 courtroom that day.

13 Do you think your wife could handle all
14 your kids at the house while you are down here
15 for one night or so?

16 A She would be able to handle them, I am quite sure.

17 Q Well, it looks like that is a houseful to handle.
18 That certainly is a large family, which you
19 probably know.

20 A It keeps both of us out of mischief. That is for
21 sure.

22 Q It certainly wouldn't make you lack for something
23 to do.

24 Mr. Kellogg, I appreciate your letting
25 me visit with you.

1 Let me ask you one final thing. If
2 I didn't, I know they will, and they will probably
3 ask you about it.

4 I think the evidence in the case might
5 show the Defendant is an illegal alien. Would
6 that affect you one way or the other as to whether
7 he is guilty or not guilty? Would that affect
8 you?

9 A No, sir. It wouldn't do that.

10 Q Good.

11 I will pass you to the Defense, and I
12 know they will have questions to ask you, and I
13 appreciate your allowing me to visit with you.

14 Thank you.

15
16 EXAMINATION

17
18 QUESTIONS BY MR. ELIZONDO:

19 Q How are you doing today?

20 A Hello.

21 Q This part of the trial is called voir dire.

22 Voir dire is a French word which means
23 to speak the truth. The reason we are here is
24 to ask you certain questions about certain things.

25 Once you get in that jury room, you

1 can't talk anymore, so we need to know how you
2 feel in a criminal trial.

3 As the prosecutor mentioned to you,
4 this is a criminal case. As in any criminal
5 case, the State has to prove certain elements to
6 you beyond a reasonable doubt.

7 In this type of case, the State must
8 prove to you beyond a reasonable doubt that on
9 a particular day in Harris County, Texas, this
10 Defendant intentionally and knowingly shot a
11 police officer in the lawful discharge of an
12 official duty knowing at the time he was a
13 police officer by shooting him with a gun.
14 They must prove that to you beyond a reasonable
15 doubt.

16 The judge will not define what that
17 term means. The Prosecution will not, and I
18 can't, because there is no legal definition
19 of "reasonable doubt."

20 Well, I can tell you though by reason
21 of analogy, that across the street in the civil
22 courthouse where they try lawsuits over personal
23 injuries and over contract disputes, sometimes
24 for millions of dollars, the burden of proof over
25 there is proof by a preponderance of the evidence,

1 the greater weight of the credible evidence.

2 Here in the criminal courthouse, the
3 legislature said, "Wait a minute. Before you can
4 forfeit anybody's life as in this type of case,
5 we are going to put the State to a heavier
6 burden, and that is proof beyond a reasonable
7 doubt." It is a heavier burden, and rightfully
8 so.

9 Before the State of Texas can forfeit
10 anybody's life, we better make darn sure they
11 have the right man.

12 Do you agree with me there?

13 A. Yes, sir. Definitely.

14 Q How do they do that? They do that by presenting
15 witnesses to come out here and sit on the same
16 stand you are sitting on and giving their rendition
17 of the facts. While they are telling you about the
18 facts, you will be sitting there looking at the
19 witness. You will be looking at his demeanor,
20 listening to what he is going to say, and if he
21 has said anything differently from what he has
22 said previously, and based on that, you can judge
23 his credibility. You can believe any part of
24 what he says, all of it, or none of it.

25 You, as the prospective juror, will be

1 the judge of the facts. It will be your job
2 and your function and your duty to decipher the
3 facts and find out in your own mind if the State
4 has proven its case to you beyond a reasonable
5 doubt.

6 After the State is through presenting
7 witnesses, they will then rest their case. That
8 means, "That is all we have."

9 The Defendant can, if it chooses,
10 present evidence. We don't have to. We can rest
11 our case right behind the State.

12 How would that affect your deliberations,
13 if after hearing the State's evidence, you are
14 sitting back there and you say to yourself, "Well,
15 I think he did it. I am not sure. I am not sure
16 they have proven their case to me beyond a
17 reasonable doubt, but the Defendant didn't testify."

18 What would your verdict be in that
19 situation?

20 A. Under that situation, I would have to go with
21 the not guilty.

22 I would hope that the right of the
23 Defendant not to have to testify would be given
24 to me if I were in an action myself, but just
25 because he had not testified in his own behalf,

1 I couldn't hold that against a person.

2 Q In any way, shape, form, or fashion?

3 A No, sir. I don't believe so.

4 Q Okay, then, by the same token, after the State
5 rested their case, we can present evidence. We
6 can call witnesses, and if we do so, I can
7 guarantee you one thing. There will be two
8 diametrically opposed stories, and again, it will
9 be the job of the jury to decide the facts based
10 on what you have heard from that witness stand,
11 and if you believe beyond a reasonable doubt that
12 the State has proven its case, then it will
13 become your job or your duty to find him guilty.

14 By the same token, though, if you
15 don't believe beyond a reasonable doubt that
16 the State has proven its case, it will become
17 your duty under your oath to find him not
18 guilty.

19 In this type of case where a police
20 officer is killed, would that make it any harder
21 for you to find him not guilty if the State
22 hadn't proven their case?

23 A No, I don't believe so. I feel that irregardless
24 of what station a person holds in life, his life
25 is the top priority.

1 Q When you say his life, whose life are you
2 referring to?

3 A Everyone's.

4 Q Okay.

5 In a capital murder case, if you find
6 the Defendant guilty of intentionally and
7 knowingly killing a police officer, then we go
8 to the punishment stage.

9 Every trial in Texas has two parts.
10 They call it a bifurcated trial, a bifurcated
11 system. That means two parts.

12 If you find him guilty of killing a
13 police officer, intentionally and knowingly
14 killing a police officer and you believe it
15 beyond a reasonable doubt, then you've got to find
16 him guilty.

17 Then we go to the second stage, the
18 punishment stage. At that point in time, the
19 only possible punishment is either life or
20 death, and of course, that is determined by how
21 you answer the questions.

22 In the first question, we will ask
23 you whether the conduct of the Defendant that
24 caused the death of the deceased was committed
25 deliberately. Deliberately is underlined.

1 Deliberately is one of those terms the
2 legislature never saw fit to define. There is
3 no legal definition of deliberately. Some people
4 say it means to ponder on or think about, put
5 under consideration. Other people have said
6 premeditate.

7 What do you think the word deliberately
8 means?

9 A Well, I would have to define that as purposeful.

10 Q Purposeful?

11 A Yes, sir.

12 Q Let me backtrack a little bit, and in the guilt-
13 or-innocence stage, you have found him guilty of
14 intentionally and knowingly killing a police
15 officer, correct?

16 A Yes, sir.

17 Q Then we go to the punishment stage, and in
18 Question No. 1, would you automatically answer
19 Question No. 1 yes solely because you found him
20 guilty of intentionally and knowingly killing a
21 police officer in the guilt-or-innocence stage?

22 A You see, what I am getting at, you
23 were talking about when the evidence is presented?

24 Q Uh-huh.

25 A And we feel that, let's say, that -- we felt that

1 the evidence was justified in bringing in --

2 Q No, like I said, there's two parts to a criminal
3 case.

4 A Yes, sir.

5 Q First of all, there's the guilt-or-innocence
6 stage. First of all, at that part, you determine
7 whether or not he is guilty or not guilty.

8 If you find him not guilty, then we
9 don't go to the punishment stage.

10 A All right. Yes, sir.

11 Q We don't even answer those two questions.

12 If you find him guilty, then we've got
13 to answer those two questions.

14 Just because you found him guilty of
15 intentionally and knowingly killing a police
16 officer in the first stage, would you automatically
17 answer Question No. 1 yes or would you want to
18 hear some evidence in the punishment stage?

19 A No. I feel I would have to hear some further
20 evidence in the punishment stage.

21 Q So if you found someone guilty of knowingly and
22 intentionally killing a police officer, you would
23 not automatically answer those two questions yes
24 just so you would get the desired result of the
25 death penalty?

1 A No, no.

2 Q What is your preference -- again, no right or
3 wrong answers -- life in the penitentiary or
4 death?

5 A Well, my personal preference, if I was subject to
6 either one of those, it would have to be life.
7 I think that goes without exception.

8 MR. MOEN: That would be a good choice.

9 Q (By Mr. Elizondo) Let me -- and I don't want to
10 belabor the point, but Mr. Moen brought it up
11 a while ago. I think it was the last question
12 about illegal aliens.

13 About three or four months ago, I think
14 it was, the Supreme Court said children of illegal
15 aliens have a right to a free education. How
16 do you feel about that?

17 A Well, this, to myself, this would be just between
18 the State and the Federal Government. As far as
19 a person being in this country whether legally
20 or illegally, I feel they do have a right to an
21 education because they are trying to assimilate
22 themselves in our particular type of society. I
23 feel they should be given the same advantages
24 that a citizen of this country has.

25 Q So it wouldn't affect your deliberations on the

1 guilt or innocence of this man?

2 A I would hope it would not. I feel fairly certain
3 it would not.

4 Q You are most certain it would not?

5 A I feel most certain it would not.

6 Q Let me backtrack a little bit. I am not sure if
7 Mr. Moen went through it or not, but back -- I
8 am going to give you a brief rendition of facts
9 just solely to find out if you have any knowledge
10 of this case.

11 Back on July 13th, 1982, about seven
12 or eight weeks ago, a police officer stopped two
13 people on a routine traffic stop on the east
14 end over here on the corner of Edgewood and
15 Walker streets. The police officer got shot.
16 He was shot three times in the head, and sixty
17 or seventy yards away, an innocent bystander
18 was driving by in a station wagon, and he got
19 shot also, and then about an hour and a half
20 later, a police officer was shot five times by
21 somebody who was later also killed.

22 Do you recall any of the facts in that
23 case?

24 A Just from the presentation on the local television
25 stations, the fact that it did make coverage on

1 just about all channels for several days.

2 Q Well, after you heard of that coverage and you
3 read the newspaper reports or listened to it, did
4 you form any kind of opinion as to the guilt or
5 innocence of the man that allegedly perpetrated
6 this crime?

7 A No. In fact, I had questions about that under
8 the circumstances under which the two people were
9 apprehended. I formed no opinion as to, you know,
10 whether they were the actual ones that performed
11 the act at Edgewood and 45 or not.

12 Q Okay. You understand, of course, that police
13 officers are also human, and they can make
14 mistakes on judgment calls or otherwise?

15 A Yes, sir.

16 Q And that they have the same frailties as you and
17 I have, right?

18 A Yes, sir.

19 Q Excuse me a moment.

20 A Yes, sir.

21 Q Mr. Kellogg, if you are selected on this jury
22 panel, can you commit yourself and can you
23 promise us one thing and that is that you will
24 give this man, Ricardo Aldape Guerra, a fair
25 trial and base your evidence and base it solely

1 on what you hear from the witness stand?

2 A Yes, sir. I can.

3 Q And can you set aside any feelings or emotions
4 you might have in regards to this case?

5 A I believe so, yes.

6 Q Let me ask you -- you can separate emotion
7 from facts, can't you?

8 A I should hope so.

9 Q Who is Dave Newburg? Was he a good friend of
10 yours?

11 A He was a personal friend. I had met him shortly
12 after moving out to Oregon when I was discharged
13 from the Air Force. We had a fairly close
14 friendship for approximately two years, and then
15 he joined the Portland P.D. at that time, and we
16 rather went our separate ways due to working
17 hours.

18 I haven't had personal contact with him
19 since we left the Portland area in about 1970,
20 I believe it was.

21 Q Did you ever talk about any kind of criminal case,
22 you and your friend, Dave Newburg?

23 A Not to any great detail. He seemed to be a little
24 bit interested and knew where all the girls were
25 in town, so to speak, and that was about the

F2068 1011

1 extent of it.

2 Q The fact that your friend was a police officer,
3 would that bias you or affect you in any way or
4 affect your judgment in a trial such as this?

5 A I don't believe so.

6 Q Consciously or subconsciously? We will say
7 consciously?

8 A Consciously, no. I don't believe so.

9 Q Hold on for a second. Okay.

10 MR. ELIZONDO: We will pass him.

11 MR. MOEN: We will accept him.

12 THE COURT: What says the Defense?

13 MR. ELIZONDO: We will accept him,
14 Your Honor.

15 THE COURT: Mr. Kellogg, you will be a
16 member of this jury. I am going to give you a
17 sheet of paper that will tell you where to report
18 and give you some phone numbers.

19 As I told you earlier this morning, it
20 will probably take us maybe two to three weeks
21 to complete the selection of this jury. You
22 are the fourth juror selected, so we have a long
23 way to go.

24 In the meantime, you will be allowed
25 to go about your normal activities, work, or

F2068 1012

1 whatever. Should you have an emergency arise
2 where you need to leave town or anything of that
3 nature, please get in contact with us at the
4 numbers I have given you.

5 I am going to instruct my coordinator
6 to -- that sounds bad -- I am going to ask my
7 coordinator to check with the jurors from time to
8 time and give them some idea of when we might be
9 calling you back down here for the trial.

10 I anticipate your having at least a
11 day or two between the time you are selected as
12 a juror until the time you are notified.

13 Please stand and be sworn as a juror.
14 Raise your right hand.

15 (Mr. Kellogg was sworn as a juror.)

16 THE COURT: The name I have written on
17 the bottom is my court coordinator's, and should
18 you have anything arise that you need to know
19 about, please call and ask for him.

20 In the meantime, there may well be
21 coverage in the media, one form or the other in
22 the media concerning this particular case. I am
23 almost certain that between now and the time we
24 select the jury there may be isolated times there
25 may be something on it.

1 Please, should you be watching
2 television and anything should come on television
3 about this case, go out of the room or turn it
4 off, and do not listen to, watch, or read anything
5 about this particular case. Your decision in this
6 case must be based upon evidence you have heard
7 from the witness stand and nothing else.

8 MR. KELLOGG: Yes, sir.

9 THE COURT: Please remember that
10 admonition, and unless you have other questions
11 of us at this point, you may be excused.

12 We will be in contact with you when
13 to report.

14 MR. KELLOGG: Would it be possible to
15 have some forms transacted with your clerk?

16 THE COURT: For your employment?

17 MR. KELLOGG: For my time.

18 THE COURT: Yes, sir. He will give you
19 a form which states to your employer where you have
20 been.

21 Thank you very much.
22
23
24
25

1 THURMAN HOWARD MATTHEWS,
2 was called as a prospective juror and responded to
3 questions propounded as follows:
4

5 EXAMINATION
6

7 QUESTIONS BY MR. BAX:

8 THE COURT: Mr. Matthews, as I told
9 you this morning, I am going to ask you a few
10 questions, or rather, they are; I am not.

11 But please be relaxed as much as you
12 possibly can.

13 There are no right or wrong answers to
14 the questions. We want you to speak about how
15 you feel about certain things. If you have
16 questions, either of me or the lawyers, feel free
17 to ask them.

18 You may proceed.

19 Q (By Mr. Bax) It's been a long afternoon, Mr.
20 Matthews.

21 A No longer than usual.

22 Q I am sorry we have had to have you stay around
23 all day, but I am sure you understand the
24 necessity of what we are going through today, and
25 probably will be going through the next couple of

1 weeks trying to select a jury.

2 I am Dick Bax with the District
3 Attorney's Office, and Bob Moen seated to my
4 right is also with the District Attorney's Office.
5 We will be representing the State in this case
6 and also the family of Officer James Harris.

7 Before I actually get into any
8 discussions with you about the law or any issues
9 we expect will be raised in this case, let me
10 give you some background information, sketchy
11 information, and see if you have perhaps read or
12 seen on TV or heard on the radio anything about
13 this case, and to see if you have formed any
14 type of opinion in this case.

15 I believe the evidence would show that
16 back on July 13th of this year, an officer named
17 James Harris had stopped a vehicle which was
18 operated by two people on a routine traffic stop,
19 at which time shortly after he had stopped the
20 vehicle, he was shot three times in the head.

21 As the two people were running off,
22 a civilian driving down the street with his two
23 children was shot once in the head, and he also
24 died.

25 Around an hour and forty-five minutes

1 after these two incidents took place, another
2 police officer named Larry Trapagnier was shot
3 five times and one of the two suspects was shot
4 and killed.

5 This all took place at the intersection
6 of Edgewood and Walker which is on the east side
7 of Houston around the Harrisburg area, and all
8 these transactions took place basically in the
9 same general area.

10 With just that little bit of information
11 I have given to you, does that trigger your memory
12 as to hearing about or reading anything about this
13 case?

14 A I remember seeing it on the 10:00 o'clock news.

15 Q All right. Have you, because of what you may have
16 seen on the news, formed any opinion at this point
17 in time as to the guilt or innocence of anyone
18 involved in this case?

19 A No, sir.

20 Q The reason I ask you about that is the law requires
21 that the twelve people ultimately selected as
22 jurors in this case, that they have no preconceived
23 opinions or notions of the guilt or innocence, but
24 rather, they form whatever opinions after they
25 hear the evidence.

1 I take it it is fair to say at this
2 time you have not formed any type of opinion as
3 to the guilt or innocence of the Defendant, Ricardo
4 Guerra, at this point in time?

5 A No, sir.

6 Q The reason we conduct individual voir dire
7 selection in a capital murder case is because
8 of the significant punishment that may be involved.

9 If a person is convicted of a capital
10 murder, there is only one of two punishments that
11 would be given by the jury and the judge, and
12 that is either life or death.

13 We have people in our society who have
14 many different viewpoints on the death penalty.

15 Some people believe that anytime a person
16 is killed, the person who did the killing should
17 forfeit their life. Other people believe that
18 well, the State nor any other individual has the
19 right to take another person's life no matter
20 what that person may have done, and there are
21 other people in the middle saying in a proper
22 case, the death penalty may be appropriate.

23 The reason we conduct this individually
24 is to discuss with the people what their viewpoints
25 are on the death penalty, and to see if -- or

1 try to avoid, I guess is the easiest way to say
2 it, a conflict that may arise at some later time
3 between a person's religious, moral, or
4 conscientious scruples in the infliction of the
5 death penalty if it were appropriate to anything
6 they hear.

7 There are no right or wrong answers
8 to anything we may ask you. Okay?

9 Certainly, no matter what your view of
10 the death penalty, no one on either side is going
11 to try to convince you you are wrong or your
12 opinion should be other than what it is. Okay?

13 But what we need to know is honestly
14 how you feel and see if whether or not because
15 of your beliefs that you could participate in
16 such a trial, and the easiest way I guess to get
17 into that subject is to just ask you point-blank:
18 How do you feel about the death penalty? Do you
19 feel it is an appropriate punishment in certain
20 types of cases, and do you feel it has any
21 real role in our society? That is sort of a
22 shotgun question to see what you think.

23 A I believe in capital punishment for certain
24 crimes.

25 Q Have you felt that way all your adult life, or is

1 there anything perhaps you have read or a person
2 would experience or go through that would change
3 your opinion at one time or another?

4 A No. I have basically believed in that.

5 Q Okay. You have said in certain instances.

6 Let me outline for you the areas in
7 which a person is subjected to the possibility
8 of the death penalty in Texas and see if that
9 does your conscience any violence and see if
10 you agree with the types of crimes a person may
11 receive the death penalty in in Texas.

12 First of all, you have to have a murder,
13 the intentional or knowing taking of another
14 person's life without justification. That alone
15 does not raise the question of the death penalty.
16 Someone who intentionally took another person's
17 life does not automatically themselves to the
18 death penalty. There has to be another element
19 added to it such as he committed the murder during
20 one of five different felony offenses, or if he
21 kills a protected class of persons.

22 All right. If you kill a person during
23 the course of a robbery -- a person goes into a
24 Utotem, and during the course of robbing the
25 proprietor of the Utotem, he shoots and kills a

1 person, if you kill someone during the course of
2 an aggravated rape or during the course of a
3 burglary when you break into someone else's home
4 or during the course of an arson or during the
5 course of a kidnapping, if you kill anyone during
6 any one of those cases, that is capital murder,
7 and the person is subjected to the death penalty.

8 If you kill a police officer or a
9 fireman who is in the lawful discharge of an
10 official duty and you know that that person was
11 either a police officer or a fireman, then that
12 is elevated to capital murder.

13 If you kill for money or if you hire
14 someone who kills for money, that raises it to
15 capital murder. If you are escaping from a penal
16 institution and you kill anyone or if you are
17 confined in a penal institution and you kill
18 an employee of that institution, that is also
19 elevated to capital murder.

20 Those are the only types of cases in
21 Texas where a person becomes eligible for the
22 death penalty. If you just have a case where
23 someone goes out and cold-bloodedly kills women
24 and children just to further their political
25 viewpoints, that is not capital murder unless it

1 has one of those other elements we have talked
2 about.

3 All right. Do you feel those are the
4 types of cases for the eligibility of the death
5 penalty? That doesn't mean the person would
6 automatically receive the death penalty if found
7 guilty, but those offenses make a person eligible
8 for the death penalty.

9 A To be frankly honest about it, my personal opinion
10 is I do not care for what do you phrase that, a
11 class of people. That is as honest as I can be.
12 I do not see why the death penalty is called for
13 for cold-bloodedly murdering some people and not
14 for others.

15 Q Would it be fair to say that the law should be
16 expanded not only to include peace officers but
17 under circumstances where anyone takes the life
18 of another person without justification, and then
19 perhaps they would be eligible for the death
20 penalty if it were cold-blooded enough or whatever,
21 or do you just feel police officers and firemen
22 should have that status?

23 A Pardon me? I am not quibbling with police officers
24 or firemen. I am saying that under the
25 Constitution, I thought we were all equal. I

1 think if I believe in capital punishment, which I
2 do, I also believe that it should refer to anybody
3 who cold-bloodedly murders somebody else, and to
4 say that he should only get this if he murders
5 a policeman or a fireman or whatever, I don't
6 think that is right.

7 I guess to answer your question honestly,
8 I think it should either be expanded or dropped.

9 Q Okay. Let me ask you this, then -- with those
10 your feelings and again, I am not going to try
11 to sit here and change your feelings, do you feel
12 you could sit on a case such as this -- in this
13 case, we will be prosecuting the killer of a
14 police officer, and as that class of person, the
15 State will be seeking the death penalty in the
16 case. Could you still sit and listen to the
17 evidence and decide, number one, whether the
18 person was guilty or not guilty based on the
19 evidence and number two, if he is guilty, whether
20 or not he should receive the death penalty by
21 answering the two questions we'll talk about in
22 a moment or two, or do you feel your thoughts in
23 that regard might prevent you from being fair
24 and impartial in that area?

25 A I don't believe my thoughts on that would prevent

1 me from being fair and impartial.

2 Q Okay. Let me briefly go over how a person receives
3 a life sentence or a death sentence after they are
4 convicted of the offense of capital murder, and it
5 doesn't matter which theory we go under. Okay?

6 If a jury finds a Defendant guilty of
7 capital murder, the two questions you see on the
8 board to your left would be submitted to the
9 jury. Depending on how the jury answers those
10 two questions, this judge would assess the
11 punishment of life or death.

12 If all twelve jurors agree the answers
13 would be yes, the judge would automatically assess
14 the death penalty.

15 If either Question 1 or 2 is answered
16 no by the jury, the judge would automatically
17 assess life imprisonment.

18 To answer a question no doesn't take
19 twelve votes, only ten to agree. It takes
20 twelve to answer yes, ten to answer no.

21 And you can see, I think, by that
22 method, the jury doesn't go back and say, "We
23 think this person deserves the death penalty or
24 the life sentence," but by the way the jury
25 answers those two questions dictates to the judge

1 what the judge must do to the Defendant. Okay?

2 A Yes, sir.

3 Q Do you follow me on that part?

4 A Yes.

5 Q Assume we have gone through the guilt-or-innocence
6 stage and the jury has decided and returned a
7 verdict in open court that the Defendant is, in
8 fact, guilty of capital murder. That would have
9 to have been proved to the jury, that the
10 Defendant is guilty of capital murder.

11 Simply because a person is found guilty
12 of capital murder does not mean Questions 1 and 2
13 are automatically answered yes. If that were
14 the case, we wouldn't need the second portion of
15 the trial and wouldn't need to submit these
16 questions to the jury at that time because the
17 finding of guilt would determine whether he
18 received the death penalty or not.

19 Do you follow me there?

20 A Yes, sir.

21 Q When we reach this stage, the burden of proof is
22 upon the State. We must prove to the jury beyond
23 a reasonable doubt that the answer to 1 is yes
24 and the answer to 2 is yes.

25 If we fail in that burden, the answer

1 is no, and that is what the jury should return
2 as their verdict.

3 Do you follow me there?

4 A Yes, sir.

5 Q These two questions are not peculiar to this
6 judge or court or courtroom. These were created
7 by the legislature back in 1974 when capital
8 murder was reenacted in Texas, and every death
9 penalty case has had to deal with these two
10 questions since then.

11 Have you had a chance to read these
12 over again? I know this morning the judge asked
13 you to look at them.

14 If you will, look those over and we
15 will discuss them for a moment.

16 A Okay.

17 Q The first question is rather straightforward.
18 Assuming we have already found the Defendant
19 guilty of intentionally causing the death of
20 another person during the course of a robbery
21 or causing the death of a policeman or fireman,
22 the question asks you to decide whether the person
23 is guilty or not guilty; would you agree?

24 A Yes.

25 Q And at this stage of the trial, you are asked to

1 decide whether the conduct of that Defendant was,
2 number one, deliberate, and number two, done
3 with the reasonable expectation that someone would
4 die as a result of that conduct.

5 We have underlined "deliberately," and
6 I will tell you now the judge will not define that
7 term for the jury. You will have to use your
8 common, everyday sense in deciding what that word
9 means.

10 To some people, it means the same as
11 purposefully; to some people, it even means the
12 same as intentionally.

13 The questions asks, if you found someone
14 guilty of intentionally causing someone's death,
15 would you automatically at the punishment stage
16 answer that question yes? At first blush, it
17 may appear that would be the appropriate answer
18 if you have found him guilty.

19 Let me give you an example of what
20 intentionally means. The law says a person acts
21 intentionally if it was their conscious objective
22 and their intentional conduct.

23 Take an example where a man goes into
24 a Utotem and says, "Give me your money." The man
25 decides, "I have decided I don't want this person

1 to chase me, don't want him to run outside and
2 get my license plate number," so he then shoots
3 him in the leg, runs out of the store, and takes
4 off.

5 Unbeknownst to the person who pulled
6 the trigger, the person is hit in the leg and
7 the artery is severed and the person dies.

8 Under our definition and under the
9 law, that person has intentionally and consciously
10 engaged in that conduct.

11 Can you see that the result of the
12 question would be the man acted intentionally, but
13 he may not have had the reasonable expectation
14 a person would die? This is where your answer
15 could be no even though you found him guilty of
16 intentionally causing the death of another person.

17 A. That is true.

18 Q. Do you feel you could listen to the evidence, and
19 even though you found a person guilty of causing
20 the death, still reevaluate the evidence and not
21 answer that question yes at the punishment stage?

22 A. I believe it is possible.

23 Q. You may hear a fact situation at the guilt-or-
24 innocence stage, after you have heard all the
25 information on guilt-or-innocence and you have

1 already answered this question yes or no. Okay?
2 But the law requires you are not to prejudge a
3 case and say, "If I find this person guilty, I
4 am going to or not going to answer yes to this."
5 You have to base your answers on evidence.

6 Do you follow me on that?

7 A Yes.

8 Q The second question is a little more difficult to
9 conceive. It is asking the jury to predict
10 future human behavior.

11 We have underlined the word "probability"
12 just to point out that to prove beyond a reasonable
13 doubt that someone is certain to do something in
14 the future, there is no way I could ever prove to
15 a jury beyond a reasonable doubt that a person is
16 certain to do anything in the future.

17 There is probably only one person who
18 could ever tell us for a certainty what is likely
19 to happen, and that is God himself, and the law
20 only requires that I prove there is a likelihood
21 or chances are this person will commit criminal
22 acts of violence that would be a continuing threat
23 to society.

24 Do you feel that is a fair question
25 as far as probability is concerned and that I

1 don't have to prove a certainty but only a
2 likelihood that the person will basically be a
3 violent-type person?

4 A I think it is a definite question that can be
5 answered.

6 Q Okay. Only criminal acts of violence -- let me
7 touch on these last few phrases -- criminal acts
8 of violence includes other murders, also includes
9 rape, robberies, burglaries, assaults on people,
10 and basically, the point there is not to prove to
11 you that this person or the person on trial is
12 likely to commit a specific act of violence,
13 not that he is likely to do that again, but just
14 have the tendency that he would commit some type
15 of violence that would constitute crimes of
16 violence.

17 Society can be life in the penitentiary,
18 not only inmates but guards, librarians, medical
19 people that also have the right to be protected,
20 that type of people.

21 Do you agree?

22 A Yes, sir.

23 Q Is there any way about how Questions 1 and 2 are
24 worded that would cause you difficulty about being
25 able to answer these questions?

1 A No, sir.

2 Q One or two other points: Question 1, of course,
3 asks the juror to look at the same evidence they
4 have already heard.

5 Question 2 can be answered simply from
6 the facts of one isolated incident. Of course,
7 more evidence can be brought to a jury at the
8 punishment stage telling about other acts of
9 violence that are known and can be proved to aid
10 the jury in answering Question 2, but our law
11 does not require that we prove anything other than
12 the facts of the case, and the case that comes
13 to mind is a case where a man named Ronald Clark
14 O'Bryan was convicted of capital murder for
15 murdering, poisoning one of his children with
16 Halloween candy and attempting to kill his
17 daughter for insurance proceeds. In that case,
18 the only evidence the jury heard was the evidence
19 of that specific crime, evidence of killing his
20 child for insurance money. They didn't hear any
21 other evidence of wrongdoing, and the Courts
22 have held that is a proper burden.

23 So, can you conceive in your mind where
24 the conduct of a person in one isolated incident
25 can give you enough evidence to answer this

1 question yes? I am not saying every case where
2 someone kills another person, but certain acts,
3 the way they are performed, and the way they are
4 done, that can give you an idea as to whether the
5 person will commit criminal acts of violence in
6 the future.

7 A Yes, sir.

8 Q Do you have any questions about how the death
9 penalty operates or anything we have gone over
10 to this point?

11 A No, sir.

12 Q Let me go over with you some obligations that you
13 would have as a juror and that the judge will tell
14 you about, whether it is a capital murder case or
15 driving while intoxicated case. These are all the
16 same obligations of a juror.

17 First of all, the judge will, at the
18 conclusion of the trial, prepare for the jury what
19 is called the Court's charge. The Court's charge
20 will contain all the law the jury needs to know
21 to decide the case, and it will also include
22 certain admonishments or warnings to the jury.

23 The first one will be the fact that
24 a person has been indicted is no evidence of his
25 guilt. In other words, the jury cannot go in the

1 back and say, "Besides all this evidence we heard
2 from the witnesses, he was indicted, and therefore,
3 he will be convicted." The judge will instruct
4 you you cannot use that indictment as any evidence
5 whatsoever of the Defendant's guilt, and really,
6 a Grand Jury indictment is just a piece of paper
7 that gets us all here, tells the Defendant what
8 he is charged with, tells us what we must prove
9 beyond a reasonable doubt before we are entitled
10 to a guilty verdict.

11 Can you not use the indictment as any
12 evidence of guilt?

13 A Yes.

14 Q Hand in hand, the judge will also tell you all
15 persons are presumed to be innocent until they
16 are proven guilty beyond a reasonable doubt.
17 You must take the jury box with an open mind.
18 You don't have preconceived notions of guilt
19 without first hearing the evidence.

20 Can you at that time afford this
21 Defendant that right and presume him innocent?

22 A Yes, sir.

23 Q I am not going to try to insult your intelligence.
24 Of course, if a person committed an offense back
25 on July 13th, he was guilty when he did it, and

1 he is guilty the day he answers to that case in
2 court and he will be guilty until the day he
3 dies.

4 MR. ELIZONDO: I object to the
5 prosecutor's last comment.

6 If proven beyond a reasonable doubt.

7 THE COURT: With that stipulation.

8 MR. BAX: If he is guilty, whether I
9 can prove it or not, he is guilty.

10 Q (By Mr. Bax) You understand what I am saying.
11 The jury must presume he is innocent until his
12 guilt is proven to their satisfaction beyond a
13 reasonable doubt.

14 Can you presume this Defendant innocent
15 at this time and put the burden on the State
16 where it rightfully belongs?

17 A Yes, sir. You will have to prove it.

18 Q I will have to prove it to you by what we call
19 beyond a reasonable doubt.

20 The judge will not define that term for
21 you. There are not enough lawyers who can get
22 together on anything, let alone what a reasonable
23 doubt is. That is something that is individual
24 to each and every juror.

25 I imagine if you have heard all the

1 evidence and you are convinced he is guilty, it
2 has been proven to you beyond a reasonable doubt.
3 If you have heard the evidence and are not
4 convinced he is guilty, it has not been proven
5 beyond a reasonable doubt, and you should acquit
6 the Defendant.

7 I can only tell you this. It is not
8 proof beyond all doubt or proof beyond a shadow
9 of a doubt or any doubt. The only way I can
10 prove anything to anyone beyond all doubt or a
11 shadow of a doubt would be if that person were
12 an eyewitness to every transaction that took
13 place. Of course, in that case, they would be
14 waiting with a phone call saying, "We have a
15 jury. Come on down. We are ready to start,"
16 and even then, you may have ten different versions
17 of what happened, because of each person's
18 ability to observe a different situation.

19 Do you follow me there?

20 A. Yes, sir.

21 Q. Would you require the State to prove anything more
22 than beyond a reasonable doubt?

23 A. No, sir.

24 Q. A Defendant in a criminal trial can sit there and
25 not say one thing throughout the whole trial.

1 His attorneys are not required by law to prove
2 anything. They do not have to prove that a
3 person is innocent of a crime. The burden rests
4 entirely upon the State to prove its case, and
5 you cannot look to the Defendant for any proof in
6 a case. They don't have to ask one question,
7 don't have to call one witness to the stand.

8 If I fall down or Mr. Moen falls down
9 in our proof, then you would be required by law
10 to find him not guilty, regardless of any evidence
11 or testimony they do not put on the stand.

12 Do you follow me so far?

13 A. Yes, sir.

14 Q We are the ones bringing the accusations here, the
15 ones saying he did it. The law says, "Prove it."

16 The Defendant does not have to testify,
17 and the judge will tell you if the Defendant
18 chooses not to testify, you cannot use that
19 failure to testify as any evidence of his guilt.
20 You can't go in the back and say, "Well, Bax and
21 Moen did a pretty good job, almost convinced me
22 beyond a reasonable doubt, but, you know, they
23 fell short. I am not convinced, but that
24 Defendant didn't testify, so I am going to add
25 that little extra they failed on and go ahead and

1 find the person guilty."

2 You can see that would be wrong to use
3 the Defendant's failure to testify as evidence.

4 Can you afford the Defendant that right
5 if he decides not to testify, solely disregard
6 that and not consider that in arriving at your
7 verdict?

8 A Yes, sir.

9 Q It is natural for us to say, "If I were charged
10 with a crime and I didn't do it, I would be the
11 first one on the stand, you know, telling these
12 people it wasn't me or that's not the way it
13 happened," but again, our law doesn't require that
14 of the Defendant.

15 Our law requires -- I am having trouble.
16 I have been talking so long -- the State prove
17 what is alleged in the indictment.

18 Okay?

19 A Yes, sir.

20 Q One other area -- whenever we talk about capital
21 murder, there is also the lesser included offense
22 of murder.

23 Let's say you heard a case and you were
24 satisfied beyond a reasonable doubt that the
25 Defendant intentionally killed another person,

1 but you were not satisfied beyond a reasonable
2 doubt that he knew that the person he killed was
3 a police officer. In that case, you would not
4 be able to return a verdict of guilty in capital
5 murder because you wouldn't have one of the
6 necessary elements. You would still find him
7 guilty; if you find him guilty of killing another
8 person, you would find him guilty of the offense
9 of murder.

10 A person guilty of murder is looking at
11 a punishment range of five to ninety-nine years
12 or life in the penitentiary, and in addition, a
13 fine of up to ten thousand dollars can be
14 assessed.

15 If a person has never been convicted
16 before of a felony and if the jury feels that the
17 proper range of punishment for that particular
18 offense is ten years or less, now the lower end
19 of the range, the jury can recommend probation
20 if they feel it is a proper case.

21 Now, I know this is sort of putting
22 you on the spot, but can you consider or think of
23 a case where a person has intentionally taken the
24 life of another person where you could consider
25 probation if, number one, you felt that the case

1 was worth ten years or less, and number two, you
2 felt it was proper?

3 A No.

4 Q Okay. I would say with that answer, you have
5 joined about ninety-five percent of the people
6 that have come through here.

7 Let me give you a situation and see
8 how you would feel about it.

9 Suppose a man and woman have been
10 married for fifty years, forty years or whatever,
11 and the woman becomes terminally ill. They are
12 in their seventies, late seventies or early
13 eighties.

14 She is placed in the hospital and kept
15 alive by some life-support system. The doctors
16 all agree she will die eventually. She has maybe
17 as long as six months or two months, but she
18 will die.

19 The husband and wife talk, and she says,
20 "Look, I have lived a good life. I have done all
21 I wanted to do. I am in pain. I know our savings
22 are going rapidly, and when I die, I don't want
23 you to be left collecting food stamps or on
24 welfare. Would you please reach over there and
25 pull the plug?"

1 And he says, "I can't do it," and
2 finally, in a moment of weakness, he reaches down
3 and pulls the plug and causes her death.

4 Under our law, he has intentionally
5 taken her life. He is guilty technically of
6 committing a murder.

7 Suppose on her side of the family, there
8 are relatives who believe that is not what
9 happened. They know the Defendant owns property
10 up at one of the lake resorts, and there was a
11 contractor who wanted to purchase that land
12 because he wanted to complete a plot for his
13 recreation condominiums.

14 They convinced the Grand Jury he pulled
15 that plug for money so he could sell the property
16 and get the money out of them, and somehow, a
17 Grand Jury indicts that person for capital murder,
18 killing for money.

19 The jury hears the facts and says, "That
20 is preposterous. That man no more killed that
21 woman for money than any one of us. He did it
22 as an act of love." They do find that person
23 guilty of murder.

24 Can you see in a case like that where
25 probation may be proper?

1 A Yes, sir.

2 Q I know that is an extreme situation. Okay?

3 And we are going to talk to you about extreme

4 situations, and most people, I am sure myself

5 included, would find it very difficult to think

6 of a fact situation where you could consider

7 probation, but the law only requires that there

8 is case where you thought probation was proper,

9 would you go along with probation and recommend

10 it to the judge if you felt it were proper?

11 A Yes, sir.

12 Your --

13 Q Do you have some problem?

14 A Well, I don't really have a problem, but if I

15 may be excused for saying so, you know, that is

16 a nice supposition and I can see where it fits

17 in the framework, but you're asking me these

18 questions, I am sure, to get a yes or no feeling

19 on my feelings to things, but that is something

20 you would have to have some evidence on to just

21 say point-blank I could find one way or the

22 other.

23 Q I apologize for having to talk to you in these

24 hypothetical terms.

25 A I realize that.

1 Q And the only way we can find out how you feel
2 is to ask hypothetical questions. I wish there
3 were some way I could ask you point-blank what
4 you would do. That wouldn't be right.

5 You do have a right to listen to the
6 evidence. I guess my real question is, would you
7 listen to the evidence before making a decision
8 one way or the other?

9 A Yes, sir.

10 Q One other thing that the judge will instruct the
11 jury on is that, whether talking about a murder
12 case, capital murder, or auto theft, in all
13 those cases, the judge would instruct the jury
14 they are not to consider the parole laws in
15 reaching their decision as to the punishment to
16 be assessed. You are to instruct the jury that
17 the parole laws are governed solely by the Board
18 of Pardons and Paroles, and that should not enter
19 anywhere into the jury's deliberations as to what
20 the punishment should be.

21 He will further instruct the jury that
22 should anyone on the jury bring up the fact of
23 parole, that they immediately be told to cease
24 that discussion and confine their deliberations
25 to the facts that are before them, and the only

1 reason I mention that to you is because our
2 Courts have said if that happens, if a jury
3 discusses the parole laws and how long a person
4 would have to serve, that is grounds for automatic
5 mistrial and we would have to start all over with
6 a new trial. And you can see the position where
7 we are in where we spent three or four weeks
8 selecting a jury and perhaps a week in trial
9 where we would have to start all over again.

10 That is the only reason I mention that.
11 If you were on a jury and bring up parole laws,
12 do not discuss them at all, and confine your
13 deliberations to the facts. All right?

14 A Yes, sir.

15 Q Do you have any questions of me up to this point?

16 A No, sir.

17 Q One other thing I need to mention to you is, I
18 think the evidence may show this Defendant is an
19 illegal alien.

20 Would that fact bias you or prejudice
21 you in making a decision and make it impossible
22 for you to give him a fair trial?

23 A No, sir.

24 Q Let me just ask you a few questions. It says here
25 you are crew chief on some race cars. Where is

1 that, and how long -- is that where thirty-nine
2 states come in?

3 A No. My dad was a truck driver. I said thirty-nine
4 states or major cities.

5 We were in record-holding drag racing
6 racing cars out of Southern California.

7 Q What kind of handicap do you have in golf?

8 A Well, I am fixing to shoot for the club
9 championship this weekend. I can't answer that
10 honestly up here.

11 About a sixteen.

12 MR. MOEN: No golfer can answer that
13 question.

14 Q (By Mr. Bax) Let me check with Mr. Moen and see
15 if he has any questions.

16 MR. MOEN: No.

17 Q Okay, Mr. Matthews. If you have no questions of
18 me, I certainly don't have anything else I have
19 to talk with you about at this time.

20 I thank you for waiting around and
21 talking with us at this time.

22 THE COURT: Mr. Elizondo, before you
23 begin, I propose to bring Ms. Monroe in and ask
24 her to return in the morning.

25 Does anybody have any objections to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

that?

(Ms. Monroe was brought into the
courtroom.)

THE COURT: Ms. Monroe, if you will,
come on up here. I need to visit with you just
a second.

The wheels of justice grind exceedingly
slow. We have been in here all evening, and
will probably be another forty-five minutes before
we get through with this juror.

Rather than have you wait longer, I
am going to ask that you return at 9:30 in the
morning, and if you will, have a seat on that
bench outside that conference room and we will
get to you as soon as possible.

Meanwhile, if there is any coverage
that you see, newspaper, radio, TV, please don't
watch or listen to it.

Thank you, ma'am.

(Ms. Monroe left the courtroom.)

THE COURT: All right, you may proceed.

EXAMINATION

QUESTIONS BY MR. ELIZONDO:

MR. ELIZONDO: Thank you, sir.

Q (By Mr. Elizondo) Mr. Matthews, how are you doing today?

A Okay, I think.

Q You've been here five or six hours.

A It seems like more than that.

Q This part of the trial is known as voir dire examination.

Voir dire is a French word, they tell me, that means to speak the truth. The reason you were up there on the witness box up there is because we can talk to you.

When you are in the jury box, we can't talk to you at all.

And again, voir dire, there are no right or wrong answers, and all we are going to get at is to see if you can be a fair and impartial juror in the trial of this case for the Defendant, Ricardo Aldape Guerra.

As the Prosecution mentioned to you, this is a capital murder case. As in any case in Texas, the State has the burden of proof. The

1 burden of proof means to prove their case to you
2 beyond a reasonable doubt. They must prove to
3 you that on a particular day in Harris County,
4 Texas, this Defendant shot and killed a police
5 officer in the lawful discharge of an official
6 duty knowing at the time that he was a police
7 officer.

8 They must prove that to you beyond a
9 reasonable doubt.

10 Mr. Bax is right. There is no
11 definition, no real definition of "reasonable
12 doubt." The judge won't give you one. I can't
13 give you one. They can't give you one because
14 there is no legal definition.

15 What I can do by way of analogy is to
16 compare it to across the street in the civil
17 courthouse.

18 In the civil courthouse, they try
19 civil lawsuits over personal injuries, over
20 contract suits, over medical malpractice
21 sometimes for millions of dollars. The burden of
22 proof over there is proof by a preponderance of
23 the evidence, the greater weight of the credible
24 evidence. The side that has the most evidence
25 wins.

1 Here on this side where a person's
2 life is literally at stake, the legislature said
3 before you can convict anybody of any kind of
4 crime, before anybody can forfeit anybody's life,
5 the State is going to have to prove that case
6 to twelve jurors' satisfaction beyond a reasonable
7 doubt, so it is a heavier burden.

8 Can you see what I am saying?

9 A Yes, sir.

10 Q And rightfully so. Do you agree with that?

11 A Yes, sir.

12 Q So the State, in proving its case, will call
13 witnesses and they will get up there where you are
14 sitting right now and you will be sitting in the
15 jury box and you will be hearing the evidence
16 and you will be sitting as near the witness as
17 possible and you can judge their demeanor and
18 their inconsistencies, if any, and based upon that,
19 you can judge a person's credibility.

20 Do you agree with that?

21 A Yes, sir.

22 Q So let's assume that the State puts on its case
23 and then the State rests their case. That means,
24 "That is all we've got."

25 The Defendant can, if he chooses, put

1 on evidence. He doesn't have to.

2 How would you feel -- let's assume
3 for a minute that you were sitting in the jury
4 box and the State has rested their case and you
5 are sitting back there in the jury box and you
6 are thinking and you are saying, "I think the man
7 is guilty, but I am not sure the State has
8 proven its case to me beyond a reasonable doubt,"
9 and we are sitting back here and we stand up and
10 say, "We rest our case, Your Honor." We don't
11 put on any evidence.

12 What would your verdict be in that type
13 of situation?

14 A Not guilty.

15 Q So you can promise me one thing: If you are
16 selected on this jury panel, on the jury, you
17 will make the State prove its case to you beyond
18 your reasonable doubt?

19 A Yes, sir. With this penalty.

20 Q Pardon?

21 A With this penalty, yes, sir.

22 Q With this penalty?

23 A With what is at stake, with capital punishment.

24 Q Okay, okay.

25 We can, if we choose, put on evidence.

F2068 1049

1 We can call the Defendant to the stand and put
2 on other witnesses, and should we do so, I can
3 guarantee you one thing, and that is that you will
4 hear two different versions of the facts and it
5 would become your job then and the jury's to
6 decipher the facts, and based upon that, make a
7 decision as to whether or not this man is guilty.

8 Can you see where you might get put
9 in the box where you, in your own mind, are
10 thinking that, "I think he is guilty, but they
11 haven't gotten to that plateau yet. They haven't
12 proven it to me beyond a reasonable doubt"?

13 Can you see where you might get put in
14 that position?

15 A. Yes, sir.

16 Q And should you do so, if you get put in that
17 position, your verdict would then be to follow
18 your oath and your verdict would be not guilty?

19 A. Right. Yes, sir.

20 Q In a capital murder case or in any kind of
21 criminal case in Texas, they have a bifurcated
22 system.

23 Bifurcated means two parts.

24 In the first part, your only job is to
25 determine if he is guilty or not. If you determine

1 that he is not guilty, then that is all there is.
2 We all go home.

3 If you determine that he is guilty in
4 a capital murder case, there is only two possible
5 punishments, life or death.

6 At that particular -- the way you get
7 at that particular punishment is by the way you
8 answer those two questions, the first question
9 being whether the conduct of the Defendant that
10 caused the death of the deceased was committed
11 deliberately and with a reasonable expectation
12 that the death of the deceased would result.

13 In that first question, the word
14 "deliberately" is underlined.

15 Again, there is no definition for the
16 word deliberately. The judge won't give you one.
17 The prosecutors can't give you one. There is
18 no legal definition of the word deliberately.

19 I have been told the word deliberately
20 means to ponder and think about, to premeditate.

21 Would you agree with that?

22 A. With your definition of deliberately?

23 Q. Well, with what I have been told it is, not my
24 definition.

25 A. I believe that is --

1 Q For example, you go into the jury deliberation
2 room and you will think about the evidence in
3 this case, ponder on it, correct?

4 A Yes.

5 Q Okay. Now, some people say that the word
6 deliberately means the same thing as the word
7 intentionally.

8 How do you feel about that?

9 A I believe they are different.

10 Q In which way?

11 A Well, I would have to get into my basic version
12 of deliberate and intent, in which deliberate
13 would be a slow measured approach to something.

14 Q Premeditated?

15 A Deliberate or a very reasonable approach to
16 something, and the intent, I don't know exactly
17 how to give you that answer as to how I
18 differentiate between deliberately and
19 intentionally.

20 Q Okay.

21 A I am sorry. I just --

22 Q That is okay. No apology is needed at all. I am
23 not sure if I have in my own mind what the
24 difference is either, but in any event, what I
25 am trying to get at is in the first part, you

1 have found the man guilty of intentionally and
2 knowingly killing a police officer, correct,
3 if you find him guilty?

4 A Correct.

5 Q In the second part, the punishment stage, you have
6 to answer the first question. What I am trying
7 to get at is, would you automatically answer that
8 first question yes just because you already have
9 found him guilty of intentionally and knowingly
10 killing a police officer?

11 A No.

12 Q Why is that?

13 Again, I am trying to get at how you
14 arrived at your position, and I know it's been
15 a long day.

16 THE COURT: Mr. Bax, do you have an
17 objection?

18 MR. BAX: Judge, I believe he has
19 answered the question, whether he would automatically
20 answer it yes, which is the qualification question,
21 and he goes into the thought process, and we are
22 spinning his wheels here.

23 THE COURT: I think I agree with that.
24 I sustain the objection.

25 Q (By Mr. Elizondo) Okay. You can't answer that

1 question?

2 THE COURT: He doesn't need to answer
3 that question.

4 Q (By Mr. Elizondo) No. 2 is asking you whether
5 there is a probability that the Defendant will
6 commit criminal acts of violence that would
7 constitute a continuing threat to society in the
8 future. That second question is asking you in
9 so many words to predict the future, correct?

10 A Yes, sir.

11 Q Do you think that a person can change his mode of
12 behavior or his mode of operation?

13 A Yes, sir.

14 Q Okay. In a capital murder case, there are also
15 lesser included offenses.

16 As Mr. Bax has pointed out to you, there
17 is the lesser included offense of murder.

18 Murder is when you intentionally and
19 knowingly cause the death of somebody. Mr. Bax
20 gave you an example, and it's probably a very
21 extreme example, but what I am trying to get at
22 is can you in a proper case in your own mind
23 and knowing the penalty range is five to ninety-
24 nine years or life, can you consider as little
25 as five years' probation in a murder case if you

1 think it is a proper case in your own mind?

2 A Again, I will say no.

3 Q You cannot?

4 A I would not consider five years' probation for
5 a murder case, no.

6 Q Let me see if I got that straight. I've got to
7 ask you some more questions, and again, there are
8 no right or wrong answers.

9 All I am trying to get at is how
10 you feel about particular punishment ranges for
11 this type of offense.

12 Can you think of any case in your own
13 mind where you could consider probation, five
14 years' probation, as a proper punishment in a
15 murder case where you have found a person guilty
16 of intentionally and knowingly taking the life
17 of somebody else?

18 A No, sir.

19 Q Now, Mr. Bax gave you an example some, maybe
20 fifteen minutes ago, twenty minutes ago.

21 Are you saying then now that you cannot
22 consider probation in a murder case which you
23 think would be a proper case for probation?

24 A No, sir.

25 MR. ELIZONDO: Your Honor, we will

1 challenge.

2
3 EXAMINATION

4
5 QUESTIONS BY MR. BAX:

6 Q Mr. Matthews, let me go over this one more time
7 with you. I am not sure if I am confused or
8 you are confused.

9 You have been asked quite a few
10 questions today.

11 As we said, it's very difficult,
12 especially for someone -- we are down here every
13 day. Mr. Moen is, Mr. Hernandez is, Mr. Elizondo
14 is, and myself. We deal with criminal behavior
15 every day and deal with every fact situation,
16 and all of a sudden, we bring people down here who
17 probably read a few articles and perhaps don't
18 think of what they would do in a fact situation
19 like that, and we expect them to come up with an
20 answer in a hypothetical case.

21 I think you said earlier it would
22 depend on the evidence or it would be hard to
23 make that decision without hearing the evidence,
24 but again, let me give you another hypothetical
25 case that perhaps you haven't thought about.

1 Assume with me a man comes home from
2 work and finds his wife has been savagely
3 raped and is on the verge of dying and his two
4 children have been killed, and in his wife's
5 dying breath, she says, "Joe Blow down the street
6 did it," and the man gets up and gets his pistol
7 and goes down the street and confronts Joe Blow,
8 and Joe Blow says, "Yes, I did it. I enjoyed
9 it," and the man takes his gun and at that point
10 in time kills Joe Blow. He has committed murder
11 under our law.

12 That fact situation could be presented
13 to a jury. Could you see where that might be
14 a proper case in your mind where you could grant
15 probation for the offense of murder? There may
16 be one or two out of a hundred that come down
17 like this, and the law doesn't require in every
18 case you consider probation, but if the facts
19 were proper in your mind, could you consider
20 probation for the intentional taking of a life?

21 A Under circumstances like that, I could consider
22 it, yes.

23 Q We can go on and on with examples.

24 You can have a woman who's been abused
25 throughout her marriage by her husband. He does

1 not work or do anything. She comes home from
2 work and he beats her up and beats up the kids.
3 She shoots him.

4 Do you see what I mean? I am trying to
5 stimulate your imagination a little bit, but I
6 think what I am saying is if the facts warrant
7 it, there could be situations where the facts
8 would warrant granting probation for taking
9 another's life.

10 A Under what you just said, that type of case.

11 MR. BAX: Nothing further.

12 MR. ELIZONDO: I am sorry. I feel the
13 same way.

14
15 EXAMINATION

16
17 QUESTIONS BY MR. ELIZONDO:

18 Q Let me see if I've got this straight now. You
19 said you could in the proper case in your own
20 mind, after finding someone guilty of intentionally
21 and knowingly taking another's life, you could
22 consider in the proper case five years'
23 probation?

24 A Yes, sir. Under certain cases.

25 Q A little while ago, you mentioned something about

1 -- and I didn't quite follow it too well -- you
2 didn't like the capital punishment aspect as
3 it applied to police officers or a selected
4 class of people?

5 A Yes, sir.

6 Q Did you say you wanted to expand it?

7 A I believe what I said and what I intended to say
8 was that if we are going to have capital
9 punishment, that it should apply to everyone, not
10 just a selected class of people, not just for
11 policemen or politicians or firemen or whatever
12 the classification might be. As capital
13 punishment goes, to me, I don't know why a man
14 should have to face the death penalty for killing
15 a person because of what they do for a living
16 anymore than they should have for anyone else.

17 Am I making myself -- in other words,
18 it should be -- capital punishment is applied
19 across-the-board to everybody or nobody.

20 Q Okay. In other words -- let me see if I got it
21 straight, and I apologize.

22 Are you saying then that anybody who
23 kills anybody, anybody killing a person should be
24 subjected to the death penalty?

25 A I am saying that option should be open, that the

1 death penalty option should be open for any
2 cold-blooded, premeditated murder-type situation,
3 and not only if it happens to a certain class
4 of people.

5 Q Okay. Well then, correct me if I am wrong again.

6 Do you have any kind of bias against
7 that aspect of law where a person can receive
8 the death penalty for killing a police officer?

9 A I have no objections to a person receiving the
10 death penalty for killing a police officer, no,
11 sir.

12 Q Do you think that anybody, a person that kills
13 another person, should always be put to the death
14 penalty?

15 A Yes, sir. That is what I am saying.

16 Q In other words, an eye for an eye and a tooth for
17 a tooth?

18 A Well, I don't like -- I guess you could put it
19 that way if you want. I am just saying that I
20 don't see where you can differentiate in murder
21 whether in this, this one case it may be a
22 politician -- pardon me -- it might be a judge or
23 police officer or whatever, but I know it deals
24 with the American system of justice, and I am
25 sorry, but, to me, your life is no more important

1 to me than mine. It is just as important as mine,
2 but not more so.

3 So to say that a man can be given a
4 death penalty by killing -- only because he killed
5 a certain class of people or under a certain
6 set of circumstances, and that he can't be, you
7 know, if he just walks up to me and blows me away
8 on the street, and you say there is no way he
9 can be tried for capital murder, I don't see why.

10 Q So you have an objection to the law as it now
11 stands?

12 A I don't know how to answer that. All I know is
13 that I have no objection to the death penalty.
14 It is just, you know, I think it should be --
15 if you want to say expanded, I believe is the
16 term you used, I think it ought to be, because
17 your life is no more important than mine.

18 Q In other words, I am kind of confused a little
19 bit. You believe that anybody that anybody that
20 kills another person should be subject to the
21 death penalty?

22 A Correct. I believe that that ought to be a --
23 what word am I looking for?

24 Q Option?

25 A Yes. It ought to be an option.

1 As it stands right now, a person can
2 only be tried -- the death penalty can only be
3 an option under certain circumstances.

4 Q Correct.

5 A Based on a class of people or what he was doing
6 at the time, and I am sorry, but to me, it sounds
7 like -- and I may be wrong -- but it sounds like
8 if he walks -- if a person was to walk up to
9 somebody on the street out of the blue and blow
10 them away, he could be tried for murder, but not
11 capital murder.

12 Q Correct.

13 A But if, you know -- so what to me it is saying is
14 that this man's life is worth more than that man's
15 because this man happened to be a police officer
16 or a judge or a fireman, and granted, they --
17 I don't know. I thought I had been fairly plain
18 in how I felt, but evidently, my mind's getting
19 muddled at the end of the day.

20 Q Well, would you favor life or death as a possible
21 penalty --

22 MR. BAX: Judge, that is asking him to
23 be more specific.

24 Q (By Mr. Elizondo) -- in a capital murder case?

25 A I believe I have already stated twice I am in

1 favor of capital punishment.

2 Q There are two possible penalties, life or death.

3 A I am sorry. My mind is getting muddled. I am
4 in favor of the death penalty under certain
5 circumstances.

6 MR. ELIZONDO: Your Honor, we are going
7 to respectfully challenge this juror as having
8 a bias against the law as it now exists.

9 MR. BAX: Judge, we object. We don't
10 feel this juror has in any way, at this point,
11 disqualified himself.

12 THE COURT: Overrule the objection.

13 Q (By Mr. Elizondo) I hate to keep on asking
14 questions and belabor the point raised by law,
15 but in a capital murder case where you have two
16 possible penalties, life or death, do you have a
17 preference as to the punishment, life or death?

18 A No, sir. I --

19 THE COURT: You have answered the
20 question.

21 A I know --

22 Well, I will be quiet.

23 Q (By Mr. Elizondo) Mr. Matthews, about three or
24 four months ago, a Supreme Court decision came
25 down that said children of illegal aliens had the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

right to a free education.

How did you react to that?

A I honestly originally questioned it.

Q Why was that?

A Well, at the time, it was based on the fact that, you know, they are not per se paying school taxes. Okay? And it was kind of a question to me on that point. I realize that, you know, they do jobs that many of us don't do or consider ourselves to be too good to do, but on that particular question, if they are paying school taxes or regular taxes, that is fine, but I do not believe that they just arbitrarily have a right to a free education.

Q Okay. If you came to find out at a later time during the trial of the case that the Defendant was an illegal alien and he is looking for the same rights that all U.S. citizens have, how would that affect you?

A I think the rights he's got goes beyond being an American citizen as far as justice and the right to be heard.

Q Do you think he is entitled to all those rights?

A Yes, sir, if he is going to be tried in our system, he is entitled to all the rights.

1 Q I have a couple of other questions and I am going
2 to let you go home.

3 What denomination of Protestant are you?

4 A Honestly? None.

5 Q None?

6 Where were you born? What were you
7 born?

8 A Baptist, Episcopalian, Church of Christ.

9 MR. ELIZONDO: Pass the witness.

10 MR. BAX: We will accept Mr. Matthews.

11 THE COURT: What says the Defense?

12 MR. ELIZONDO: Your Honor, we would
13 re-voice our objection and the motion previously
14 voiced in this court and ask the Court to consider
15 the motion and allow the Defendant to examine the
16 entire venire at the end of the voir dire.

17 THE COURT: That is denied.

18 MR. ELIZONDO: Note our exception.

19 Also, violation of Witherspoon, Your
20 Honor.

21 THE COURT: Mr. Matthews, thank you
22 for your participation in this case.

23 Either side can exercise up to fifteen
24 challenges for whatever reason they choose to base
25 that on, and the Defense has decided to excuse

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

you in this case, and we appreciate your honesty
with us.

We understand your confusion.

Thank you very much, and you are
excused.