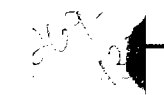


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CAUSE NO. 359,805

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

VOLUME VIII
STATEMENT OF FACTS
VOIR DIRE EXAMINATION
SEPTEMBER 13, 1982

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1 (A jury panel of three was brought
2 into the courtroom, whereupon the following
3 proceedings were had.)

4 THE COURT: Good afternoon, ladies
5 and gentlemen.

6 I would normally come down to be out
7 there, but the only way to get out of here is to
8 go in the hallway and around, and I cannot do
9 that. This is not my courtroom. My name is
10 Henry Oncken. I am judge of the 248th District
11 Court, and our courtroom is located on the fourth
12 floor, but we are in the process of picking a
13 jury for a capital murder case where the State
14 is seeking a conviction for capital murder and
15 asking for the death penalty in this case. When
16 that occurs, we have to have somebody take care
17 of our normal docket because it takes some period
18 of time to select a jury and then try the case,
19 so we can't leave the other cases go, so we
20 have a visiting judge and that judge has to have
21 the facilities to conduct a normal docket and we
22 go around finding whatever space is available for
23 picking a jury. We may be here today and tomorrow
24 as well.

25 So with that explanation, let me

1 introduce several people to you.

2 The case that you are here to be
3 questioned concerning your qualification on is
4 the case -- the Defendant is Ricardo Aldape Guerra,
5 the gentleman seated in the short sleeve shirt,
6 and he is represented by his attorneys, Mr.
7 Candelario Elizondo and Mr. Joe Hernandez, and
8 the lady seated there is Linda Hernandez, no
9 relation to Joe Hernandez. She is an interpreter.
10 Mr. Guerra does not speak English and we are
11 providing him with an interpreter to tell him
12 what is going on throughout this trial.

13 The Prosecution will be represented by
14 two Assistant District Attorneys, Mr. Dick Bax
15 and Mr. Bob Moen, and they are employed on the
16 staff of Johnny Holmes, District Attorney.

17 The lady up here is Cindy Layne. She
18 is the court reporter, and she has a little
19 machine up there that you cannot see where you
20 are located, but she is reporting anything I have
21 said and she will report any responses made in the
22 courtroom, so when you are called in to visit
23 with us, remember to speak out and not nod your
24 heads. Her machine does wonderful things but
25 does not report a nod of the head. If you will,

1 do that, please.

2 Let me tell you just a few things
3 concerning this matter to hopefully enlighten
4 you a little bit about what we are doing. In any
5 criminal case, the State must prove its case.
6 The Defense does not have to prove anything. The
7 State has the burden of proof, and it will be Mr.
8 Moen's and Mr. Bax's job to convince twelve
9 citizens the Defendant did what he is charged
10 with.

11 It is alleged that back on July 13th,
12 1982, Mr. Guerra shot and killed one James D.
13 Harris, a Houston Police officer, and at the time
14 that occurred, Officer Harris was in the course of
15 his official duties.

16 Now, with that knowledge or with that
17 brief statement of what this case is all about,
18 does any one of you know anything about this case
19 that you recall at this time?

20 All right. It will be Mr. Bax and Mr.
21 Moen's job, as I have said, to prove that to you
22 beyond a reasonable doubt, and I will at the
23 close of the evidence in this case, I will draw
24 up what is called a charge. It is simply several
25 sheets of paper that contain all of the law

1 applicable to this particular fact situation.

2 Most of what will be in that charge
3 I cannot tell you, because I don't know what
4 issues yet will be raised by the evidence, and
5 that is what governs what is in that charge for
6 the most part.

7 There are certain things in every
8 charge, and those are the things I want to visit
9 with you about so the lawyers won't have to do
10 that.

11 The burden of proof is beyond a reasonable
12 doubt, and that is a term that will not be defined
13 for you. I can only define for a jury those
14 terms the legislature defines for me, and I will
15 not define that one. To me, it means common
16 sense. To others, it may mean other things.
17 I assume all three of you brought with you your
18 common sense when you came today, and that is what
19 we are talking about.

20 The indictment I mentioned a moment ago
21 is a legal pleading, and it contains the charges
22 that the State has brought against this
23 individual. I will tell you in the charge that
24 that indictment is absolutely no evidence of
25 guilt. It is a legal pleading and nothing more.

1 It is a document that brings this case to this
2 court for trial at this time, and it is the same
3 thing as if you had an accident, automobile
4 accident, and you were injured and you were suing
5 somebody for damages. You make allegations and
6 you must prove those, like when the State made
7 these allegations, and they must prove them.

8 Mr. Guerra, through his attorneys, does
9 not have to put on evidence, does not have to
10 testify, doesn't have to ask questions, doesn't
11 have to do anything, and if he does not do that,
12 if he does not testify -- I don't know whether
13 he will or not -- but if he does not testify,
14 I will tell you in the charge he has the right
15 to remain silent and that circumstance is not to
16 be taken as any evidence of his guilt if he does
17 not testify.

18 In this state, a trial in a criminal
19 case is divided into two parts. The first part
20 of the trial is to hear facts about an event
21 which occurred and to determine whether or not
22 the individual charged with that offense has
23 committed that offense.

24 Then, if the jury finds that the
25 individual charged is the party who committed

1 the offense, then there is a second stage of
2 the trial. That is called the punishment stage,
3 and at that phase of the trial, the jury hears
4 facts, if any, about the prior history of the
5 Defendant, and you hear something about the man
6 who committed the offense for which he is being
7 convicted.

8 So please bear in mind that there are
9 two stages. If, obviously, the jury finds the
10 Defendant not guilty during the first stage, there
11 is not a second phase to the trial.

12 Now in a capital case such as this one,
13 it is a little bit different. Normally, I would
14 submit on the punishment phase of a case to the
15 jury, the full range of punishment the Defendant
16 can be sentenced to. Let's assume it's a first-
17 degree felony offense, say, murder for example.
18 The range of punishment for the term "ordinary"
19 -- I apologize for that term, because no murder
20 is ordinary, but under the law, that is the way
21 it is termed -- but the full range of punishment
22 is not less than five years in the penitentiary
23 nor more than ninety-nine years or life and
24 possibly a fine attached to it, so the jury has
25 an option when they go back in the jury room

1 to set any term of punishment in that range for
2 punishment.

3 In a capital case, the jury answers
4 two questions. Those two questions are right
5 here on the wall, and I will give you just a few
6 seconds to look over that and the lawyers are going
7 to talk with more about that anyway.

8 All right. The jury is given those
9 two questions after hearing whatever evidence
10 either side wants to put on at the punishment
11 stage, and they go back to answer those questions.
12 Those questions must be proved to the jury beyond
13 a reasonable doubt, and the State has the same
14 burden of proof that the State had in the first
15 stage of the trial.

16 A yes answer to both of those questions
17 will result in my assessing this individual to
18 death by injection. A yes answer to one question
19 and a no answer to another question will result
20 in my assessing the sentence of life.

21 For this individual, those are the
22 only two possible punishments in this case. If
23 the Defendant is found guilty of capital murder,
24 there are only two possible punishments, death
25 or life imprisonment.

1 Because the State has the burden of
2 proof, they get to go first. They will put on
3 evidence first. They have a right to open and
4 close arguments at both stages of the trial.
5 That is because they have the burden of proof.

6 In every criminal case, there are
7 thirteen judges in the courtroom in a felony
8 case. We have separate functions, but we are
9 equal. The jury decides the facts and I or
10 any judge decides the law. We submit the law
11 to the jury, rule on the objections, rule on the
12 admissibility of certain evidence, and you decide
13 the facts.

14 Obviously, we must listen to the facts
15 so that we can give the proper law. I have no
16 function in deciding what the facts of this case
17 will be. That is your job.

18 Now just two other brief matters --
19 and it comes up from time to time that jurors
20 will want to ask questions during the course
21 of the trial. Let me assure you at the voir dire
22 stage of the trial, that is what we call this
23 portion of it where the lawyers visit with you
24 to determine your qualifications and eligibility
25 to serve, you can ask all the questions you want

1 to. If you don't understand some stage of the
2 trial or some aspect of the evidence or law,
3 you may certainly ask questions.

4 However, once the evidence begins and
5 we are actually in trial, the jury cannot ask
6 questions. You can ask to have certain things
7 repeated if you didn't hear them, but you can't
8 examine witnesses or cross-examine witnesses.
9 I can't do that either. Sometimes I would like
10 to.

11 Likewise, the taking of notes.

12 MR. McDONALD: Excuse me. Can you ask
13 questions that would involve explanations of what
14 is going on?

15 THE COURT: No, sir.

16 MR. McDONALD: Can you ask questions
17 about what was said?

18 THE COURT: If you didn't understand
19 what was said, you can ask that.

20 MR. McDONALD: Not for interpretation?

21 THE COURT: That is up to the lawyers
22 to develop.

23 I am glad you brought that up. I was
24 about to overlook a key thing.

25 When you are back there to deliberate,

1 if you have a disagreement amongst the jurors
2 as to what was said at that particular point,
3 you can specify that point and tell me in writing
4 what your disagreement is; that is, we have a
5 question about the testimony of Witness "X"
6 concerning this point when Mr. Bax was examining
7 that witness. May we hear that again?

8 That is what this lady is doing. She
9 is making a record. If that question is asked,
10 I will have her look it up in the record. That
11 portion will be read back. She will not read the
12 testimony of all witnesses or all the trial, but
13 only that portion that specifically the jury has
14 a disagreement about.

15 Is that understood?

16 MR. McDONALD: Yes.

17 THE COURT: During the trial, I would
18 ask that no jurors take notes. A lot of times,
19 jurors sit there and take notes in the jury box.
20 That is distracting to other members of the jury.
21 A lot of times, they pay more attention to what
22 they are writing than what others say. All of us
23 may put different interpretations and may arrive
24 at conclusions by different processes, and if
25 you are paying more attention to what somebody

1 is writing down rather than what is going on,
2 you may miss something and it is not permissible
3 at all to have notes taken to the jury room,
4 because that is -- please, no notes.

5 Any questions?

6 Okay. Now, the way we conduct the
7 voir dire in a capital case is individually. We
8 were not able to start this morning with this
9 case and only brought up three jurors, but it
10 takes about an hour. History shows it takes about
11 an hour to examine each juror, and that is done
12 individually. We bring them in one at a time,
13 and, Ms. Oliver, you happen to be first in this
14 case.

15 The other two, Mr. Mock and Mr.
16 McDonald, we would ask that you wait in the
17 hallway. You may, of course, go down and get a
18 cup of coffee if you have a desire to do that
19 at this time. That will be fine.

20 I would ask that once you are through
21 with your examination and you leave the
22 courtroom, either as a juror or one who has been
23 excused for whatever reason, when you leave the
24 courtroom, do not discuss with the others in the
25 hallway what went on.

1 The evidence in this case is what will
2 be the deciding factor as to the guilt or
3 innocence of this individual. When you do come
4 in to be examined, I would ask that you relax.
5 I realize you are in an atmosphere you are not
6 familiar with, and I assure you none of us are
7 going to try to embarrass you or impose our views
8 on you in any way. All we want to know is how
9 you feel about certain issues, and if you feel
10 one way, you are entitled to that opinion, and
11 nobody is going to argue with you about it.

12 Once again, are there any questions?

13 Ms. Oliver, if you will, come right up
14 here and have this chair right here, and, Mr.
15 Mock and Mr. McDonald, if you would like to run
16 to the basement and get a cup of coffee or Coke
17 and so on, please do so, but if you will, be
18 available within thirty minutes.

19 We can't state exactly how long it will
20 take.

21 Thank you.

1 WANDA OLIVER,
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 MR. BAX: May I proceed, Your Honor?

9 THE COURT: Yes, sir.

10 Q (By Mr. Bax) Ms. Oliver, as the judge told you
11 a few moments ago, my name is Dick Bax. I, along
12 with Bob Moen, am with the District Attorney's
13 Office, and we will be representing the State and
14 the family of Officer James D. Harris in this
15 case.

16 Before we get into real questions, let
17 me give you a little background on the case and
18 see if you may have read something in the
19 newspapers or heard something on TV about it.

20 Officer Harris was killed back on
21 July 13th of this year when he had stopped a
22 vehicle with two persons in it for a traffic
23 violation after Officer Harris had exited his
24 patrol vehicle, and he was shot three times in
25 the head.

1 As the two men were fleeing the scene
2 where Officer Harris was killed, a civilian
3 was driving by with his two children in the car.
4 Two shots were fired in that vehicle, and he
5 also died as a result of those wounds he received.

6 Around an hour and forty-five minutes
7 later when the police were trying to apprehend
8 the suspects, another police officer was shot
9 five times. He survived. He returned fire and
10 killed one of the suspects involved.

11 This all took place in the east part
12 of Houston. Dumble and Harrisburg are the main
13 thoroughfares in that area.

14 With that information, do you recall
15 seeing or reading anything on the news about the
16 case?

17 A No, I don't.

18 Q The reason we ask that question of jurors right
19 off the bat is to see if someone may have formed
20 an opinion about the guilt or innocence of the
21 person from what they read in the newspaper
22 accounts.

23 The law requires the twelve people
24 ultimately selected to hear the case, that they
25 have no prior knowledge that would cause them to

1 form an opinion. There is nothing wrong with
2 reading something in the newspaper, but it
3 wouldn't be fair to have made their minds up
4 already as to whether a person is guilty or not
5 guilty.

6 As I can see, you served on a jury
7 just last year?

8 A Right.

9 Q And I am sure at that time, they brought you over
10 with a large group of thirty or forty people?

11 A I think so.

12 Q The reason we do this individually is, number
13 one, because the law requires it, and, number
14 two, so we can get to know someone better, what
15 their feelings are.

16 Should this Defendant be convicted of
17 capital murder, Mr. Moen and I will stand before
18 that jury, I am sure, and ask that you answer
19 the two questions to your right in such a manner
20 as to cause the judge to assess the death
21 penalty, and really, we have had all types of
22 people come through, and I am sure all types will
23 again, before we get twelve people.

24 They all have different views on the
25 death penalty.

1 Some people feel the death penalty
2 is appropriate in any case where a life is
3 taken.

4 Some people feel in no case has the
5 State the right to take a life.

6 There are people who, in a proper case,
7 under the proper set of facts, believe in the
8 death penalty as a type of punishment.

9 What we need to know from you is how
10 you feel about the death penalty.

11 You are the only person who could put
12 yourself in the witness box. No one is going to
13 try to change your opinion, whatever that opinion.
14 Okay?

15 A Okay.

16 Q We need to know how you really feel and see if
17 there is anything to prevent you from being on
18 a jury where the death penalty is involved,
19 whether or not you have religious, conscientious,
20 or moral scruples against the death penalty as
21 a punishment which would prevent you from being
22 a juror in the case.

23 Do you follow me so far?

24 A Right.

25 Q With that brief introduction, would you in your

1 own words -- and I know you haven't had a lot
2 of time to think about it -- but would you tell
3 us about your feelings on the death penalty and
4 whether it would be appropriate in certain cases?

5 A Well, I think it would be appropriate in certain
6 circumstances but not all.

7 Q I know this may be a difficult question to ask you,
8 but what type of circumstances?

9 A I think in the case like we are talking about.

10 Q Let me tell you, there are only certain types of
11 cases where the death penalty becomes a possible
12 punishment. First of all, there has to be a
13 murder, the intentional taking of another life.
14 That alone -- and I don't mean to minimize it
15 again, but it doesn't subject a person to the
16 death penalty.

17 If murder is committed during the
18 course of one of five different felonies, during
19 the course of robbery, during the course of
20 breaking into someone's home or work, killing
21 someone during the course of a rape, during the
22 course of a kidnapping, and, of course, during
23 the course of an arson, if you have a murder
24 during any one of those situations, it becomes
25 capital murder. Okay?

1 If you kill a certain class of people,
2 if you kill a fireman and you know he is a
3 fireman during the lawful discharge of his
4 duties, a policeman, that becomes capital murder.
5 If you kill for money or hire someone to kill,
6 if you kill someone while trying to escape from
7 a penal institution or kill an employee of a
8 penal institution and you are an inmate, those
9 are basically the types of cases where a person
10 subjects himself to the death penalty.

11 Do you feel those are the appropriate
12 types of cases?

13 THE COURT REPORTER: Would you please
14 speak out?

15 Q (By Mr. Bax) Let me ask you one other thing.
16 Cindy Layne has to write down everything you say,
17 so please speak out.

18 A Yes.

19 Q Have you always felt that way about the death
20 penalty as far as you are concerned?

21 A I think so.

22 Q There has been nothing from your personal
23 experience or nothing about the crime rate
24 that would make you now be in favor of it?

25 A No, sir.

1 Q Even though a person -- just to give you the way
2 the whole system works -- even though a person
3 finds a person guilty of a capital murder --
4 let me give you an example of someone who kills
5 a police officer. Just because that person is
6 found guilty of capital murder does not mean
7 automatically the death penalty is imposed.

8 We have the first stage of the trial,
9 and at the first stage, the guilt-or-innocence
10 stage of the trial, at that time we are concerned
11 with did he do it or did he not do it. After
12 we have found him guilty, we proceed to the
13 second stage, the guilt-or-innocence stage.
14 That is when the two questions behind you come
15 into play. If all are answered yes by the jury
16 and all twelve jurors must agree to answer yes,
17 then the judge must, by law, sentence the
18 Defendant to death. Okay?

19 If either Question 1 or 2 is answered
20 no, it is a little different. It only takes
21 ten people to agree to answer a question no.
22 All right? And you don't have to remember these
23 questions. They will be given you at a later
24 time.

25 If either question is answered no, the

1 judge sets his punishment at life imprisonment.

2 The jury does not go back and decide
3 whether the person receives the death penalty
4 or life imprisonment, but really the way you
5 answer those questions tells Judge Oncken what
6 to do.

7 Do you follow me there?

8 A Yes.

9 Q Do you want to look over those questions?

10 A Yes.

11 Q Assume with me for the purposes of our
12 conversation now that you have been on a jury
13 and with eleven other people, you have found a
14 Defendant guilty of capital murder, so now at
15 the punishment stage, these two questions are
16 presented to you.

17 These two questions were created by the
18 1974 -- in 1974, these questions were set forth
19 by the legislature to be used by jurors to
20 determine whether a person would receive life
21 or death in a death penalty or capital murder
22 case. There is nothing peculiar as far as this
23 case is concerned. These questions have had to
24 be dealt with in every capital case since 1974.
25 Okay?

1 A Uh-huh.

2 Q At the second phase, the first question is asking
3 whether the conduct of the Defendant was, number
4 one, deliberate, and, number two, was it done
5 with the reasonable expectation someone would die
6 as a result of that conduct. Okay?

7 Because you have found a person guilty,
8 again, of capital murder doesn't mean that
9 question is automatically answered yes.

10 You see, back in the guilt-or-innocence
11 phase of the trial, you had to find the
12 Defendant intentionally caused the death of a
13 police officer knowing that he was a police
14 officer.

15 We have the word deliberately underlined
16 here. To a lot of people, deliberately and
17 purposefully and intentionally all mean about
18 the same thing, so if you notice, this is a two-
19 part question, so if you were to say deliberately
20 means the same as intentionally, simply because
21 you have found him guilty doesn't mean you would
22 find that it was done deliberately.

23 Do you follow me?

24 A I don't see how I could, so far.

25 Q Let's say you have two people. Under what we

1 call the law of parties, if two people conspire
2 together to commit a crime, it doesn't matter
3 who was guilty, doesn't matter who was the
4 lookout man or -- let's say you have an ex-convict
5 and he gets a seventeen-year-old to commit an
6 armed robbery with him. He says we will go to
7 the bank and all you have to do is stand out in
8 front and you will have a gun, but I will put
9 my gun to the teller's face and get the money.
10 The guy says he will go with you. The seventeen-
11 year-old waits out front and is looking out for
12 the police while the thirty-five-year-old ex-con
13 is inside.

14 During the course of the robbery,
15 something happens and the thirty-five-year-old
16 shoots and kills the teller where he stands. They
17 run out and the police catch both of them.

18 Under our laws, even the seventeen-year-
19 old is guilty of capital murder because he was
20 involved in the robbery and aided and assisted
21 in the commission of the robbery. So, in that
22 type of case, they are both guilty of causing
23 the death of the bank teller, even though the
24 thirty-five-year-old was the only one who did
25 the shooting.

1 When you came down to Question No. 1
2 as to the thirty-five-year-old ex-con, you may
3 say, "Yes, his action was deliberate and was done
4 with the reasonable expectation someone would
5 die."

6 But answering that question as to the
7 seventeen-year-old, you may find his conduct was
8 deliberate, but it was not done with the
9 reasonable expectation someone would die. Okay?

10 A Yes.

11 Q You could have other situations. You could have
12 someone who committed a robbery and accidentally
13 shot someone in the leg, and if that person was
14 guilty of causing the death, you may say it was
15 deliberately done but not with the reasonable
16 expectation that someone would die. All right?

17 A Okay.

18 Q Perhaps at the guilt-or-innocence stage you may
19 have answered that already, but the law says
20 you must base that on the evidence and not on
21 the fact that you found him guilty. There are
22 no automatic answers to either one of these
23 questions. Okay?

24 A Yes.

25 Q Let's talk for a second about Question 2. That

1 is a little bit different. It's really asking
2 you to look into the future as much as you can.
3 All right?

4 We have the word probability underlined,
5 and I don't know -- I guess if I had to substitute
6 a phrase for probability, I would put something
7 like chances are or more likely than not. Would
8 you agree with that?

9 A Yes.

10 Q There is no way I can prove to you to a certainty
11 what is going to happen in the future.

12 A All right.

13 Q The law doesn't require me to prove that.
14 Certainly, only one person could do that and that
15 is God and there is no way -- I don't mean to
16 sound funny -- but he will not be involved, as
17 far as the jury is concerned in this case.

18 Under the law, we must only prove there
19 is a likelihood that the Defendant would commit
20 criminal acts of violence that would be a
21 continuing threat to society.

22 Continuing acts of violence would
23 include other capital murders, robberies, assaults,
24 rapes, and assaults where you would beat up on
25 people. I would not have to prove he would commit

1 another act of murder. The law only requires
2 I prove he is the type of person that would
3 engage in that type of conduct in society.

4 Okay. Society can either be the
5 society where you and I raise our families, work,
6 and what not, but also it is the society in the
7 penitentiary. That includes not only the inmates
8 but guards, librarians, medical help and people
9 to help the inmates.

10 Do you agree with that?

11 A. Yes.

12 Q Do you feel you could answer both of those
13 questions based on the evidence yes or no after
14 hearing the evidence?

15 A. I think I could, yes.

16 Q There is nothing about the way they are worded
17 or phrased in any way that would cause you a
18 problem as far as the answering of those
19 questions?

20 A. No.

21 Q Of course, Question No. 1, the only evidence you
22 can look to there is the evidence you have heard.

23 The law also says as far as Question
24 2 is concerned, a jury can answer that question
25 based solely on the facts before them. In

1 other words, you can look to a criminal episode
2 and determine from that conduct a person displayed
3 whether or not he would be likely to commit
4 criminal acts of violence in the future. That
5 is not saying you have to answer that yes, but
6 you can based on the evidence from one isolated
7 event, answer that question yes or no.

8 Do you follow me there?

9 A. Uh-huh.

10 Q I guess the case that comes immediately to mind
11 is the Ronald Clark O'Bryan case. He is known
12 as the Candy Man. Back in '79, he poisoned one
13 child and attempted to poison another for insurance
14 money.

15 Our court has upheld that conviction,
16 and based on that one incident, they have
17 upheld that and said --

18 MR. ELIZONDO: Your Honor, I object to
19 going into the Ronald Clark O'Bryan case as being
20 a misstatement of the law.

21 THE COURT: Overruled.

22 Q (By Mr. Bax) Do you have questions about 1 or
23 2?

24 A I don't think so.

25 Q And again, those questions are not automatically

1 answered yes simply because you find someone
2 guilty of taking a life, but you have to look to
3 the evidence before you, and if it is proven to
4 you beyond a reasonable doubt the answer should
5 be yes, you would have to vote yes, and if it is
6 not proved beyond a reasonable doubt, you must
7 answer no.

8 Okay?

9 A Yes.

10 Q I am going to go over some general principles of
11 law I am sure the lawyers talked to you about
12 before when you had your jury duty, and if you
13 have questions about them, please stop me, but
14 you are more familiar than most jurors since you
15 have had recent jury duty.

16 The fact this Defendant has been indicted
17 by a Grand Jury, the judge will tell you in the
18 charge, that is no evidence of his guilt.

19 I have a copy of the indictment before
20 me, and it alleges basically that on July 13th
21 of this year, this Defendant in Harris County,
22 Texas, intentionally and knowingly caused the
23 death of James Harris, a police officer in the
24 lawful discharge of his duty, by shooting the
25 police officer with a gun, knowing at the time he

1 was a police officer.

2 It does two things. It charges him
3 and causes him to be on notice. It also tells
4 the State what we must prove in order to be
5 entitled to a guilty verdict. Other than that,
6 it serves no purpose. You are not to consider
7 this as evidence of guilt.

8 Would you have problems in that area,
9 disregarding the indictment as evidence of guilt?

10 A No.

11 Q The Defendant in this case, whether a capital
12 murder or driving while intoxicated, is presumed
13 to be innocent.

14 The reason I asked you before about
15 pre-trial publicity is to be sure we don't have
16 someone who has formed an opinion. All Defendants
17 are presumed innocent until they have been proven
18 guilty beyond a reasonable doubt.

19 Can you afford this Defendant the
20 presumption of innocence?

21 A Yes.

22 Q Simply because a person is presumed to be
23 innocent doesn't mean they are innocent. When
24 they committed the offense on the date of the
25 indictment, they are guilty then. They are guilty

1 when they walk into the courtroom, and they will
2 be guilty the day they die, but the law says
3 that the State simply has to prove it first.

4 Do you have any problem with that?

5 A. No.

6 Q We can't define reasonable doubt. There is no
7 legal definition for it. I am sure they told you
8 it is not proof beyond all doubt or beyond a
9 shadow of a doubt or any doubt. The only way
10 I can prove anything to you and eleven other
11 people beyond any doubt would be if every one
12 of you were eyewitnesses to each transaction
13 that took place, and if you saw the same thing,
14 you would have different versions of what happened,
15 and the law requires I prove it beyond a reasonable
16 doubt, and if you are an eyewitness, you couldn't
17 be a juror.

18 Is there any problem with that?

19 A. No.

20 Q You understand, even though we are talking about
21 capital murder, we have the same burden of proof
22 that the Prosecution had in 1981 in your
23 robbery case, and the same burden of proof we
24 would have in a driving-while-intoxicated case.
25 A Defendant in a criminal trial is not required

1 by law to give any testimony whatsoever. His
2 lawyers can sit there and not ask one question
3 throughout the trial. The Defendant can choose
4 not to testify and the judge will instruct you
5 if the Defendant chooses not to testify, you
6 cannot use that failure to testify as evidence
7 of guilt, and I think the way to think of that
8 is that the whole burden of proof is on our side.
9 Mr. Moen and I have to prove our case. Mr. Guerra
10 does not have to prove his innocence or prove
11 anything.

12 The only thing you have to take into
13 consideration is the evidence you hear from the
14 witness stand. If the Defendant didn't take the
15 witness stand, even though you may wonder why,
16 you may not use that as evidence. You may only
17 use the evidence before you.

18 Any problem with that?

19 A No.

20 Q As far as witnesses are concerned, if the Defendant
21 chooses to testify, he is no different than any
22 other witness that comes before a jury. Simply
23 because he is presumed innocent does not mean
24 that he is presumed to be a truth-teller, and when
25 each witness comes before you, then all, either

1 in your presence or at some other time, take an
2 oath to tell the truth.

3 Even though they do that, the jury
4 must look at each witness as they testify and
5 determine whether they are going to believe that
6 witness or disbelieve that witness, and you can
7 look to the things that I guess we look to in
8 everyday life when we meet people and try to
9 decide if they are telling the truth. What is
10 their motive? Is it reasonable in relation to
11 everything else in the case?

12 After listening to a witness testify,
13 the jury can choose to believe all, part, or
14 nothing of what a witness says.

15 Okay?

16 A. Uh-huh.

17 Q. No witness takes the stand with automatic
18 believability simply because of their occupation.
19 Even though it is our favorite minister or
20 policeman, the fact that they walk into a
21 courtroom with their uniform on gives them no
22 right to be more believable before the jury.

23 The jury is asked to listen to the
24 evidence and then determine if the witness is
25 believable or not.

1 Do you have questions on that?

2 A No.

3 Q Do you have any questions on what we have talked
4 about at this point?

5 I am going a little fast, and if you
6 have questions, please feel free to stop me.

7 Okay?

8 A Okay.

9 Q I need to talk to you about one area of the law
10 we call lesser included offenses.

11 When we initially began to talk, I
12 explained capital murder is murder plus something
13 else.

14 If the jury heard all the evidence
15 in a particular case, and after hearing the
16 evidence, they felt, "Yes, the State has proven
17 to me beyond a reasonable doubt that the Defendant
18 intentionally killed another person, but I have
19 a reasonable doubt that the person who did the
20 killing knew the person he killed was a police
21 officer --"

22 Okay?

23 A Yes.

24 Q -- you could not return a verdict of capital
25 murder. You would only have half of it, but you

1 could find the Defendant guilty of murder which
2 is a lesser offense than capital murder.

3 A person convicted of the offense of
4 murder is not looking at the punishment of life
5 or death. There is a whole new range of punishment
6 in that situation. The punishment range for
7 murder is for any term of years from five years
8 to a maximum of ninety-nine years or life, and
9 in addition, a fine can be assessed of ten
10 thousand dollars. That is a wide, wide range
11 of punishment, and, of course, the legislature
12 says many murders are committed by many types
13 of people in many different fact situations.
14 That is why murder has a different range of
15 punishment.

16 If a juror decides, after hearing all
17 the evidence, that the punishment for the
18 murder is somewhere from five years to ten years,
19 the low end of the scale, the jury can, if they
20 feel it is proper under the facts, recommend to
21 the judge that the Defendant receive probation.

22 I am sure they talked to you about
23 probation in the robbery case. It means the
24 release of someone under certain conditions
25 imposed by the Court.

1 Can you imagine or can you think of a
2 situation -- I am not going to ask you to tell
3 me what the situation is -- but can you think
4 of a situation where you could consider probation
5 if the facts called for it in a murder case?

6 A Yes.

7 Q The judge will also tell the jury that one of
8 their obligations as a jury will be that they
9 not discuss the parole laws in deciding punishment.
10 The jurors are not to consider or talk about or
11 allude to how long a person would have to serve
12 on a life sentence. That is left to the exclusive
13 discretion of the Board of Pardons and Paroles.

14 MR. ELIZONDO: I object to counsel
15 going into parole laws.

16 THE COURT: Overruled.

17 Q (By Mr. Bax) That is left to the discretion of
18 the Board of Pardons and Paroles, and the reason
19 I mention that to you at this point in time is
20 because while you are on this jury and anyone
21 at any stage mentions the word parole, you are
22 under an obligation to tell that person to stop
23 that and not consider that in your discussion,
24 and, number two, the reason I am telling you that
25 is that that is so important. If that is brought

1 up by a jury, that is reversible error, and we
2 would have to start all over again, and that is
3 the reason we go into that. You probably recall
4 that being in the charge the last time.

5 Do you have a preference between a
6 life sentence and the death penalty? Do you have
7 preferences between the two punishments?

8 A That is sort of hard to answer. It would depend,
9 you know, on the circumstances.

10 Q It would depend on the facts before you?

11 A Right.

12 Q In the 1981 robbery case, were you able to reach
13 a verdict in that case?

14 A I beg your pardon?

15 Q Was the jury you were on in 1981 -- were you able
16 to reach a verdict in that case?

17 A Yes.

18 Q Was the jury called upon to assess the punishment?

19 A Uh-huh.

20 Q Do you have a nephew -- is that the one who is a
21 police officer with the Houston Police Department?

22 A Right. My husband's nephew.

23 Q What is his name?

24 A Jimmy Davis.

25 Q Jimmy Davis?

1 A Uh-huh.

2 Q Is he a patrol officer, or do you know how he is
3 assigned?

4 A I don't really know.

5 Q Does he visit with y'all at the house at all, or
6 how often would you say you see him?

7 A Well, I see him about once a year at Christmastime.
8 I talk to him on the phone some.

9 Q Okay. You wouldn't feel any requirement to find
10 a person guilty who was charged with killing a
11 police officer just because you have a nephew
12 who is a police officer, would you?

13 A I should hope not.

14 Q Is there anything about that relationship that
15 would cause you problems in listening to the
16 evidence in a case like this?

17 A No.

18 Q What bank is your one son a teller at?

19 A I think it is Southwestern Savings and Loan.

20 Q And you've got one son who is a student. Where
21 is he a student?

22 A At the University of New Mexico in Albuquerque.

23 Q I tried to get in law school out there. That is
24 a very pretty place.

25 A It really is.

1 Q Do you have questions of me as far as anything
2 we have talked about?

3 A No.

4 Q Can you think of any reason why you wouldn't be
5 a fair and impartial juror to both sides if you
6 were selected on a case such as this?

7 A No.

8 Q Ms. Oliver, I have enjoyed talking with you.

9 MR. BAX: No further questions.

10 Pass the juror.

11
12 EXAMINATION

13
14 QUESTIONS BY MR. ELIZONDO:

15 Q Hello, Ms. Oliver. How are you doing?

16 A Fine.

17 Q How long have you lived in Houston?

18 A Ten years.

19 Q As the prosecutor mentioned to you, this is voir
20 dire examination. Voir dire is a French word
21 which means to speak the truth, and the reason
22 we are asking questions is to see how you feel
23 about certain things and that is why we are doing
24 it individually so the questions will not
25 embarrass you or humiliate you in front of anybody

1 else.

2 As the State mentioned, this is a
3 capital murder case. They have certain burdens
4 of proof. They have to prove to you beyond a
5 reasonable doubt that it happened here in Harris
6 County, Texas, on a particular day, this
7 Defendant shot and killed a police officer in the
8 lawful discharge of an official duty, knowing at
9 the time he was a police officer. They have to
10 prove that to you beyond a reasonable doubt.

11 As he mentioned a little while ago,
12 there is no legal definition for the term
13 reasonable doubt. The judge won't give you one,
14 he won't give you one, and I can't give you one.

15 All I can say is to give you a comparison
16 or an analogy. Across the street at 301 Fannin,
17 the civil courthouse, they try lawsuits over
18 personal injuries, workmen's compensation cases
19 sometimes for a lot of money, millions of dollars.
20 The proof over there is proof by a preponderance
21 of the evidence, the greater weight of the
22 credible evidence.

23 The legislature said in the criminal
24 courthouse before anybody's life is forfeited,
25 literally in this case, the State has a pretty

1 heavy burden, and they have to prove that case
2 beyond a reasonable doubt, so by reason of that
3 analogy, I hope I have explained to you basically
4 what a reasonable doubt is. It is a heavy
5 burden, and rightfully so.

6 Do you agree or disagree?

7 A I agree with that.

8 Q So the State, in proving their case, will prove
9 their case basically by calling witnesses to the
10 witness stand where you are sitting now, and you
11 will hear the rendition of the facts. You, as
12 the juror, will be the closest person to the
13 witness. You will be able to see their demeanor,
14 how they answer questions, how they act, and then
15 it will become your job as a juror to be the
16 judge of the facts. You can believe some of,
17 none of, or all of whatever a witness says.

18 Then the State will then rest their
19 case. That means that is all we have.

20 The Defendant, at that time, can if he
21 chooses, he can put on evidence. He doesn't have
22 to.

23 How do you feel about that?

24 A I don't know.

25 Q Have you ever thought about it?

1 A I've probably never thought about it until I was
2 here before.

3 Q Do you like that or dislike that part of the law?

4 A I don't really have strong feelings about it. I
5 just know that is the way it is.

6 Q Let's give you an example. Assume the State
7 puts on their case and they rest their case and
8 we rest our case also, don't have evidence. You
9 go back to the jury deliberation room and you
10 deliberate and you are sitting back there saying,
11 "I think he did it, but the State hasn't proven
12 their case to me beyond a reasonable doubt. The
13 Defendant didn't testify." Are you going to use
14 the fact that he didn't testify to kind of carry
15 you over to that burden of proof and find him
16 guilty?

17 A Well, I would hope not.

18 Q Like I said, I am not trying to quarrel with you
19 over that. I am trying to see how you feel about
20 certain things.

21 A I don't think I would.

22 Q You don't think you would?

23 A Well, I have never been in that type of situation
24 before, so I guess I could never really say for
25 sure what I would do. I know you are not

1 supposed to use that against him.

2 Q When you use the word "think," it scares us.

3 Like an example, if I go up there and say, "You've
4 got a mallet in your hand. Are you going to hit
5 me with that mallet," and you say, "I don't think
6 so," I would be scared you might hit me with that
7 mallet.

8 Would you or wouldn't you?

9 A No.

10 Q There are no right or wrong answers.

11 A I hate to say definitely no. I wouldn't think
12 so, but I have never been in that position. I
13 can't swear to it.

14 Q Would you hold it against the Defendant, Ricardo
15 Guerra, if he didn't testify?

16 A No.

17 Q Would you want him to testify?

18 A Well, you know, if I had questions in my mind,
19 I might want him to.

20 Q If you want him to testify and he doesn't testify,
21 and you are sitting in the jury deliberation
22 room --

23 A I think that would be more of a curiosity thing.
24 My wanting him to testify would be to see what he
25 had to say about it.

1 Q Well, would you use that against him in any way,
2 use that against him if he did not testify?
3 A No.
4 Q If you are back in the jury deliberation room
5 and thinking and saying to yourself, "I am not
6 sure they proved their case to me beyond a
7 reasonable doubt, but the Defendant didn't testify
8 --"
9 A No.
10 Q " -- therefore, he must be hiding something, and
11 therefore I am going to carry over and use that
12 against him and find him guilty beyond a reasonable
13 doubt"?
14 A No, no.
15 Q So you understand, he has got a right or privilege
16 not to testify?
17 A Right.
18 Q And you won't use it against him?
19 A No.
20 Q A little while ago, I gave you an example where
21 you might think somebody is guilty, but it hasn't
22 been proved beyond a reasonable doubt.
23 Have you ever given a deposition?
24 A Will you say that again?
25 Q You might think someone else is guilty. You might

1 go in the jury room and say, "I think he did it,
2 but I don't think so beyond a reasonable doubt."

3 If you ever got to that situation, what
4 would your verdict be in any kind of criminal
5 case?

6 A. If I wasn't sure, I would say not guilty.

7 Q. You can see you might be put in a situation where
8 you think he might have done it, but it hasn't
9 been proven to you beyond a reasonable doubt.
10 Do you see where you might be in that position?

11 A. I guess it would be possible. I am not sure.

12 Q. Let's assume the State rests their case and we
13 put on evidence. We call witnesses to the witness
14 stand, call the Defendant to the witness stand,
15 and, you know, he can be impeached for any felony
16 conviction up to ten years. He can be discredited
17 as to any criminal felony conviction he might have
18 had, say, in the last ten years, and you, as a
19 juror, will be able to judge his credibility or
20 judge the other people's credibility, and then
21 if that should happen, there would probably be
22 two diametrically opposed stories and then it
23 will become your job as a juror to decipher the
24 evidence and make a decision and base it upon a
25 reasonable doubt.

1 If you believe he is guilty beyond a
2 reasonable doubt, it will become your job to
3 find him guilty.

4 If, however, you don't believe he is
5 guilty beyond a reasonable doubt, then it will
6 become your job to find him not guilty.

7 Can you promise you will do that?

8 A. Yes.

9 Q. In a capital murder case, if you find him guilty
10 of capital murder, there are two possible
11 punishments, life or death.

12 In this type of case, murder of a police
13 officer, would you always give the death penalty
14 in that type of case?

15 A. Now what?

16 Q. In a murder of a police officer, in a capital
17 murder of a police officer --

18 A. Uh-huh.

19 Q. -- would you always give the death penalty?

20 A. Are you asking me would I, personally?

21 MR. BAX: I object to the form of the
22 question. The jury does not give the death
23 penalty.

24 Q. (By Mr. Elizondo) Let me rephrase it.

25 A. All right.

1 Q In a death penalty case, there are two phases
2 in any capital case, two stages: Guilt-or-innocence
3 to determine whether they are guilty. If not
4 guilty, we don't go to the second stage. If we
5 find him guilty, we go to the punishment stage.
6 At that stage of the trial, it would be two
7 possible punishments: life or death, and, of course,
8 that is determined by how you answer those questions.

9 A Right.

10 Q If you answer yes, the Defendant gets the death
11 penalty.

12 A Right.

13 Q If either is answered no, he gets a life
14 sentence.

15 A Right.

16 Q If you find him guilty of knowing and
17 intentionally killing a police officer in the
18 first part, the guilt-or-innocence stage, would
19 you automatically answer the question yes?

20 MR. BAX: Your Honor, first of all,
21 he is using a specific situation in which a police
22 officer is killed, and is about to limit it to
23 one area, and I object to it.

24 MR. ELIZONDO: I want to find out how
25 she feels about a capital murder case involving

1 a police officer.

2 A Okay. You are saying if I found someone guilty

3 --

4 Q Guilty.

5 A Would I automatically answer the question yes;

6 is that what I would do?

7 Q Yes.

8 A No.

9 Q The first question will ask you to determine

10 whether the conduct of the Defendant that caused

11 the death of the deceased was committed

12 deliberately and that wording is underlined.

13 A Uh-huh.

14 Q Deliberately will not be defined for you by the

15 judge, by the Prosecution, or by me. There is

16 no legal definition for the word deliberately.

17 The legislature, when they made up

18 those two questions, didn't see fit to give you

19 a definition for the word deliberately. The

20 only thing I can do is to give you by analogy

21 again -- when you go to the jury deliberation

22 room and deliberate on whether he is guilty or

23 not, you will go and ponder or think about with

24 measurable consideration whether or not he is

25 guilty or not.

1 In other words, to some people, it
2 might mean premeditated, the word deliberately.

3 How do you feel about that? Do you
4 think the word deliberately means the same thing
5 as the word intentionally or give me your feeling
6 on that.

7 A I think that would be the same, deliberately and
8 they intentionally did it.

9 Q Okay. I don't want to confuse you and hope I
10 don't confuse you, but if you have already found
11 him guilty of intentionally causing the death
12 of somebody, then we will go to the punishment
13 stage. There you get to the first question again,
14 whether his conduct was committed deliberately
15 and with a reasonable expectation that the death
16 of the deceased would result.

17 Would you automatically answer that
18 question yes?

19 A No.

20 MR. BAX: She has answered for the
21 record, and I will object to that as being
22 repetitious. He has asked it two or three times.

23 Q (By Mr. Elizondo) The second question is asking
24 you more or less to predict the future -- would
25 you agree? Whether there is a probability the

1 Defendant would commit criminal acts of violence
2 that would constitute a continuing threat to
3 society.

4 Do you think a person can change his
5 mode of behavior or mode of conduct?

6 A I know a person can.

7 Q Pardon?

8 A I know a person can.

9 Q Let's assume we are back at the guilt-or-innocence
10 stage and you have found the Defendant guilty of,
11 let's say, murder, instead of capital murder, and
12 let's assume that it becomes now your time, your
13 job, to assess a penalty and the penalty range
14 for murder is anywhere from five to ninety-nine
15 years or life and possibly a ten-thousand-dollar
16 fine imposed.

17 Could you in your own mind consider
18 something like five years' probation?

19 MR. BAX: My only objection is classic.

20 Someone who is charged with murder and
21 they find him guilty of murder, I think the proper
22 question would be: Would you in a proper case
23 consider probation?

24 MR. ELIZONDO: I am trying to phrase
25 it.

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THE COURT: Rephrase it.

Q (By Mr. Elizondo) Suppose you find him guilty of murder and get to the punishment stage.

In a proper case, any case, could you assess five years' probation?

A Are we talking about a murder case?

Q Yes, ma'am.

A And would I be willing to give probation?

Q Consider it.

THE COURT: Ms. Oliver, if you will, please, answer out.

A Okay. Sorry. I keep forgetting.

Q In the example of Mr. Bax's case about the seventeen-year-old and the thirty-five-year-old going to the Seven-Eleven, I believe it was to commit a robbery, let me give you another example and change some of the facts there hypothetically.

We can't talk about this case at all, but let's assume the thirty-five-year-old is going to the Seven-Eleven and he has got a gun and he walks up and meets up with the seventeen-year-old and he gives the seventeen-year-old a gun. They don't talk about robbery. He just gives him a gun. They go in the Seven-Eleven and the seventeen-year-old is buying a stick of gum

1 or whatever, and all of a sudden, this thirty-five-
2 year-old pulls out a gun and commits a robbery
3 and kills, let's say, the cashier. The seventeen-
4 year-old gets scared and runs out, out of the store.
5 The seventeen-year-old runs out of the store and
6 they both get caught, apprehended.

7 Under the law of parties, if that
8 should arise, the judge will give you a charge
9 on that, the law of parties. The law of parties
10 says that anybody who assists, encourages, aids,
11 or abets in the commission of a felony or another
12 crime, he is just as guilty as the other one.

13 You are sitting in the jury deliberation
14 room and you are saying, "I am not sure this
15 fellow, this seventeen-year-old, had anything to
16 do with the robbery, and if you believed that,
17 would you find him not guilty?

18 A Uh-huh. Yes.

19 Q Okay. I forget when it was, six, maybe seven
20 months ago, the Supreme Court came down and said
21 that children of illegal aliens have a right to
22 a free education.

23 Do you remember that?

24 A No.

25 Q I don't recall when it was. It might have been

1 three or four months ago.

2 How do you feel about that?

3 A All right with me.

4 Q If it should come to your knowledge during the

5 trial that the Defendant is an illegal alien,

6 will you hold that against him?

7 A No.

8 Q How would you consider yourself politically?

9 Liberal, moderate, conservative?

10 A Probably moderate.

11 Q What is your son studying at the University of

12 New Mexico?

13 A Business.

14 Q Is he a sophomore now?

15 A Uh-huh.

16 Q Live in the dormitory or outside?

17 A He lives in the dorm.

18 Q Let me ask you just a couple more questions.

19 Would you believe a police officer over

20 everybody else just merely because he is a police

21 officer?

22 A No.

23 Q You will judge everybody the same?

24 A Right.

25 Q Ms. Oliver, if you were on the jury panel, can

1 you promise us one thing, that you will base
2 your verdict, and base it upon the law and
3 evidence you hear?

4 A Yes.

5 Q And you will give this man, Ricardo Aldape
6 Guerra, a fair and impartial trial?

7 A Yes.

8 MR. ELIZONDO: Thank you. Pass the
9 juror.

10 MR. BAX: The State will gladly accept
11 this juror, Your Honor.

12 THE COURT: What says the Defense?

13 MR. ELIZONDO: Your Honor, prior to
14 excusing Ms. Oliver, we would re-urge our motion
15 to examine the entire venire, exercise our
16 peremptory challenges after the examination of
17 the entire venire.

18 THE COURT: Overruled. You are
19 exercising a strike?

20 MR. ELIZONDO: Yes, Your Honor.

21 THE COURT: Ms. Oliver, the Defense
22 has elected to exercise one of their challenges
23 in your situation, so you will not be required
24 to serve on this jury.

25 MS. OLIVER: Wonderful.

1 THE COURT: Let me tell you we do
2 appreciate very much your presence.

3 The clerk is about to give you a work
4 slip.

5
6
7
8 THOMAS ALLEN MOCK,
9 was called as a prospective juror and responded to
10 questions propounded as follows:

11
12 EXAMINATION

13
14 QUESTIONS BY MR. MOEN:

15 THE COURT: Mr. Mock, if you will,
16 just relax. You will notice we have coffee and
17 we have an extra cup if you would like some.

18 THE JUROR: I don't believe so.

19 Q (By Mr. Moen) Is it Mock? Is that how you
20 pronounce your last name?

21 A Yes, sir.

22 Q I am Bob Moen, and I a member of the District
23 Attorney's Office of Harris County, and seated
24 next to me is Mr. Bax. He is also a member of the
25 District Attorney's Office in Harris County.

1 He and I will be representing the
2 State of Texas and the family of J. D. Harris
3 in the prosecution of this case styled the
4 State of Texas versus Ricardo Aldape Guerra.

5 He is the individual seated next to the
6 interpreter at my far left, and at his far right
7 is Linda Hernandez, his interpreter.

8 Candelario Elizondo and Joe Hernandez
9 are the two lawyers to the left who are
10 representing Mr. Guerra in the defense of this
11 case. This portion is very important. We have
12 to have the jurors come in so we can visit with
13 them individually. It is not that we have the
14 luxury of doing this on every case, but because
15 of the punishment involved, the law requires we
16 bring the jurors in individually because of the
17 seriousness of the case, to talk to them
18 individually and find out what their feelings
19 are and to try to apprise them of what would be
20 expected of them because of their jury service
21 on the case and to find out what their feelings
22 are regarding capital punishment.

23 I will ask you that in just a second,
24 but I want to explain to you certain things.

25 Not all murders in our state are

1 capital murder cases. For a person to take
2 another person's life, unlawfully take another
3 person's life, that person, if he were found
4 guilty by the jury, would stand liable in the
5 punishment range of a sentence from five years
6 in the penitentiary to ninety-nine years or life.
7 That is the penalty for the crime of murder.
8 The death penalty doesn't apply to murder.

9 Our legislature has taken five different
10 circumstances and they have said, if a murder
11 takes place during those circumstances or to
12 certain individuals, we will define those murder
13 cases as capital murders and elevate the
14 punishment the person can receive and will
15 receive for committing that crime.

16 A person who is found guilty of
17 capital murder can only receive one of two
18 possible punishments, the death penalty or a life
19 sentence. For capital murder, those are the only
20 possible punishments.

21 The way the punishment is assessed is
22 not by the jury going back and deliberating,
23 "Should we give a life or death sentence." The
24 jury doesn't do that. Instead, they take all the
25 evidence they have heard during the entire trial

1 and try to answer those questions over by the
2 pillar on your right shoulder, and depending
3 upon their answers to those questions, a
4 particular punishment is handed down, either a
5 life sentence or the death penalty.

6 At this portion of the trial, what we
7 do is find out what your feelings are.

8 There are no right or wrong answers.
9 I am going to start asking you questions shortly.

10 A Okay.

11 Q All we ask is that you give us your frank
12 responses. I know you will do that.

13 The reason I emphasize this is that
14 no person is required to be a juror in any case
15 where the jury service would violate his
16 religious, conscientious, or moral beliefs he has
17 held dear all his life. No one is required to be
18 a juror where to do so would violate his beliefs.
19 The only way we can do that is by asking a juror
20 how they feel, would it allow them to serve or
21 keep them from serving.

22 A Uh-huh.

23 Q All we ask is that they tell us themselves.

24 We don't care what their answers are, but by
25 their answers, they either qualify themselves or

1 tell us they could not do it and they are
2 excused.

3 A Right.

4 Q We only know by their responses, and with that
5 in mind, tell us your feelings about the death
6 penalty.

7 A I have fairly mixed emotions on that issue, but
8 currently, I feel that I could not in good
9 conscience vote for capital punishment.

10 Q I appreciate your telling us that. In fact, after
11 two weeks of doing this -- this is your first day
12 here, but this is our eleventh working day at
13 doing this.

14 It is nice to have someone tell us
15 frankly that is how they feel.

16 Please, you don't have to apologize.
17 I know you weren't saying that by way of apology,
18 but because you feel as you feel doesn't make you
19 any more or less of a citizen. All we are asking
20 is for someone to give us their frank opinions.

21 Bear with me. I need to ask you five
22 or six questions the law requires me to ask even
23 where people come and tell me or make the
24 responses you have given me.

25 I take it by what you are saying you

1 are against the concept of the death penalty, or
2 as far as you anticipate --

3 A As far as I am concerned, for my conscience.

4 Q Is that a -- your feelings concerning the death
5 penalty or capital punishment, are those based
6 on your religious beliefs, personal convictions,
7 or a combination of those?

8 A I think it is just personal convictions.

9 Q Okay. Are these deep-seated on your part?

10 A Like I say, I have mixed emotions, but I would
11 say so. Though it might be all right with me
12 if it were a member of my family.

13 Q Is it pretty much the way you have felt all your
14 life?

15 A Yes.

16 Q Let me explain to you now a little bit about what
17 we have already talked about, these two questions
18 here.

19 The way a person gets the death penalty
20 is by answering these two questions. If both
21 answers are yes -- no one tries to hide anything
22 from you on a death penalty case like this. No
23 one tries to do it in any case. No one would try
24 to hide anything from a jury panel especially in
25 a capital murder case -- but if both questions

1 are answered yes, the man receives the death
2 penalty.

3 If a no answer goes in on either one
4 of the questions, the man gets the life
5 punishment.

6 I want to ask you a hypothetical
7 question. The law requires it. I want to ask
8 it one more time. I ask it of all jurors. You
9 are not in the hot seat all by yourself.

10 Imagine a case where you are a juror
11 in a capital case and it came down to answering
12 these questions and the evidence convinced you
13 your answers ought to be yes. Are you telling
14 me because of your feelings, you would be
15 inclined and would always answer one of the
16 questions no?

17 A. Yes, if I was a juror.

18 Q. Yes?

19 A. Yes.

20 Q. I am not going to give you any horrible cases
21 like thirty children being machine gunned to
22 death, but are you telling me that is how you
23 feel now and would feel for all times?

24 A. Yes. Like I said, if it had been a member of my
25 family, I wouldn't know if I would. I wouldn't

1 know until it happened.

2 Q Even a member of your family, you feel like --

3 A I wouldn't know, but I would think so.

4 Q Can you think of any other case where you would
5 be able to participate as a juror with your
6 feelings on capital punishment?

7 A No.

8 MR. MOEN: I will pass you to the Defense,
9 and they may give you examples of horrible fact
10 situations. I don't know whether they will or
11 not, but I will let them question you.

12

13 EXAMINATION

14

15 QUESTIONS BY MR. ELIZONDO:

16 Q Mr. Mock, how do you do?

17 As Mr. Moen told you, this is a capital
18 murder case.

19 As in all trials in Texas, there are
20 two parts. First, there is the guilt-or-innocence
21 stage, and if you find him guilty of capital
22 murder, you go to the punishment stage, and at
23 that point in time, if you find him guilty of
24 capital murder, you can consider either life or
25 death, and that is determined by how you answer

1 those two questions, and I noticed you told Mr.
2 Moen you weren't too sure or you had mixed
3 emotions about the death penalty; is that correct?

4 A Yes, I do, but down deep, I am against it.

5 Q You are against it?

6 A Yes.

7 Q Well, you know, sometimes we are against certain
8 things, but we can still follow the law and base
9 our verdict upon the law.

10 Let me give you some hypothetical
11 examples, and maybe you can see what I am getting
12 at.

13 You heard about the Coral Eugene
14 Watts case in the paper? He was accused of
15 killing nineteen women, and I believe he got
16 sixty years. Let's assume for a minute that
17 Coral Eugene Watts had kidnapped one of those
18 girls and then he killed her. Well, that would
19 have been capital murder. Let's assume for a
20 minute you are sitting on a jury and you heard
21 the evidence and you find he confessed to it
22 and found his confession was voluntarily given,
23 and as I said, the first part is guilt or
24 innocence, and the State has proven to you beyond
25 a reasonable doubt that he is guilty of the

1 offense of capital murder, kidnapping and murder.

2 Could you then find him guilty at the
3 guilt-or-innocence stage?

4 A. Yes. I could find him guilty.

5 Q. Of capital murder?

6 A. But my conscience wouldn't allow me to sentence
7 him to death.

8 Q. That would be in the first part. You could find
9 him guilty of capital murder?

10 A. Yes. Yes.

11 Q. Then in the second part, you are asked a question
12 as to whether or not the conduct of the Defendant
13 that caused the death of the deceased was
14 committed deliberately and with the reasonable
15 expectation that the death of the deceased might
16 result.

17 Well, you find during the course of
18 the trial that he strangled her and tortured her
19 and he finally killed her. Well, that first
20 question, you would find he committed the
21 offense deliberately, would you not?

22 A. Yes.

23 Q. And, of course, with a reasonable expectation that
24 death would result?

25 A. Yes.

1 Q Could you, in your own conscience, find the
2 answer should be yes, if you found he tortured
3 her and strangled her and sexually abused her
4 and shot her in the head with a .45? Could
5 you answer that question yes if you found that
6 beyond a reasonable doubt?

7 A Deliberately?

8 Q That the death of the deceased would result.

9 A Yes.

10 Q Then you go to the second part and the second
11 part will ask you whether there is a probability
12 that the Defendant would commit criminal acts
13 of violence that would constitute a continuing
14 threat to society.

15 At that point in time in the trial,
16 the State is allowed to bring in other evidence,
17 and they will bring you the other nineteen people
18 he tortured and killed.

19 MR. MOEN: I would believe, suggest
20 we would not bring in nineteen people tortured
21 and killed.

22 THE COURT: I will take judicial
23 notice of that.

24 Q (By Mr. Elizondo) Well, bring you evidence he
25 tortured and killed nineteen other people.

1 You sit in the jury deliberation room
2 and are asked the second question, whether there
3 is a probability he would commit criminal acts
4 of violence that would constitute a continuing
5 threat to society, and if you believe it beyond
6 a reasonable doubt, could you answer that question
7 yes?

8 MR. MOEN: The only thing I ask is that
9 he include, by answering both questions yes, the
10 death penalty would result.

11 MR. ELIZONDO: I wasn't through.

12 THE COURT: You may proceed.

13 Q (By Mr. Elizondo) If you go back in the jury
14 deliberation room and you hear this evidence of
15 these other nineteen murders: strangulations,
16 sexual abuse killings, and you are asked to
17 answer Question No. 2 and you believed beyond a
18 reasonable doubt that there was a probability he
19 would commit a criminal act of violence in the
20 future that would constitute a continuing threat
21 to society, would you answer that question yes?

22 A Yes.

23 MR. MOEN: Same objection again. He
24 said he was going to finish the question or add
25 to it, and then he did not.

1 The only thing I would ask him to
2 explain so Mr. Mock is not confused, is asking
3 if he would answer the question yes rather than
4 stating him to the Coral Eugene Watts case, is
5 to test Mr. Mock on the general qualification of
6 the law rather than specific examples.

7 The question is could he answer the
8 question yes knowing the death penalty would
9 result or would that violate his conscientious,
10 moral, or religious scruples.

11 I think that is the proper question,
12 not what he would do in the Coral Eugene Watts
13 case.

14 THE COURT: You may proceed.

15 Q (By Mr. Elizondo) You would have answered
16 Questions 1 and 2 yes, correct?

17 A Yes.

18 Q At that point in time, you know your answers to
19 the questions is going to make Judge Oncken
20 kill him, give the death penalty.

21 Could you still answer Questions 1 and
22 2 yes if you believed him guilty beyond a
23 reasonable doubt?

24 A Well, if I was on the jury?

25 Q Uh-huh.

1 A I had been selected?

2 Q You told me a little while ago you could answer
3 Question 1 yes if you believed it beyond a
4 reasonable doubt and you could also answer
5 Question 2 yes if you believed it beyond a
6 reasonable doubt.

7 Now, when you answer those two questions
8 yes, you know that Judge Oncken will then have to
9 sentence him to death.

10 A That is what I am against.

11 Q I am against the Blue Laws. I don't -- you know
12 what the Blue Laws are? You can't shop on
13 Sunday.

14 A Yes. Yes.

15 Q I have to follow them. I have to obey them.

16 All I am asking you is could you follow
17 the law? Could you obey the law and if you believed
18 beyond a reasonable doubt that those two
19 questions should be answered yes, could you answer
20 them yes?

21 MR. MOEN: I object to counsel
22 insinuating that Mr. Mock would be violating the
23 law by not answering the questions yes.

24 THE COURT: Sustained on that basis.

25 Q (By Mr. Elizondo) I didn't mean to insinuate

1 that. I am trying to figure out if you could
2 answer Question 1 yes if you believed it beyond
3 a reasonable doubt that it should be answered
4 yes?

5 A Knowing the result, I could not answer yes to
6 No. 2 then.

7 Q Okay. No. 2 is asking you to determine if there
8 was a probability that the Defendant would commit
9 criminal acts of violence that would constitute
10 a continuing threat to society.

11 In a hypothetical example, they are
12 allowed to bring in other offenses the Defendant
13 may have committed such as, let's say, they bring
14 in a fact situation that he has committed this
15 type of offense before or two or three times
16 before, and if you believed it beyond a reasonable
17 doubt that there was a probability that he would
18 commit criminal acts of violence that would
19 constitute a continuing threat to society, could
20 you answer that question yes?

21 MR. MOEN: Same objection as before.
22 Rather than asking what he would do on any
23 specific question, I think the proper question to
24 ask the juror in light of his responses already
25 given, is there any case he can think of in his

1 mind he could answer the questions yes, knowing
2 the death penalty would result.

3 THE COURT: Sustained.

4 Q (By Mr. Elizondo) Can you imagine a hypothetical
5 example in your own mind where you would answer
6 Question 1 yes and Question No. 2 yes knowing that
7 your answers to those two questions would have
8 Judge Oncken sentence him to death?

9 A No.

10 Q You can't think of a hypothetical example?

11 MR. MOEN: Judge, based on the responses
12 Mr. Mock has given, we would respectfully challenge.

13 THE COURT: Sustain the challenge.

14 Mr. Mock, thank you very much for your
15 presence with us today, and bear in mind no one
16 is arguing with your position. We certainly
17 respect it. You are entitled to that. We thank
18 you very much.

19 You are excused.

20 MR. ELIZONDO: Your Honor, for the
21 record, we would object to it as a violation of
22 Witherspoon.

23 THE COURT: Objection noted.
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MARSHALL McDONALD,

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

EXAMINATION

QUESTIONS BY MR. MOEN:

MR. MOEN: Hang on just a second and we will start.

THE COURT: I am sorry, Mr. McDonald. Please bear with us. We are obviously relaxing with a cup of coffee. We have an extra one if you would like one. Please just relax.

You may proceed.

MR. MOEN: Thank you, Judge.

Q (By Mr. Moen) Mr. McDonald, my name is Bob Moen. I am with the District Attorney's Office here in Harris County. Seated beside me is Mr. Dick Bax, also with the District Attorney's Office of Harris County, and we will be representing the State of Texas and the family of J. D. Harris in the case of the State of Texas versus Ricardo Aldape Guerra.

He is charged with killing a police officer by the name of J. D. Harris by shooting

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1 him in the head three times with a pistol.

2 He is represented by two lawyers,
3 Candelario Elizondo and Joe Hernandez. They
4 will be representing Ricardo Aldape Guerra.

5 On their left, and the lady next to them
6 is an interpreter. She will interpret everything
7 we say and the judge says from English to Spanish.

8 The judge mentioned earlier he would
9 like to know if the jurors had heard anything
10 about the case. Let me give you a few more
11 details to see if you have heard or read anything
12 about this case.

13 It occurred July 13th at the intersection
14 of Edgwood and Walker, which is near the southeast
15 portion of this town near the intersection of
16 Harrisburg and Dumble where they intersect.

17 I don't know if you are familiar with
18 that part of town or not.

19 It is alleged Officer Harris was killed
20 in the line of duty after making a routine traffic
21 stop, and about seventeen feet from that point,
22 a man was driving with his boy and daughter in
23 the backseat of the car and he was killed, and
24 an hour and forty-five minutes later while the
25 police officers were attempting to arrest the

1 suspects, one police officer was shot five
2 times and one of the suspects was, in turn, shot
3 and killed.

4 Is there anything about those facts
5 that may ring a bell about this particular
6 occurrence that occurred on July 13th?

7 A I think I recall hearing it or seeing it on
8 television, the news.

9 Q The only reason I go into it, it is to find out
10 whether or not what you have read or heard caused
11 you to form any conclusion or opinion about this
12 man on trial?

13 A I don't think so, no.

14 Q There is nothing wrong with having heard or
15 read anything about a case. We ask jurors if
16 they have formed any opinions whatsoever.

17 I need to ask you questions about your
18 feelings and opinions about the death penalty
19 in just a little bit, but before I do that, I
20 need to explain the procedure and what we are
21 doing here this afternoon.

22 This is your first day over here with
23 us, but we have been at this -- this is the
24 eleventh working day. The law requires us to bring
25 in jurors individually one at a time to talk to

1 them, to tell them what would be required of
2 them on jury service and find out what their
3 feelings and opinions are, and the reason we do
4 it individually is because it is a very serious
5 case. I think you realize that, but more than
6 that, I have to find out about the jurors because
7 our law does not require any citizens to
8 participate on a jury panel where their morals
9 would oppose them from doing so.

10 There are people who say, "I cannot
11 participate in a capital murder case and return
12 a verdict which would result in the death penalty,"
13 and we talk to other jurors and they say, "Yes,
14 I could do it if the evidence were there." There
15 are others who ask us to explain it a little more,
16 if we would, and they can do it as well.

17 That brings me to the first question.

18 Can you tell me what your feelings or
19 opinions are concerning the death penalty? Would
20 they allow you to serve on such a case and allow
21 you to return a verdict that would result in
22 someone receiving the death penalty?

23 A. Yes.

24 Q. Your feelings concerning capital punishment, are
25 those lifelong feelings on your part?

1 A Certainly.

2 Q Some people tell us because of a particular
3 occurrence in their life or study or conversations
4 they have had with friends, they at one time were
5 opposed to the death penalty, but have changed
6 their opinions.

7 Are your opinions the way you have felt
8 pretty much all your adult life?

9 A Yes, they are.

10 Q Not all murders in our state or in our community
11 are punished as capital murders.

12 Our legislature has taken ten different
13 instances in which a murder takes place and they
14 have said if a particular individual was killed
15 or if the murder takes place during the course
16 of committing another crime, another felony
17 offense, that person, if found guilty by a jury,
18 will receive only one of two possible punishments,
19 a life sentence or the death penalty. All other
20 murders fall into a totally different range of
21 punishment, five to ninety-nine years or life.
22 That is the punishment for someone to receive
23 who takes another person's life, five to ninety-
24 nine years or life.

25 However, our legislature has said in

1 these cases I am going to mention to you, while
2 in the course of engaging in this felonious type
3 of activity or in murdering this class of people
4 -- let me give you an example of what they are
5 talking about. Rape-murder, the rapist kills his
6 rape victim; kidnapping-murder; breaking into a
7 home and killing anyone inside the home or anyone
8 who arrives at the scene; robbery-murder; and
9 finally, arson-murder, setting a fire intending
10 to kill someone and that is the result that
11 occurs.

12 Also, our legislature has said if a
13 fireman is killed during the course of his
14 official duties, someone sets a fire to watch
15 the fireman arrive, and when he does, kills him
16 because that is his idea of fun, that is a capital
17 murder. To kill a police officer during the
18 course of his official duty, to kill during the
19 escape from a penal institution or kill anyone
20 inside, and lastly, murder for hire.

21 Our legislature says in those ten
22 instances, they are capital murder, subject to the
23 life sentence or the death penalty. They are the
24 only two punishments a man can receive.

25 The way the jury answers the questions

1 there determines how the punishment is assessed
2 by Judge Oncken. The punishment is assessed by
3 the jury's answers to those questions over your
4 right shoulder.

5 If you would, take an opportunity to
6 look at the language in those questions.

7 Let me ask you, if you will, to direct
8 your attention to this first question over here,
9 and let me talk to you a little bit about that.

10 Before -- as I mentioned earlier --
11 the way a juror assesses punishment in a jury case
12 is not by deliberating and saying, "Shall we give
13 a man the life sentence or the death penalty in
14 this jury case?" Instead, they take those questions
15 back in the jury deliberation room with them.

16 At the first stage of the trial, all
17 you decide is whether a man is guilty or not
18 guilty. That is the only decision you have to
19 make. If you find a man guilty, you come out and
20 get into a seat in the jury box and proceed to
21 the second phase of the trial.

22 In addition, at the second phase of the
23 trial, they can hear additional evidence about
24 the man on trial, what type of man he is. The
25 jury can take all the information they have heard

1 and they go back to the jury deliberation room
2 and decide what the answers should be to those
3 questions. If both answers are yes, the man
4 receives the death penalty. If either question
5 is answered no, the man receives a life sentence
6 rather than the death penalty.

7 Do you follow me so far on that?

8 A Yes, I do.

9 Q All twelve jurors have to unanimously agree before
10 a question can be answered yes.

11 However, only ten have to agree before
12 a question can be answered no.

13 Do you follow me on that?

14 A Uh-huh.

15 Q This first question would basically be asking you
16 to make a determination about, first of all, the
17 man's conduct that resulted in the death of the
18 deceased. Was the conduct on the part of the
19 Defendant that caused the death of the deceased,
20 was that deliberate conduct and was it done with
21 a reasonable expectation the deceased would die?

22 Let me give you an example of how
23 the first question applies to a hypothetical
24 capital murder case.

25 Imagine a man going into a convenience

1 store and he confronts the cashier at the
2 convenience store. It is in the early morning
3 hours. He thinks there are no witnesses other
4 than the cashier. She delivers the money and
5 then he fires into her chest or into her head,
6 killing her. He runs out of the store.

7 Unbeknownst to him, she has triggered
8 an alarm system that calls the police and they
9 are waiting outside.

10 That is capital murder in our state,
11 robbery-murder.

12 After being found guilty by the jury,
13 the jury would then decide, in answer to Question
14 1, was the conduct of that man, the firing of the
15 bullets in her body, was that deliberate on his
16 part and done with the reasonable expectation
17 that she would die.

18 Do you follow me how that first question
19 is answered?

20 A Yes.

21 Q You follow the conduct of the man on trial.

22 A Yes.

23 Q It's a fairly straightforward question the jury
24 would be required to answer based on the facts.

25 Do you follow me on that?

1 A Yes.

2 Q You will have to use your own definition for
3 deliberately.

4 The legislature drew these questions
5 up, but they didn't give us definitions on that.
6 You will have to use your own common sense. Okay?

7 The second question is different because
8 it calls for making a determination about the man
9 on trial based on everything they have heard about
10 him and the offense he committed, whether or not
11 the man on trial is the type of person that would
12 commit criminal acts of violence that would
13 constitute a continuing threat to society.

14 Let me direct your attention to the word
15 probability, and you will notice that the word
16 is probability. You will notice they drafted
17 this word as well, and when they drafted our
18 murder statute, these are the two questions they
19 drew up. They didn't give us any definition for
20 probability, criminal acts of violence, or society,
21 or deliberately. You will have to use your common
22 sense.

23 The word is probability, not certainty.

24 Before you answer this question yes
25 based on the evidence you will hear, you do not

1 have to believe there is a certainty the man would
2 engage in any specific act of violence, and I
3 think you will know why. The only person I can
4 think of in this entire universe that could
5 answer that question to a certainty is God
6 himself, and the jurors are not asked to play
7 God. The jurors do not have to put themselves
8 in the position of the Almighty. They are to do
9 the best they can considering the evidence of the
10 crime itself, and the evidence about the man who
11 is on trial to make a determination. Is he the
12 type of person who would commit criminal acts
13 of violence that would constitute a continuing
14 threat to society.

15 Now the word society is all-inclusive
16 phrase or word, and you will have to use your
17 own definition for that.

18 I think you realize a man who is found
19 guilty of capital murder would find himself in the
20 prison society rather than the society you and I
21 live in.

22 Criminal acts of violence that would
23 constitute a continuing threat to society.

24 Do you follow me on Questions 1 and 2?

25 A Yes.

1 Q Do you feel like these are the type of questions
2 that you, as a juror, would be able to answer
3 depending upon the evidence you would hear?

4 A Yes.

5 Q Is there anything about the way these questions
6 were worded that would make you feel it was
7 impossible to answer the questions just because
8 of the way they are worded?

9 A No.

10 Q Do you have questions of me about 1 or 2 that
11 we can go over at this time?

12 A No.

13 Q Let me point out something to you. I thought
14 there was something to explain to you, and there
15 is. I almost forgot it.

16 When you are answering these questions,
17 you answer them basically like we are talking
18 about, on the evidence on the trial; the answers
19 to 1 and 2 are not automatically yes just because
20 a man has been found guilty of murder. If the
21 answers were automatically answered yes, that
22 would be the end of the trial. If the jury
23 returned a guilty verdict, both questions would
24 be answered yes, and we would all go home.

25 Let me give you a hypothetical case

1 of why these questions are not automatically
2 answered yes just because a man has been found
3 guilty of capital murder.

4 For example, imagine a case, a
5 hypothetical, where the man goes into the
6 convenience store and confronts the lady working
7 behind the counter. Imagine this man was an
8 ex-con thirty-five years old with a prior
9 conviction and he had taken a seventeen-year-old
10 boy with him. This older fellow had been able
11 to dominate the seventeen-year-old as far as
12 getting him to do what he wants him to do. He
13 puts the gun in the seventeen-year-old's hand
14 and says, "I want you to stand in front of the
15 store and watch, and if you see anyone coming, you
16 let me know." The seventeen-year-old knows a
17 robbery is taking place, and he agrees to
18 participate to that extent, but, you see, under
19 our law of parties, people who act together to
20 commit a crime are equally guilty together. A
21 getaway man is just as guilty as a man robbing
22 a bank, even if he is the man waiting outside
23 in the getaway car.

24 If the roles were reversed, under our
25 law of parties, one criminal cannot come down

1 and say, "I can't be a Codefendant just because
2 he was shooting someone to death. I didn't have
3 any intention of anybody being shot."

4 Our law says whenever there are criminal
5 acts of violence -- and it's reasonable to say
6 when you take a gun, it is for a reason, even if
7 it's the lookout driver, they would be able to
8 anticipate someone might be shot even though they
9 had no intention whatsoever of shooting anyone, and
10 they could be guilty of capital murder.

11 Even the seventeen-year-old, under the
12 hypothetical I have outlined to you, would be
13 guilty of capital murder.

14 Do you see how if he were tried, and
15 you came to answering the questions and were trying
16 to decide was that deliberate conduct on his
17 part, the jury might very well think it wasn't
18 deliberate at all as far as the cashier was
19 concerned? In fact, I honestly believe the
20 seventeen-year-old had no knowledge he was going
21 to shoot her, and did nothing in the furtherance
22 of her being shot.

23 Do you see how, under different fact
24 situations, different answers can be given by the
25 jury to these questions?

1 Do you follow me on that?

2 A Yes, I do.

3 Q That is why the answers are not automatically
4 yes just because someone else has been found
5 guilty under our law of capital murder. The
6 individual looks to see what part the individual
7 played in the crime to see what the answers to
8 the questions should be. Okay?

9 A All right.

10 Q I want to talk to you about a couple of other
11 things, but before I get to that or talk about
12 those, let me talk to you a little bit about your
13 personal information sheet here.

14 Back in the 1940's, you were the victim
15 of a burglary?

16 A Yes.

17 Q Was the person or were the persons apprehended?

18 A Yes, they were.

19 Q Did your wife or yourself have to come and
20 testify?

21 A No; as far as I know, I don't know what the
22 outcome of it was. This was when I was in
23 school and the fraternity house I was living in
24 was burglarized.

25 Q How about the robbery in 1982? Were you the

1 victim of that?

2 A. That was my son.

3 Q. Your son was?

4 A. Yes.

5 Q. Was he hurt in the robbery, other than the mental

6 anguish?

7 A. He was held up with a pistol.

8 Q. How about the person who committed that? Was he

9 ever apprehended?

10 A. Not to my knowledge.

11 Q. Was your son by himself?

12 A. He was by himself.

13 Q. He is a fireman with the Houston Fire Department?

14 A. Yes, he is.

15 Q. How long has he been doing that type of work?

16 A. He started the training program last November

17 and graduated, I think it was, in April.

18 Q. And your wife, I take it she is deceased?

19 A. I have no wife.

20 Q. Have you ever been married?

21 A. Yes.

22 Q. Now, back on your last page we have some questions

23 of all prospective jurors. Have you ever had an

24 unpleasant experience involving law officers,

25 and you said yes. Incidents involving police

1 officers?

2 A There are at least three instances that have
3 occurred.

4 Q I would appreciate it if you would be as specific
5 as you can. Were these involving yourself or
6 another member of your family?

7 A They were involving myself and my son or together.

8 Q Were they primarily in traffic ticket citation
9 types of situations?

10 A No, none of them were.

11 Q I wonder if you might tell me about them.

12 A Any particular one?

13 Q All three, if you would.

14 A As I said, there are approximately three. There
15 might have been more than that.

16 The first incident I recall was not
17 with a specific police officer. He was an ex-
18 police officer who was a guard, a member of the
19 security guard at Transport Aircraft where I
20 worked.

21 Q Okay.

22 A And I drove to work one morning and arrived in
23 there, and without my knowledge or anyone else's
24 knowledge, they had changed the whole parking
25 setup.

1 Q Yes.

2 A And I usually got to work early so I could park
3 near the gate, so I wouldn't have to walk a mile
4 to get into the place, and as a result of this
5 change they had arbitrarily made without notifying
6 anybody, I went to park where I was accustomed
7 to parking, and this officer started running up
8 and running and screaming and telling me I couldn't
9 park there, and we had a little hassle about it.

10 Q He didn't strike you?

11 A He would have liked to, but he didn't. I think
12 he had that much control, but when the incident
13 was over, I left the parking lot with my car and
14 waited until the time was such that I could park
15 where I wanted to and parked where I had had
16 parked, and when I went to the office, I called
17 the chief of the police of the company police
18 and told him what had happened and he said, "Well,
19 I am pretty certain -- I have already had some
20 complaints about this particular problem," and
21 he said, "I don't think we will keep this parking
22 arrangement much longer," so I dropped it at that
23 point and the parking arrangement was dropped
24 after that week.

25 The thing that led to the problem was

1 that the man who was accosting me about it --
2 it was his idea of how to park the cars this way.

3 Q I can understand why you were upset.

4 A That was the situation.

5 In another situation, my son and I were
6 out when he was a young teenager. He's been
7 interested in the fire department and police
8 department and things they did for quite a long
9 time. In this particular instance, we were in
10 the neighborhood or something, and he had these
11 radios where you could hear what was going on
12 and the police calls and fire calls, and we
13 heard of this particular thing where someone had
14 a gun and was held up in a house and the police
15 were in the neighborhood, so we went by there to
16 see what was happening, and there were at least
17 a hundred, hundred fifty people in the general
18 neighborhood, and we were standing behind the
19 lines that were set up by the police to see what
20 was happening. There really wasn't anything
21 happening. We decided to walk up the street, not
22 the street where the man was barricaded, but on
23 the next street up. We decided to walk to the
24 other end of the block to see what was happening,
25 if anything, up in that area.

1 Q Yes.

2 A And when we got about a third of the way up the
3 block, this police officer at the other end of
4 the block started screaming and yelling and came
5 down toward us and telling us we couldn't be
6 there and this, that, and the other, and the
7 usual hassle, and he started -- I asked him
8 several questions of what the problem was. When
9 I said there was a hundred fifty people standing
10 as close to where we are now to where things
11 are going on, and he dropped his interest in me
12 and started talking to my son and you could see
13 him developing, working himself up to a problem
14 there, and I said, "Wait a minute. You keep things
15 civil here," and he changed his attitude just
16 like that and said, "Oh, I am being civil about
17 it. I am being civil." And the whole thing
18 quieted down and he went back to where he had
19 been, and I went back to where he was, and this
20 is the sort of thing.

21 I can't remember another one, although
22 I recall a couple of instances.

23 Q The only reason I had any concern at all, I am
24 sitting here myself, and I have experienced that
25 type of altercation with security guards and what

1 not. I just want to do everything I can to
2 represent them as well as a member of my family.
3 I want to make sure and check with you that there
4 is nothing about your experiences that would keep
5 you from being fair and impartial, not only to the
6 Defendant but to the slain officer as well.

7 A I don't think so.

8 Q Where were you stationed in World War II? Were
9 you stationed stateside or overseas?

10 A Both. In England, Africa, Italy, China.

11 Q Did you receive any type of commendations or
12 meritorious service awards for your service?

13 A Nothing out of the ordinary, no.

14 Q How many men were you in charge of as a captain
15 in World War II?

16 A I was a technical officer, and in general, I was
17 in charge of a small group, if any. Frequently,
18 I worked on my own.

19 Q When you say technical officer, what do you mean?

20 A I was in radar work.

21 Q Okay. Let me talk to you about the things that
22 will be required of you by your jury service.

23 I notice that you have been on a sanity
24 hearing before and where a liquor license
25 violation had taken place, which are a little

1 different, I think.

2 On the liquor license violation type
3 case, you've got the same responsibility as a
4 juror that you have at a sanity hearing where
5 civil rules prevail, but on a case like this, the
6 judge is going to charge you in writing there are
7 certain functions that you are to perform as a
8 juror. He will tell you that you are to presume
9 that the Defendant is innocent and that you are
10 to reach your verdict based on the evidence that
11 you hear from the witness stand rather than from
12 the fact that the Defendant finds himself here
13 in this courtroom having to answer an indictment
14 that has been returned by the Grand Jury and
15 he finds himself represented by two attorneys.

16 Do you follow me on how that presumption
17 of innocence works?

18 A. Yes.

19 Q The presumption of innocence is a legal
20 presumption, and I think you realize from your
21 common sense a man who is caught committing a
22 crime is just as guilty the day he is caught
23 as when he comes to the courthouse.

24 The only thing we ask is that the
25 jurors who don't know anything about a crime

1 presume he is innocent and base their verdict
2 on the evidence.

3 Do you follow me on that?

4 A Yes.

5 Q The law also charges that a man has a right to
6 remain totally silent if he chooses to do so.
7 A trial is a wide-open proceeding. Either side
8 or both sides, rather, have an opportunity to
9 offer evidence, to prove or disprove what either
10 side would like to.

11 The Defendant has the right, if he
12 chooses to exercise it, to get on the stand and
13 testify. No one can keep him off the stand.

14 He also has the right to remain in
15 his chair and not say a single thing in his
16 defense, not say a single word and not get on the
17 stand and do otherwise.

18 The judge will tell you if the Defendant
19 doesn't testify, you are not to consider that as
20 evidence of his guilt.

21 Do you follow me on how --

22 A Yes.

23 Q -- silence works or failure to testify works?

24 A Yes.

25 Q The judge will charge you in a criminal case that

1 the burden of proof always rests with people
2 like myself, members of the District Attorney's
3 Office, to prove beyond a reasonable doubt --
4 that is the phrase the judge used a couple of
5 hours ago when talking to you and the two other
6 jurors.

7 You see, the burden of proof in a
8 criminal case always rests on this side of the
9 table. We have the burden of proving to all
10 jurors, before they can say to their verdict
11 guilty, and that burden is to prove his guilt
12 beyond a reasonable doubt. It never shifts to
13 the Defense. As I mentioned, they don't have
14 the burden to prove or disprove anything. They
15 have the opportunity to prove or disprove whatever
16 they would like, but as far as the burden is
17 concerned, the obligation to do it, the only
18 person or persons who have the obligation are
19 Mr. Bax and myself.

20 Do you follow me on that burden of
21 proof?

22 A Yes.

23 Q That burden is to prove he committed the offense
24 beyond a reasonable doubt. Before you could say
25 by your verdict in this or any other capital

1 murder case or any case, we must prove his guilt
2 beyond a reasonable doubt. We must prove the
3 man was guilty.

4 Before you answer Questions 1 and 2
5 yes, you would have to believe beyond a reasonable
6 doubt that is what your answer should be, not
7 beyond all doubt, any doubt, or a shadow of a
8 doubt. Those are not the tests. Those are the
9 tests on the lawyer shows on television, but the
10 test here in this court is to prove to the jury
11 the guilt beyond a reasonable doubt.

12 Why is that? I think the legislature
13 realizes, as you do, to be convinced beyond all
14 doubt, beyond a shadow of a doubt, you would have
15 to be present yourself when a crime took place
16 or see a videotape replay a crime taking place.
17 If the authorities could know when a crime was
18 going to take place and film the act, you could
19 be convinced beyond all doubt or a shadow of a
20 doubt, but the law says witnesses can never be
21 jurors on a case, and therefore, the test is not
22 to prove to witnesses beyond all doubt or a
23 shadow of a doubt, but to people who know nothing
24 of how a crime took place, beyond a reasonable
25 doubt.

1 Do you follow me on that?

2 A Yes.

3 Q I would suggest in answer to Question 2, the only
4 person I know of who can answer Question 2 beyond
5 all doubt or a shadow of a doubt would be the
6 Almighty himself, and like I say, no one requires
7 anybody to put himself in the position of God,
8 and therefore, the burden of proof is beyond a
9 reasonable doubt and not beyond all doubt or
10 a shadow of a doubt.

11 Do you follow me on that?

12 A Yes.

13 Q The judge will charge you when you judge the
14 credibility of witnesses -- you know that. You
15 have sat on the liquor license violation case.
16 It may have been sometime ago -- you judge the
17 credibility of the witnesses. You decide who is
18 guilty and who is not, even though that person
19 has taken an oath to God to tell the truth.

20 I think you realize there are many
21 people in this community who will take an oath
22 to God to tell the truth and they will march up
23 to the witness stand and do the opposite. That
24 is why the burden falls on the jurors to decide
25 who they believe and who they do not believe.

1 The law tells us this, as a way of
2 guiding citizens on a jury: You are not to give
3 a witness any more or less belief just because of
4 his job. A fireman or police officer or a
5 retired engineer or member of the District
6 Attorney's Office is not any more believable just
7 because of the job he has. The law doesn't say
8 our favorite minister or best friend, because
9 of his job, are the automatic tellers of the
10 truth.

11 The jury is to determine the credibility
12 of that witness by his demeanor on the stand.
13 Does their story make sense in logic and fact
14 in light of what they have heard from the other
15 witnesses. Those are decisions the jury makes.

16 Don't believe or disbelieve anybody
17 because of their job.

18 Do you follow me on that?

19 A Yes.

20 Q That brings me to the last final thing, and I will
21 pass you to the Defense and they will have some
22 questions.

23 We have talked about the punishment
24 range for the offense of murder, and I am sure
25 you wanted to ask me, "Why was he talking about

1 that?" It was to draw a distinction between murder
2 and capital murder, but to get me also to this
3 point.

4 Someone found guilty of capital murder,
5 which is to intentionally or knowingly take another's
6 life, can be given probation.

7 Did you know that?

8 A Which class?

9 Q Someone who is found guilty of murder.

10 A Not capital murder?

11 Q Not capital murder, but the offense of murder,
12 which has that range of five to ninety-nine years
13 or life sentence, can be given probation by a
14 jury even though the jury has found him guilty of
15 murder.

16 Do you realize that?

17 A Yes. I knew that.

18 Q Are you familiar with how probation works,
19 generally?

20 A Yes.

21 Q The only thing a juror has to do before they can
22 grant someone probation for having committed the
23 offense of murder, they have to believe in their
24 hearts and minds, first of all, it is the proper
25 case for probation, and secondly, they have to

1 believe in their hearts and minds the man should
2 receive no more than ten years in the
3 penitentiary.

4 You have to unanimously agree to that,
5 and then the jury can, if they feel it is a proper
6 case, recommend probation, even though they found
7 someone guilty of murder.

8 Do you follow me on that?

9 A Yes.

10 Q Do you feel like if you had found someone guilty
11 of the offense of murder, can you think of
12 some circumstances in your mind, or could you ever
13 consider recommending probation in a case where
14 probation could be given by the jury?

15 A Yes.

16 Q Good. Sometimes, we have to stimulate jurors or
17 give them hypotheticals, but I take it you can
18 imagine circumstances in your own mind where a
19 person could be found guilty of murder and
20 receive probation?

21 A Yes, sir.

22 Q Do you have any questions of me at all so far
23 about anything I have gone over with you?

24 A No. I don't think so.

25 Q Now, are there any other responses you have given

1 me so far this afternoon that would be in any
2 way different if you were to learn the Defendant
3 was an illegal alien? Would that affect your
4 decision in this case one way or the other?

5 A No.

6 Q Hang on a second. I want to talk to Mr. Bax. I
7 want to see if he has questions I haven't thought
8 of.

9 I am glad he reminded me.

10 The judge will charge you one final
11 thing. This will apply when you're answering
12 those questions. You are not to consider what
13 time a man would have to serve on a life sentence.

14 MR. ELIZONDO: Objection to the
15 prosecutor discussing the law of parole.

16 THE COURT: Overruled.

17 Q (By Mr. Moen) That is solely within the
18 discretion of the Board of Pardons and Paroles.
19 There has been a lot of information about that
20 in the paper recently in regards to some cases,
21 and I am sure you are familiar with our Board of
22 Pardons and Paroles, at least in general terms.

23 A Yes.

24 Q I can have a promise from you, if someone brought
25 it up, you would tell them to keep their mouth

1 shut, and you would tell us?

2 A Yes.

3 Q Are there any questions of me at all?

4 A No.

5 MR. MOEN: I will pass you to the
6 Defense, and if you are selected, I look forward
7 to serving with you.

8

9 EXAMINATION

10

11 QUESTIONS BY MR. HERNANDEZ:

12 Q Mr. McDonald, this portion of the trial is called
13 voir dire, which means literally to speak the
14 truth.

15 We are here today not to pry into your
16 personal life and will try not to offend you or
17 embarrass you in any way.

18 I ask you these questions merely in
19 good faith so we are certain we can select twelve
20 people on this jury who can be fair, just, and
21 honest.

22 Of course, I can't emphasize the
23 seriousness of this case enough. It is a capital
24 murder case, a capital murder case where a police
25 officer was killed in the line of duty.

1 So, though, when I ask you these
2 questions there is no right or wrong answers in
3 what you say, we will respect your own beliefs
4 and your own principles and own morals.

5 We also, by that same token, understand
6 that all people have biases and prejudices of
7 some kind or another, and although you will not
8 -- possibly will not be able to serve on this
9 jury or well -- I don't know, but if you are not,
10 it is not anything to detract from your being a
11 good citizen. You could serve on another jury,
12 but not this jury in that case, so again, I will
13 reemphasize what we are looking for is honesty
14 and sincerity in your answers. It is how you
15 feel.

16 Are you with me on that?

17 A. Yes.

18 Q. Let me ask you some personal questions. Would
19 the fact that your son, being a fireman in the
20 line of duty, would that affect you in any way
21 in your judgment in this trial?

22 A. Not that I can see, no.

23 Q. Would the fact that Mr. Guerra is here as an
24 illegal alien and represented by two attorneys and
25 charged with intentionally and knowingly causing

1 the death of a police officer affect you in any
2 way?

3 A I don't think so.

4 Q Would you agree with me then as he sits here today
5 indicted by the Grand Jury, that would be no
6 evidence whatsoever concerning his guilt? In
7 other words, as he sits here today, would you give
8 him the presumption of innocence as he sits today?

9 A I would give him the presumption of innocence
10 he has been charged with the thing. I mean,
11 exactly what the situation is right now is that
12 he has been charged, but does not mean guilt,
13 as far as I am concerned.

14 Q As Mr. Moen was saying, there are three concepts
15 or basic principle concepts of the criminal
16 justice system, which is the presumption of
17 innocence and the burden of proof and the reasonable
18 doubt.

19 He is presumed to be innocent until
20 you have proof beyond a reasonable doubt of his
21 guilt.

22 Can you agree with me on that?

23 A Yes, sir.

24 Q And that is that his presumption will go or will
25 be with him throughout the trial.

1 Would you agree with me on that?

2 A Yes.

3 Q And that presumption can only be overcome only

4 when the State has proved it beyond a reasonable

5 doubt.

6 Can you agree with me on that?

7 A Yes.

8 Q The law states that the burden of proof will

9 always be on the State to prove the case.

10 Do you have any problems with that?

11 A No.

12 Q Would you expect my client to prove his case or

13 prove he is innocent in any way?

14 A No.

15 Q So you would demand, if the State brought the

16 charges, would you not demand that he prove up

17 the case beyond a reasonable doubt to you or to

18 the other eleven jurors?

19 A Yes.

20 Q And the fact that he has been indicted by the

21 Grand Jury would not affect you in any way as

22 he sits here today?

23 A No.

24 Q Okay. Now, there is a theory of law or concept

25 of law called reasonable doubt or beyond a

1 reasonable doubt. That will not be explained
2 to you by the judge and will not be explained to
3 you by Mr. Moen or explained to you by us.

4 A. Is reasonable doubt what the judge would
5 interpret as he did, common sense?

6 Q. The State has the burden of proving to you beyond
7 a reasonable doubt this Defendant's guilt, and we
8 cannot interpret for you what reasonable doubt
9 is.

10 My interpretation, very simply, of
11 reasonable doubt is doubt founded in reason or
12 with reason.

13 So would you demand the State to prove
14 to you beyond a reasonable doubt this Defendant's
15 guilt?

16 A. Yes.

17 Q. Now, would you agree with me then that police
18 officers make mistakes and can make mistakes and
19 they are subject to the same human frailties
20 as we are?

21 A. Yes.

22 Q. Would you agree with me then that under certain
23 circumstances, witnesses, whether they be police
24 officers, whether they be citizens, whether they
25 be ministers, whether they be professional people,

1 are subject also to the same frailties as far
2 as making mistakes?

3 A Certainly.

4 Q Well, let me start again.

5 This trial will take two phases. The
6 first one is the guilt-or-innocence stage.

7 If you find him guilty, then you are
8 asked to answer these two questions in the
9 punishment stage. There are two stages, guilt
10 or innocence and punishment.

11 If you find him guilty at the guilt-or-
12 innocence stage, everybody goes home -- if you
13 find him not guilty at the guilt-or-innocence
14 stage, everybody goes home. If you find him
15 guilty at this stage, you are asked to assess
16 the punishment he is charged with of intentionally
17 and knowingly causing the death of the police
18 officer.

19 I will ask you to read with me the
20 No. 1 question, whether the conduct of the
21 Defendant that caused the death of the deceased
22 was committed deliberately and with the reasonable
23 expectation that the death of the deceased or
24 another would result.

25 The word deliberately will not be defined

1 for you by either myself or the judge or the
2 State.

3 How would you interpret the word
4 deliberately?

5 A Intentionally.

6 Q Well, all right. Let me ask you this. If you
7 have found in the first stage my client guilty of
8 intentionally and knowingly causing the death of
9 someone, which would be murder of a police
10 officer, his intention, since intentionally is
11 the same as deliberately, would you automatically
12 answer 1 in the punishment stage as yes?

13 A Not necessarily. I think it gives you a strong
14 inclination in that direction, but I think there
15 might be some mitigating circumstances that would
16 interpret that a little differently.

17 A Right, and then you will probably ask or demand
18 -- not so much demand -- but would keep an open
19 mind as to the punishment stage if the State
20 decides to present evidence to you? Am I
21 correct?

22 A Yes.

23 Q In other words, you would listen to the evidence
24 in the punishment stage, whether it would be
25 deliberate or not?

1 A Yes.

2 Q Now, you have lived in Falfurrias, Texas?

3 A Yes.

4 Q And you are predominantly Mexican-American,
5 right?

6 A Right.

7 Q So the fact he is an illegal alien would not
8 affect you in any way?

9 A Yes.

10 Q Did your parents live in Falfurrias?

11 A Our whole family lives there.

12 Q Were you ranchers?

13 A My father was a retired Army officer and that
14 is where we retired. We had an orange grove and
15 farm and lived there until we went to college.

16 Q So the fact that -- since you have been around
17 Mexican-Americans and the fact he is an illegal
18 alien, or far as illegal aliens as a class, it
19 wouldn't affect you in any way?

20 A In this case, no.

21 Q And you would set aside all feelings of prejudice
22 and decide it solely on the evidence before you?

23 A Yes.

24 Q And, of course, you have the right to keep an
25 open mind until you hear the evidence?

1 A Yes.

2 Q And afford him the presumption of innocence?

3 A Yes.

4 Q And place the burden solely on the State to prove
5 to you beyond a reasonable doubt --

6 A Yes.

7 Q -- this Defendant's guilt?

8 And you would not hold it -- there will
9 be a portion or a situation where Mr. Elizondo
10 and I will make a decision whether we would want
11 our client to testify or not.

12 Do you understand that a person has the
13 right not to testify? Did you understand that?

14 A I understand that.

15 Q And if we make the decision, solely our decision,
16 not to have him testify or for other reasons he
17 doesn't testify, would you hold that against him?

18 A No.

19 Q Would you want him to prove to you his innocence?

20 A No.

21 Q Would you expect him to prove his innocence?

22 A No.

23 Q Then would you demand the State to come forth
24 with the evidence and to prove to you beyond a
25 reasonable doubt this man is guilty?

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MR. HERNANDEZ: No more questions.

THE COURT: What says the State?

MR. BAX: May we have a moment?

MR. MOEN: Judge, we will excuse Mr.
McDonald.

THE COURT: Mr. McDonald, by way of
explanation, each side has, in a capital murder
case, fifteen strikes that they can make for
whatever reason, and the State has decided to
make that exclusion in your particular situation.

I think you are a very intelligent
individual, and I appreciate very much having
you on jury duty.

You are excused.

THE JUROR: Am I free to go all the way
home now?

THE COURT: You can do whatever you
would like.

MR. ELIZONDO: You are free now.

(At this time court recessed for the
day.)