Aldape: Trial Transcript
(9/82) (voir dire) Cv.13)

~~SdA~~ ~~FINM~~ ~~Opened: 07/26/98~~

H NEXT DAY 03/15/2006 3:00pm CST R2
HH254 60654804-000020 For: JAASM
VINSON & ELKINS LLP
1001 FANNIN STREET
SUITE 2240
FLOOR 22
HOUSTON, TX 77002-6760
RECORDS MGMT RECORDS MGMT B06156485
JULIE AASMYR-RECORDS DEPT SR
ZZ0865766032
0865766032
HHY00535211-00003 Return To IRON MOUNTAIN

CAUSE NO. 359,805

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

VOLUME XIII
STATEMENT OF FACTS
VOIR DIRE EXAMINATION
CONTINUED
SEPTEMBER 20, 1982

F2069 0102

I N D E X

	Page
VOLUME XIII	
September 20, 1982	
VOIR DIRE EXAMINATION, CONTINUED	
NEW JURY PANEL EXAMINED BY THE COURT	2136
Carolyn Sanders	
Examination by the State (Bax)	2148
Examination by the Defense (Hernandez)	2176
Examination by the State (Bax)	2179
Examination by the Defense (Hernandez)	2181
Examination by the State (Bax)	2184
George E. Phillips	
Examination by the State (Moen)	2191
Examination by the Defense (Elizondo)	2220
Tommy Kent Bridges	
Examination by the State (Bax)	2240
Examination by the Defense (Hernandez)	2281
Georgia Washut Smith	
Examination by the State (Moen)	2293
Examination by the Defense (Elizondo)	2333
Oscar Eugene Brown	
Examination by the State (Bax)	2365
Examination by the Defense (Hernandez)	2403
Examination by the State (Bax)	2422

F2069 0003

Page

Examination by the Defense (Hernandez) 2428

I N D E X

	Page
VOLUME XIII	
VOIR DIRE EXAMINATION, CONTINUED	
Tommy Kent Bridges	
Examination by the State (Bax)	2240
Examination by the Defense (Hernandez)	2281
Oscar Eugene Brown	
Examination by the State (Bax)	2365
Examination by the Defense (Hernandez)	2403
Examination by the State (Bax)	2422
Examination by the Defense (Hernandez)	2428
George E. Phillips	
Examination by the State (Moen)	2191
Examination by the Defense (Elizondo)	2220
Carolyn Sanders	
Examination by the State (Bax)	2148
Examination by the Defense (Hernandez)	2176
Examination by the State (Bax)	2179
Examination by the Defense (Hernandez)	2181
Examination by the State (Bax)	2184
Georgia Washut Smith	
Examination by the State (Moen)	2293
Examination by the Defense (Elizondo)	2333

(A jury panel of six prospective jurors was brought into the courtroom, whereupon the following proceedings were had.)

THE COURT: Let me introduce myself to you. I am Henry Oncken, Judge of the 248th District Court, and we are down here in this conference room -- we have been here for the last three weeks -- to pick a jury in the case of the State of Texas versus Ricardo Aldape Guerra.

That is Mr. Guerra seated in the corner next to the lady. Mr. Guerra is charged with the offense of capital murder, it being alleged on July 13th, 1982, he took the life of one James D. Harris, a police officer for the City of Houston, and about a minute or so after Officer Harris was shot, there was a citizen shot while there were two small children in the car with him. About an hour later when the Houston Police Department received information as to the whereabouts of the alleged perpetrators of that shooting of Officer Harris, there was another police officer shot five times, and the individual who shot him was killed in that incident, and I tell you that to ask whether or

2069 0006

not any of you have any knowledge, with the previous set of facts that I have given you, have any knowledge of this case at all.

It is not wrong to have knowledge of it, just --

MR. BRIDGES: Only what I have seen on TV and in the newspapers.

THE COURT: Is there any knowledge that you have about the case that has caused you to form opinions about the guilt or innocence of this Defendant or anyone else involved in it?

MR. BRIDGES: No.

THE COURT: I take it if all of you were chosen on the jury, you could base your decisions on the facts and on the evidence introduced in the courtroom. Would that be an accurate statement?

Let me introduce the rest of the parties. Mr. Guerra is represented by two attorneys, Mr. Candelario Elizondo and Mr. Joe Hernandez, and the lady seated back there is Linda Hernandez, no kin to Joe Hernandez. She is an interpreter. Mr. Guerra speaks no English and we are providing him with an interpreter to tell him what is going on in these proceedings.

F2069 0007

The Prosecution will be represented by two District Attorneys, Mr. Dick Bax, the gentleman standing, and Mr. Bob Moen, the gentleman on the phone, and they are employed by Johnny Holmes, District Attorney, to prosecute criminal cases.

Now, I want to talk to you briefly about some things in every case that is filed in Harris County, and especially the state of Texas.

First of all, if you don't know anything about the law, don't worry about it, because anything you need to know about the law I will provide to you in writing at the end of the evidence.

Your job, if you are chosen as jurors, will be to listen to the evidence and listen to the witnesses who testify, and decide whether or not the State has met its burden of proving the guilt of this individual, and I will provide the law for you.

Any Defendant charged with a criminal offense is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt. The State has that burden of proof.

F2069 0008

The Defense never has to prove anything. They can sit absolutely silent and not ask any questions, not put on any testimony whatsoever. I don't know whether Mr. Guerra will testify. I don't know whether or not there will be any evidence put on by the Defense. If there is or if Mr. Guerra does not testify, I will charge the jury, will tell you in that law that I give you, that you are not to consider that as any evidence of his guilt. That is a right given to him, and the State must prove his guilt. He does not have to prove his innocence.

There will be many terms defined for you in the charge, and when I use that word, "charge," that is what I am talking about. That is the law I give you. That is formally called the charge. Many terms will be defined for you, but one which will not be defined for you is the burden of proof, and that is beyond a reasonable doubt. There is no definition legally for that term. The legislature has not given me one, so therefore, I cannot give you a definition of beyond a reasonable doubt.

To me it means that you bring with you your common sense and you listen to what

F2069 0016

goes on in the courtroom and if you are convinced that the individual charged with the crime committed that crime, then if you believe that, the State has met its burden of proof.

If you are not convinced, they have not met their burden of proof. To me, it is that simple. It may not be that simple to other folks, and maybe more simple to other people, but that is the way my definition is.

The first thing that the jury will hear after everybody is seated and sworn and what have you, I will tell the Prosecution to present the indictment.

The indictment is a legal pleading and it is a piece of paper with words typed on it which is the charge, the accusation, if you will, brought against this individual.

I will tell you in the law that I give you that the fact that any individual, and this individual in particular, has been arrested for, charged with, and indicted for an offense is absolutely no evidence of his guilt. That is merely a pleading by which the case gets to this stage.

It is the same type of thing as if

F2069 0010

you received a traffic ticket. The officer fills it out and directs you to be at a particular location at a particular time, but that ticket itself is no evidence of guilt. Although most of us feel like it is, it really isn't. The city prosecutor will have to prove you went through the red light or school zone or whatever he charged you with.

This is the same principle, and I will tell you that in the charge.

Any criminal trial at this stage is divided into two parts. The first part of a criminal trial is to hear facts about an event which occurred, in this case, the killing of Officer James Harris, and if, based upon what you hear in that first stage of the trial, you decide that the State has met its burden of proof, then you find the Defendant guilty as charged.

If you are not convinced that the State has met its burden of proof, you are to find the Defendant not guilty.

In the event the jury finds the Defendant not guilty, then we all go home, or you go home and about your normal business. I

F2069 0011

go back and try other cases, and these lawyers handle other cases.

In the event the jury finds the Defendant guilty, then there is a second phase of the trial, and that is to hear facts about the individual who committed the offense that you found him guilty of having committed.

Normally in a criminal case, a jury goes back after they have heard that evidence, and they will decide upon a punishment based upon a given range. For instance, murder in this state is punishable, unless it is capital murder, it is punishable by not less than five years nor more than ninety-nine years or life in the penitentiary, and there can be up to a ten-thousand-dollar fine attached to it, so the jury in a murder case would go back to the jury room after having found the Defendant guilty and decide upon a term of years within that range of punishment.

In a capital case, if the jury has found the Defendant guilty of the offense of capital murder, then they go back and simply answer those two questions on the board.

If you will, take just a minute to

F.2069 0012

read over them. These lawyers are going to talk to you in great detail about them later, but if you would, read them now.

All right. The jury will hear certain evidence on the second stage of the trial and go back to answer those two questions based upon what they have heard.

If the jury answers both of these questions yes, simply the word yes, then it is my duty under the law to assess the punishment of this Defendant at death.

If the jury answers one of those questions yes and one of those questions no, then it is my duty under the law to assess his punishment at life in the penitentiary. Those are the only two possible punishments for the conviction of capital murder, death or life in the penitentiary.

Now, in any criminal case, there are -- or any felony criminal case, there are thirteen judges in the courtroom. The judge who sits up here on the bench rules on the law, objections and certain admissibility of evidence and testimony, and gives you the law in writing to consider along with the evidence that you have

F2069 0013

heard.

The jury hears the facts. They listen to the witnesses who testify and they decide those facts. The judge has no function in deciding facts where there is a jury involved. That is the jurors' job. Obviously, the judge has to listen to the testimony so he can properly rule and properly charge the jury, but the jury decides the facts. In this case, the jury will decide those facts, and they will tell me whether to assess his punishment at death or life or whether or not he has been convicted of the offense of capital murder or possibly some lesser offense. Okay?

Do any of you at this point have any questions of me?

While we are talking to you on voir dire -- this is called voir dire, and it is a French term, as Mr. Elizondo will probably explain to you. He's been told it means to tell the truth. What it is is a chance to visit with you a little bit and see how you feel about certain things.

These lawyers will ask you questions and get your responses and feelings on things.

F2069 0014

Please do not tell us what you think we want to hear. Tell us how you feel on different matters. I need for you to think about how you feel about the punishment of death as a punishment.

We will have no quarrel with you one way or the other, however you feel about it. That is strictly your business, and we are not going to try to change your mind one way or the other, but you are entitled and we are entitled and Mr. Guerra is entitled to know how you feel about those things.

No one is going to try to embarrass you or try to make you look small or anything of that nature. In a capital case, the jurors are examined individually. In a normal case, we bring over a whole panel of thirty-six to forty people and talk to you all at one time, and that process takes maybe three hours to pick a jury.

I have told you we have been at this three weeks. We have six jurors. We have a long time to go.

I anticipate the testimony will kick off sometime around October 4th, hopefully, so

F2069 0015

I need for you to be thinking about how you feel about the death penalty.

I am going to ask that Ms. Sanders, Mr. Phillips, and Mr. Bridges, and Ms. Smith remain here this morning. It normally takes anywhere from about twenty minutes to an hour to examine each juror, and rather than have everybody sitting around here and twiddling their thumbs all day long, Mr. Brown and Mr. Ross, you will return here at 1:30 this afternoon. You can go do anything you want to do in that period of time, go back to work, go home and get more sleep, or whatever you want to do, but by 1:30, we ought to be ready to get back to the jury selection, and, Ms. Smith, you may, in fact, sit around all morning without getting an interview, but, hopefully, we might be able to get to you before.

As I started to say to you earlier, if you have questions, you may ask these questions during the course of the voir dire in just a second.

Once the jury has been selected and evidence begins, the jury cannot ask questions. They can ask questions if they didn't understand

F2069 0016

them or hear them, but you cannot ask questions of anybody else.

After the close of the testimony when you're back there deliberating, then you can request to have certain disputed portions of testimony read back to you.

I didn't introduce Ms. Cindy Layne to you a moment ago. She is a court reporter. Her little machine here, through the magic of her fingers, is taking down every word of what we say, so if you have some dispute about a fact or some testimony when you are deliberating on the case, you put that in writing and tell me exactly what you have disputes about, who the lawyer was who was questioning the witness at this time, and I will ask Ms. Layne to read it back and call you back in the courtroom to hear it read back to you.

Those are the only questions during the course of the trial.

Are there any questions of me at this time?

Okay. Fine. If you two gentlemen want to leave, you may do so.

Ms. Sanders, unfortunately for you,

F2069 0017

you will be the first out of the barrel, so you won't have a chance to sit and think about things, but if you will, remain here.

Mr. Phillips, Mr. Bridges, Ms. Smith, if you would like to go downstairs and grab a cup of coffee, do so. Mr. Phillips, please be available anywhere perhaps from twenty minutes, twenty to thirty minutes, be available.

Thank you.

CAROLYN SANDERS,

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

EXAMINATION

QUESTIONS BY MR. BAX:

THE COURT: Ms. Sanders, if you will, sit in the middle and that will give everyone an equal opportunity to view you and visit with you, and please relax, and I know you are in a strange environment and are a little apprehensive, but we are not going to do anything to embarrass

12069 0018

you. We are just going to ask you questions.

Mr. Bax?

Q. (By Mr. Bax) Good morning, Ms. Sanders.

A. Good morning.

Q. How are you today?

A. Fine. Thank you.

Q. You probably didn't expect to find yourself in a situation like this when you got up this morning, did you?

A. No, I didn't.

Q. If you would, just relax for us. I am going to try to talk to you a little bit and get to know you a little better and if you have any questions about what we talk about, please feel free to stop us anytime.

I am going to talk to you, and either Mr. Elizondo or Mr. Hernandez will talk to you, and really, all we are looking for is to try to find out how you feel. We are trying to get twelve jurors who can sit on a jury and give a fair trial to both the Defendant and the State of Texas. Okay?

I guess the easiest thing to do is -- and I know you are in an uncomfortable situation with all the strangers around -- but

F2069 0019

I am going to try to talk to you about something you have probably never given much thought to, so be fair to yourself. Okay?

A. Yes.

Q. The reason we select this jury one at a time, differently from any other cases, is because of the punishment involved.

The Defendant who sits behind you, if he is found guilty of that offense, Mr. Moen and I are going to ask that same jury to return the death penalty, and I know that is the most serious punishment ever given out. We talk to people individually because it is the type of punishment some people say, "I can't do that because of my religion, because of the way I was brought up. I can't personally be involved in that type of case, because it would violate my personal beliefs," and in this country, no one, no one is going to make someone serve on a jury where that jury service might violate their personal beliefs.

I think you understand that no one can force somebody to sit on a death-penalty case when they truly say to themselves, "That would violate my beliefs, would be something I

F2069.0020

can't really do," and there is nothing at all wrong for someone to feel that way.

Someone who, for some reason or another, could not sit on a death-penalty case, would be fine jurors on another type of case, but when it comes to the death penalty, where they themselves have to participate and be a part of that sentence, they are not capable of that type of case.

As the judge told you earlier, we are not going to fight or argue with you. If you are of the belief you personally could not return a verdict in a death-penalty case, that is fine, and that doesn't make a person any less of a citizen than any other person. As a matter of fact, it probably makes that person more of a citizen because they are able to come up with the courage to tell us how they feel, and you can see it would be wrong for a person to say, "I am going to hide these feelings, hold them in and wait until I am on the jury to tell them I feel this way."

Whatever your opinion is, if you are in favor of the death penalty or if you feel because of your personal beliefs, you could

F2069 0021

never return a verdict of a death penalty, that is fine. You see, by your answers, you will either put yourself on the jury or put yourself off the jury, so it is important to be true to us, but more important, to be true to yourselves so you won't put yourself in a situation you might regret.

Do you follow me so far?

A. Yes.

Q. Can you tell me how you feel about the taking of the life of another person? Do you feel you could participate in that, or would that violate some of your feelings, religious upbringing, or what not?

A. Well, I am not too up for it, but --

Q. Okay. Let me ask you this: Some people come through here and they say, "I believe in the death penalty. The way I was brought up. The way I went to school. The way my parents taught me and what not. They taught me to believe in the death penalty. My religion taught me to believe in the death penalty."

Other people say, "My religion taught me no man has the right to take a person's life, whether it be a criminal or the State of Texas

F2069 0022

taking the life of a criminal, and the way I was brought up is that no one has that right. That is for someone else to decide what the punishment should be, and I personally couldn't do that."

Would you be of the opinion that because of your upbringing and religious training, you don't believe anyone has the right to take another's life?

A. Right.

Q. That is fine. You are probably in the majority. Most of the people feel the same way you have just expressed to me. They say, "I personally, because of my beliefs, I cannot take the life of another person or be involved in a trial that may cause another person to lose their life."

Would that be fair to say, that no matter what the facts in a particular case, you could not participate or be a party to the taking of another person's life?

A. Right.

Q. Okay. You are going to have to answer up a little. The lady over here is putting down everything you and I are talking about. All right?

F2069 0023

A. All right.

Q. Relax. I know you are nervous. Really, can you relax as much as possible?

A. Right.

Q. Can you think of any situation or any set of facts where you could be involved in the taking of a person's life, or would your religious beliefs prevent you from doing that?

A. Any person -- if it was for my own safety.

Q. Okay. If you were out and someone was trying to rob you?

A. For my safety.

Q. Okay. How about if you were going to be a juror where the person is in custody, not going to harm anybody, but they are in custody.

Could you return a verdict which would cause the judge to assess the death penalty, or would you always be in favor of the life sentence over the death penalty?

A. Yes.

Q. The life sentence?

A. Yes. Life sentence.

Q. Let me tell you how it works. Okay?

First of all, for a capital murder, for a person to have the possibility of receiving

F2069 0024

the death penalty, first of all, they have to take someone else's life, have to have them guilty of committing capital murder. Then, if they rob someone, if a man goes in a store with a loaded pistol and kills someone while robbing the store, kills the clerk, you've got murder-robbery, or if someone breaks into someone else's home and kills someone inside the house, that is also capital murder.

If a rapist kills the woman he is raping, that is capital murder, or if you kill while kidnapping or while committing the offense of arson, that is capital murder.

When I say capital murder, that means one of two punishments if the person is found guilty, life or death.

Do you follow me so far?

A. Yes.

Q. If you kill a police officer or if you kill a fireman, that is capital murder. If you kill for money, someone comes out and hires somebody to kill somebody, that is capital murder.

A. Okay.

Q. Or if a prisoner in the penitentiary kills a guard or an employee of the penitentiary, or

F2069 0025

if he kills anybody while trying to escape from the penitentiary, that is capital murder. Okay?

A. All right.

Q. Those are the only cases in which a person can properly receive the death penalty. All right?

This case we are talking about is a case where a person is alleged to have killed a police officer.

Do you follow me so far?

A. Yes.

Q. You have told me now that basically you don't believe in the death penalty. Correct?

A. Correct.

Q. Do you feel that your feelings are so strong against the death penalty that you could ever find a person guilty of capital murder after hearing the evidence, or would your feelings not allow you to find a person guilty, knowing if you did, he might receive the death penalty?

A. No.

Q. Would you be able to find them guilty or not be able to find them guilty, knowing he would receive the possibility of the death penalty if you found him guilty?

F2069 0026

A. Yes. I believe I could find him guilty.

Q. You could find a person guilty or not guilty of capital murder?

A. Right.

Q. If you find a person guilty of capital murder, then we have a second trial. Okay?

At the second trial, the jury is given these two questions, and depending on the way they answer these questions, the judge either assesses life or death. Okay?

So we are going to have to play pretender or make-believe.

Pretend you are on a jury and you have found the Defendant guilty of killing a police officer. If all twelve jurors answer Question 1 yes, and all twelve jurors answer Question 2 yes, then the judge gives the death penalty.

If either No. 1 or 2 is answered no, then the judge assesses life imprisonment. So you have to have two yes answers if he is going to receive the death penalty. It takes just one no answer, and he is going to get life.

So you know by the way you answer these questions whether the person is going to receive life or death. Okay?

F2069 0027

A. Right.

Q. If you answer one no, you know he is still going to be severely punished. He is going to spend the rest of his life in jail. Okay?

If you answer both yes, you know what is going to happen: The judge will order someone to inject a substance into his arm which will cause him to die. Okay?

A. Yes.

Q. Because of your strong feelings about the death penalty, would you always answer one of these questions no to insure someone would receive a life sentence, regardless of the testimony, because of your feelings about the death penalty?

A. No.

Q. All right. Let me give you this situation. Suppose you have heard all the evidence, okay, and after hearing all the evidence, you decide that Question No. 1 should be answered yes.

Do you think you could answer Question No. 1 yes, knowing that if you did answer it yes, the man would be one step closer to the death penalty? In other words, you would be putting him one step closer to the death penalty, or would you perhaps answer that no to prevent

F2069 0028

the death penalty?

MR. HERNANDEZ: I think she has already answered that, Your Honor. It is basically the same question. All he did was just change it around a little bit.

THE COURT: Go ahead.

Q (By Mr. Bax) Do you follow me so far?

We have already heard the evidence. We are talking about Question 1.

You have found the man guilty, and already he is one step closer to the death penalty, either life or death. You have heard all the evidence and the answer should be yes.

MR. ELIZONDO: I object to that question until the prosecutor qualifies it, if proven beyond a reasonable doubt the answer to the question should be yes.

THE COURT: All right.

MR. BAX: I think I said that.

Q (By Mr. Bax) You have seen the questions and you believe the answers should be yes.

Could you answer that question yes knowing if you answer it yes, the man would be one step closer to the death penalty, or -- and there is nothing wrong with this -- answer it

F2069-0029

no to make sure he got a life sentence rather than the death penalty, because of the death penalty?

A. No.

MR. HERNANDEZ: Your Honor, he didn't state --

Q. (By Mr. Bax) Would you be answering the question yes?

A. Yes.

Q. You know what he is going to do if you answer Question 2 yes?

A. Yes.

Q. What is going to happen?

A. Death penalty.

Q. If the answer shows No. 2 should be yes, could you answer it yes, or would your personal feelings prevent you from answering it yes?

A. No. My personal feelings wouldn't prevent me from answering yes.

Q. Are you telling me then that you could?

A. That I could answer it yes?

Yes.

Q. You know if you answer both questions yes, the judge is going to assess death?

A. Yes.

F2069 0030

Q. A few moments ago, you told me -- maybe I am wrong --

Are you for or against the death penalty? Do you believe in the death penalty? Do you feel that is proper, or do you feel the death penalty is wrong and no one has the right to take another person's life?

A. Well --

Q. There is no right or wrong answer to what I am asking you.

A. It all depends.

Q. Okay. How do you personally feel? I don't care whether you agree with the law or not, but how does Ms. Sanders feel about the death penalty personally?

A. Well, I don't really feel, you know, like no one should take no one's life unless, you know, it is for your own personal safety.

Q. You know, when we are talking about a trial, we are not talking about self-defense.

A. Yes.

Q. Your basic feeling is no one should take the life of another person unless that person's life is being in jeopardy at that moment?

THE COURT REPORTER: Please answer

F2069 0031

out.

A. Yes.

Q. Basically, you don't believe in the death penalty?

A. No.

Q. Okay. You can understand if you are on a jury and we were talking about the death penalty and these answers should be yes, you would be doing something going against your personal feelings?

A. Yes.

Q. And going against something, I would assume, some very strong feelings? Is that correct?

A. Yes.

Q. Now, do you feel that knowing that is the way you feel about it, do you feel that you could ever answer these questions yes as fairly and impartially as someone who perhaps believed in the death penalty?

MR. ELIZONDO: I object to the question. It's already been asked and answered. Repetitious.

THE COURT: I sustain the objection as to the form of the question.

Q. (By Mr. Bax) Let me state it this way: The law talks about terms such as unfairness, bias, and

F2069 0032

prejudices. Those are terms that we usually think of in a bad way. Okay? And when I am using those terms with you, I don't mean them that way. We all have biases and all have prejudices.

In other words, there are certain things that I probably couldn't be a fair juror about.

You know the law that says you can't sell certain things on Sunday?

A. Yes.

Q. I don't believe in that law. I think that is -- in my own personal opinion, I think that is a stupid law, and if you can sell something on Monday, Tuesday, Wednesday, Thursday, and Friday, and Saturday, I don't see why you can't sell on Sunday.

I can probably say, even though I have those feelings, I can put those feelings aside and be a fair juror, but I think if I were on a jury like this, subconsciously my feelings would prevent me from being as fair as someone who agreed with the law.

Do you follow me on that?

A. Yes.

Q. And I probably wouldn't be able to judge the facts as fairly as someone who didn't have that

F2069 0033

bias I have.

Do you follow me?

A. Yes.

Q. You have told me you are against the law that says we can take a life in a situation where a person is convicted of capital murder. Okay?

A. Yes.

Q. Do you think that your feelings against that law would prevent you from being impartial in judging the facts?

A. No.

Q. Do you think you could put those out of your mind?

A. Yes.

Q. You understand that you don't have to be a juror on this case if being on the jury would violate those personal feelings that you have, if you feel that, "Well, Ms. Sanders might not be able to look at herself again in the face if she participated in giving someone the death penalty."

How do you think you would feel if you were to answer both of these questions yes, and you had to face yourself the next day, knowing you did it? Do you think it would bother you from that day forward?

F2069 0034

A. Oh, yes, without a doubt.

Q. It should bother people. I am not saying this is something someone would go into going boom, boom. We wouldn't want people on the jury like that either. Do you understand?

A. Yes.

Q. Knowing it would bother you, do you think you could participate in such a trial or would those feelings make you look at the facts differently than someone who did not have your feelings?

MR. ELIZONDO: Objection, Your Honor. Repetitious.

THE COURT: It's all about -- go ahead.

Q. (By Mr. Bax) Do you think your personal feelings might come into play, and even though I have proven it to you, you would say I really haven't proven it to you?

A. No.

Q. You know, this Defendant -- take a look at the Defendant behind you.

A. Okay.

Q. I will tell you right now that I expect the evidence may show he is not in this country lawfully, okay, that he did not come into this country with the proper papers or anything.

F2069 0035

He is alleged to have been involved in the killing of a police officer, shooting him three times in the head, and I believe the evidence would also then show he is alleged to have shot and killed an innocent person who was driving by and that he was involved somewhat in the shooting of another police officer.

A Grand Jury has indicted him, and what the judge does is, when they return an indictment, he says there was probably a crime committed and the person named being the Defendant probably was the person who committed that crime. He is here with two lawyers, and I am sure you understand we didn't just go pick him up off the street and say I think we will try you for this case.

Knowing he is here and we've got an interpreter and we've got a bailiff in here, what do you think about whether he did it or not? Do you have a gut feeling as to whether he is guilty of what we have alleged?

A. No.

Q. How do you feel about it?

A. How do I feel -- whether he --

Q. Yes. Just knowing all those things are going

F2069 0036

on already, he's been indicted and got some lawyers here, that we have been taking three weeks to pick a jury so far, does that bother you or does that make you think --

A. Yes.

Q. What does it make you think?

A. Well, well -- I don't know, you know, if he was caught red-handed at the scene of the crime or not.

Q. Okay.

A. So really, I couldn't just say really whether he actually did it. If he wasn't caught at the scene of the crime --

Q. The fact he is here, that wouldn't bother you?

A. No.

Q. Would you use that fact, he has been charged and arrested for and indicted for this offense, would you use that as evidence against him?

A. Well, no. Well, because he was charged doesn't mean legally that he did it.

Q. What about arrested, charged, and then indicted by a Grand Jury?

MR. ELIZONDO: Your Honor, I object. Repetitious. He's already asked the question.

THE COURT: Sustained.

F2069 0037

Q. (By Mr. Bax) How do you feel about illegal aliens, people who come into our country illegally? I am just curious as to how you feel about that.

Do you have a feeling one way or the other?

A. Not really.

Q. It doesn't bother you at all?

A. No.

Q. Suppose that you have found a person guilty of capital murder. Okay? You have said that yes, that person committed capital murder, and let's say that you found that person intentionally killed a police officer without justification, without any reason. Okay?

Would you automatically answer these questions yes?

A. Yes.

Q. Okay, because, see, to find him guilty of capital murder, you have to find he deliberately caused someone's death.

A. Yes.

Q. Do you think that deliberately means the same thing, basically, as intentionally?

A. Yes.

F2069 0038

Q. So, if you found he intentionally caused someone's death, you have already said, "Yes, he did it deliberately, and also did it with the reasonable expectation someone would die"?

A. Yes.

Q. Do you think that someone who would go out and kill a police officer would probably kill someone in the future, if they could do something as bad as that, kill a police officer protecting our streets and all? Do you think that person would personally commit other acts of violence?

A. Yes, because I feel if they could kill a police officer and get by, they would kill anybody and get by.

Q. If someone doesn't have the respect for a police officer, certainly they wouldn't have respect for someone else?

A. Yes.

Q. So if you found someone intentionally killed a police officer --

A. Yes.

Q. -- in your mind, he should automatically receive the death penalty?

A. Yes.

Q. And do you see where there is a difference in

F2069 0039

killing a police officer and killing someone like, you know, in a barroom altercation where two people got mad at each other and one decides to shoot the other one because he is upset?

Do you think it is more serious to shoot a police officer?

A. Yes.

Q. Although anytime a person loses their life, that is a horrible situation?

A. Yes.

Q. I think what you are telling me is if you found someone killed a police officer, that is about as bad a situation as anyone could be involved in?

A. Yes.

Q. And would you think that anyone who would do that deed, to kill a police officer, would probably commit criminal acts of violence that would be a continuing threat to society?

A. Yes.

Q. So if you found someone guilty of intentionally killing a police officer, no matter what the evidence was, then as long as that was the evidence, you would answer Question No. 1 yes automatically and Question No. 2 yes

F2069 0040

automatically?

A. Yes.

Q. Can you ever think of a situation where you could answer those questions no where a person killed a police officer, just shot him for no reason?

A. No.

Q. If you found someone did that, it would be answering yes and yes to No. 1 and No. 2?

A. Yes.

Q. What do you think about a person who doesn't testify, doesn't come forward and say -- if other people have come up to you and said, "So and so accused you of doing something --

A. Correct.

Q. -- what do you do? Would you tell them, "Well, no, I didn't," or speak up for yourself?

A. Yes.

Q. I think that is natural when anybody accuses us. It has happened to all of us when someone comes up and does it and says, "Did you do this?" You are the first one to stand up and say, "I didn't do it," and, of course, if someone doesn't speak up, you think they probably did do it?

A. Did do it.

Q. If you heard all the evidence from the State, we

F2069 0041

put on our case and the Defendant doesn't get on the stand, doesn't tell you he didn't do it, would that make you think probably he is hiding something, probably did do it, because most people would say, "Yes, you've got the wrong guy. I didn't do that"?

A. Yes. He could be hiding something, he could be, you know, not to say something, for fear he may say the wrong thing --

Q. May say something --

A. May say something where people would give him a stiffer punishment.

Q. He may not get up there because if he was going to tell the truth, he would tell he did it?

A. Yes.

Q. Like and get into more trouble?

A. Yes.

Q. So if you didn't hear the Defendant testify, you may think he is probably hiding something from you?

A. Yes.

Q. And would you think probably, when talking to the other jurors, think, "He never testified; probably he did it because he never testified"?

A. Yes.

F2069.0042

Q. Would it be fair to say then that if the Defendant did not testify, you would be biased or prejudiced against the Defendant? You would rather have him testify and therefore, if he didn't, you would probably hold it against him -- and I think that is just natural.

A. If he didn't testify, would I hold it against him?

Q. Uh-huh.

A. No, not --

Q. Saying he must be guilty, he must be --

MR. HERNANDEZ: She has already answered that question.

MR. BAX: I didn't hear her answer.

THE COURT: Nor did I.

Q. (By Mr. Bax) If he did not testify, would you hold it against him? Would you say, "Yes, he did it, because if he didn't do it, he would be the first person --"

A. That is the way I feel. He would want to testify.

Q. If he didn't do it?

A. If he didn't do it. If he didn't testify, if he did it, he, you know, wouldn't want to talk.

Q. If he did it, he wouldn't want to say anything?

A. Wouldn't want to say anything.

F2069 0043

Q. The only thing he could say would be things that hurt him?

A. Yes.

Q. Just for the record, we've got to get this down so she has it and everybody will be able to understand it later, so if the Defendant didn't testify, didn't get up there and tell us his side of the story, you would probably believe he did it because he didn't get up there and testify?

A. Yes.

Q. I think that is something you have felt like many people do. All your life, you have felt that if someone were innocent, you would speak up?

A. Yes.

Q. I am sure you would.

If someone came and accused Ms. Sanders of something, you would be the first one to say, "I didn't do it"?

A. Yes.

Q. And I am sure you have done that all your life when someone accused you, back as a school child, when one of the other students might have accused you of taking a pencil or whatever

F2069 0044

school children accuse each other of? If you didn't do it, you would be the first one to say so?

A. That's right.

Q. And even though the law says you can't consider that as evidence, the Defendant's failure to testify, the judge will tell you you can't consider that as evidence, I think probably since you have felt that all your life, you would consider that as evidence of guilt, the person's failure to testify?

A. Yes.

Q. That is the way you have felt all your life?

A. Yes.

Q. I mean, since you have been able to know the difference between right and wrong?

A. Yes.

MR. BAX: Your Honor, on that ground, that she would, in fact, consider failure to testify as guilt --

THE COURT: All right.

F2069 0045

EXAMINATION

QUESTIONS BY MR. HERNANDEZ:

Q. Ms. Sanders, I am Joe Hernandez. We are here defending Ricardo Aldape Guerra.

Let me ask you a couple of questions, and, of course, these questions I am about to ask you are personal in nature.

We are not here to embarrass you in any way or humiliate you in any way. What we are trying to do is select the best twelve people we can select who can be fair and honest and just in listening to the testimony of what really happened and listen to the evidence, and based on that testimony and based on that evidence, to reach a true verdict.

Can you do that for us?

A. Yes.

Q. All right. Let me ask you this, then. You mentioned a little while ago, or you didn't mention it, you just answered.

Mr. Bax asked you if the fact that a person, irregardless of what he is charged with, does not testify on his own behalf, would you hold it against him.

Do you understand that to be true?

A. That if --

Q. That a person brought before a court by the State and charged with a crime, would he have to prove his innocence to you?

A. No, he wouldn't have to prove his innocence to me.

Q. All right. Let me tell you this, then. The law says that my client or any Defendant, any citizen of this United States, does not have to testify, does not have the burden to bring forth any proof whatsoever. The State brought the charges, and they have to prove it to you.

Do you agree with that or disagree with this law?

A. I agree.

Q. You agree.

So what you are saying, the State will have to prove to you beyond a reasonable doubt, which is the law also, that the citizen brought before you at a trial, the State has the burden of proof.

Do you agree with that?

A. Yes.

Q. All right. Let me tell you what the law really

is, and perhaps we can probably solve some of these miscommunications.

The law states that the State will always have the burden of proof. The burden will never shift throughout the trial.

Do you understand what I am saying by that? What I am saying is that the State has brought the charges against this man or anybody, any citizen, so it is upon them, the burden is upon them to show to you that he is guilty beyond a reasonable doubt, and that is a heavy burden. It is a real heavy burden, and this man, or anybody charged with a crime, any crime, whether it be D.W.I., shoplifting, it doesn't matter, this man does not have to testify because they have to prove it to you.

Do you agree with me?

A. Yes.

Q. So, in essence, what we are saying is -- or let me ask you so we can get it on the record: Are you telling us then this morning if I understood you correctly that you would hold it against this man for not testifying if he does not testify?

A. I wouldn't hold it against him, but I feel like it would be better, you know, in his best interest

F2069 0048

if he would testify, would tell his side.

Q. All right, but you wouldn't have any biases, would you?

A. No.

Q. And you wouldn't hold it against him, would you?

A. No.

Q. And you wouldn't go in the jury room and scratch your head and say, "Dang, they didn't prove the case to me, but he didn't testify"? You wouldn't say that, would you?

A. No.

MR. HERNANDEZ: I think she is fine. No problem.

THE COURT: Go ahead.

EXAMINATION

QUESTIONS BY MR. BAX:

Q. What would you say to yourself?

A. What would I say?

Q. If he didn't testify.

A. It would leave some doubt in my mind about it.

Q. About what?

A. If he did it and didn't want to talk, didn't want to tell.

F2069 0049

Q. Leave the thought in your mind he was really innocent?

A. Yes.

Q. So when you say you wouldn't hold it against him, I don't think you would -- I don't think you would go back and say, "I find him automatically guilty because he didn't testify," but it surely would allow me to prove my case to you, wouldn't it?

A. Yes.

Q. It would make my case easier to prove if he didn't testify than if he did; is that right?

A. Yes.

Q. In other words, I would have an easier job of making my proof of guilt than if he did testify?

A. Yes, than if he testified.

Q. So in that regard, when we say "hold it against him," it would be a mark in my favor and a mark against him if he didn't testify? Is that right?

A. That's right.

Q. And you could follow the law. I have no question you could follow the law, and even if the judge told you you couldn't consider that, you couldn't consciously consider it, but it might make my evidence look a whole lot better than if he did

F2069 0050

testify?

A. Yes.

Q. And if it were a real close case where you weren't sure if he was guilty, if he didn't testify, it might provide that little extra to make you believe he was guilty?

A. Yes.

MR. BAX: We renew our challenge, Judge.

THE COURT: One more shot.

EXAMINATION

QUESTIONS BY MR. HERNANDEZ:

Q. Now, if your son was brought before a court --

MR. BAX: I object to any reference of personal family or anything of that nature.

THE COURT: Sustained.

Q. (By Mr. Hernandez) Or any citizen brought before you in trial, you know, knowing what the law is, that you don't have to prove your case, you don't have to prove your innocence to anybody, the State has charged a citizen, and they must prove it to you beyond a reasonable doubt, and the law says that you cannot consider the fact

F2069 0051

that a Defendant, any Defendant did not testify. That is his right. You can't consider it at all.

Are you saying to me in your own words that you would consider that against him?

A. If he didn't testify?

Q. Right.

A. No, I wouldn't consider it against him.

MR. BAX: Let her continue her answer.

THE COURT: Explain it.

A. I wouldn't consider it against him, but it would put doubt in my mind that he is guilty of it if he doesn't testify.

Q. But you wouldn't use it against him, would you?

A. No, I wouldn't use it against him.

Q. And because you could follow the law and the law says that a Defendant or anyone brought before a court has the right to be silent until the State proves its case.

Do you agree with me there?

A. Yes.

Q. So you could follow the law?

A. Yes.

Q. And not use that against him or consider it against him? Could you?

A. No --

F2069 0052

Q Of course, you would be curious, but that is about it.

MR. HERNANDEZ: That is all we have, Your Honor.

THE COURT: Ms. Sanders, let me understand something.

You told Mr. Bax now that you could follow the law, but that it would make Mr. Bax's and Mr. Moen's job easier if the Defendant did not testify.

Is that a fair statement of what you said?

THE JUROR: No, it would make their job easier if he testified.

THE COURT: If he testified? I thought I understood a moment ago you said if he did not testify, it would make their job easier.

Did I misunderstand what they said?

THE JUROR: I --

THE COURT: We are not quarreling with you. I just have to understand exactly what your feelings are. This Defendant has a right not to testify.

THE JUROR: Testify -- yes, I understand.

THE COURT: And if he does not testify,

F2060 0053

the charge will tell you you are not to consider it as any evidence of his guilt.

Now, if he did not testify, would you go back into the jury room and take that into consideration and say he must be hiding something because he didn't testify?

THE JUROR: No.

THE COURT: All right, so you could decide, or could you decide his guilt or innocence based on what you hear in the courtroom, and that alone?

THE JUROR: Yes.

THE COURT: Go ahead, Mr. Bax.

EXAMINATION

QUESTIONS BY MR. BAX:

Q. Maybe I misunderstood. Let me switch it around a little bit, Ms. Sanders.

Suppose the Defendant does not testify. Okay? You have never heard his side of the story.

Would you be able to find him guilty, not knowing what his side of the story was, or would that always stop you from finding him

F2069 0054

guilty because you would require that you hear from the guilty before you found him guilty?

A. I wouldn't necessarily have to hear from him to find him guilty.

Q. So, it wouldn't bother you? You could still find him guilty if he did not testify?

A. Yes.

Q. You would not hold that against the State one way or the other?

A. No.

Q. I have no control whether he testifies. I can't call him as a witness. He is the only one that could put himself on the stand.

A. Uh-huh.

Q. Let me ask you one last time, and we will go on to something else.

To make sure we are perfectly clear, if the Defendant, after hearing all my witnesses and you say to yourself, "I think he did, but I am not convinced beyond a reasonable doubt," okay, and the Defendant doesn't testify, would you use that as something else in my favor to help me get over my burden of proof to find him guilty, the fact that he didn't testify?

A. No.

F2069 0055

Q. What would you do in that case if the Defendant didn't testify and you thought he was guilty, you were pretty sure he was guilty, but it hadn't been proven beyond a reasonable doubt? What would your verdict be?

A. What would my verdict be?

Q. Yes.

A. After hearing the different testimony -- I really couldn't say right now what it would be.

Q. Okay. Even though you may have a reasonable doubt in your mind, you still may find him guilty?

A. Yes.

Q. Because why? Because he didn't testify, you might find him guilty, because you have a reasonable doubt?

A. If he didn't testify, would I find him --

Q. Let me do it this way: We will just talk about when he doesn't testify. If he testifies, that is no problem, and you can listen to him and decide whether he is telling you the truth or not. Okay?

A. Yes.

Q. But assuming no testimony comes from the Defendant, okay --

F2069 0056

MR. HERNANDEZ: Your Honor, I object in that we have gone over this for the last fifteen minutes, basically the same questions.

THE COURT: I will overrule that because I am not clear on it either.

You have about seven or eight minutes.

MR. BAX: Thank you, Judge.

Q. (By Mr. Bax) There is no testimony from the Defendant. He just sits there and never says word one. Okay?

A. Yes.

Q. After hearing all the testimony, you go in the back, okay, and you have heard from all the State's witnesses. You did not hear from the Defendant. He chose -- it was his decision alone, he chose not to testify. Okay?

After hearing all the evidence and everything, you say to yourself, "I think he did it. He probably did it, but I have not been convinced beyond a reasonable doubt." You know that he didn't testify.

Are you telling us that perhaps because he doesn't testify, even though there was that reasonable doubt in your mind, you still might find him guilty because he doesn't come forward

F2069 0057

and tell you his side of the story?

A. Yes.

Q. Okay. So, you see what I am saying? We have gone back and forth, and I wanted to make sure I understood you correctly.

If it hadn't been proved to you and it was, say, a very close case, the difference between a guilty and not guilty verdict might be whether or not the Defendant testified or not?

A. Uh-huh.

Q. Is that a fair statement?

A. Yes.

Q. So, in some cases where a Defendant -- I am sure if I put on my case and I had thirty witnesses who would automatically say, "Yes, the Defendant did it," and you went back, in that case, whether the Defendant testified or not probably wouldn't affect you because there was so much evidence. Okay?

But what you are telling me is if the evidence is real close as to whether the Defendant did or did not do it, the turning point in your decision would be whether he testified or not, perhaps? Would that be fair to say?

A. Not necessarily.

F2069 0058

Q. Okay. Let's go back to that question.

If you thought in your mind, after hearing all the evidence that he probably did it, after hearing all the evidence, you heard these people come forward and give their testimony and you say to yourself, "He probably did it. I think he did it, but I am not convinced beyond a reasonable doubt he did it, but it is close. The State almost proved it to me," and then you didn't hear any testimony from the Defendant, he never chose to get on the stand to tell his side, in that type of case, that may make a difference between a guilty and not guilty finding by you, correct?

A. Yes.

Q. And you may say, "He didn't testify. It's a close case, so therefore, he is probably hiding something, and therefore, he probably did do it, and I would find him guilty." Correct?

A. Yes.

MR. HERNANDEZ: My objection to it is only, Your Honor, that I don't think Ms. Sanders has been well informed of the law of beyond a reasonable doubt in order to make that answer to that question, Your Honor.

F2069 0059

THE COURT: That objection is overruled.

Q. (By Mr. Bax) So in a close case, what I am talking about, you are not sure which way to go, whether guilty or not guilty; if the Defendant didn't testify, that may help you to go to say he did it?

A. Yes.

MR. BAX: Judge, again, I renew our challenge.

THE COURT: I am going to sustain the State's challenge.

MR. HERNANDEZ: Note our exception, Your Honor.

THE COURT: Ms. Sanders, thank you very much. We appreciate your coming. You are a nice lady.

F2069 0060

GEORGE E. PHILLIPS,

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

EXAMINATION

QUESTIONS BY MR. MOEN:

THE COURT: Hello, Mr. Phillips.

THE JUROR: How are you?

THE COURT: Getting tireder by the minute.

Mr. Phillips, these lawyers are going to ask you a few questions. Please relax and visit with us.

Can we get you a cup of coffee?

THE JUROR: No, I am fine.

THE COURT: Go ahead, please, sir.

Q. (By Mr. Moen) Mr. Phillips, my name is Bob Moen. The judge introduced me a few minutes ago. I am a member of the District Attorney's Office here in town.

Seated beside me is Dick Bax, also a member of the District Attorney's Office, and together with Mr. Bax, we will be handling this case styled the State of Texas versus Ricardo

F2069 0061

Aldape Guerra, who is charged with killing a police officer in Harris County, Texas, back on July 13th.

We will be representing Harris County, Texas, and the family of J. D. Harris.

I take it from what the judge told you this morning, when you were in here with the other prospective jurors, that you have not heard or read anything about this case?

A. No.

Q. There is nothing wrong with that. The only reason we inquire is to find out whether the jurors have formed an opinion on the guilt or innocence of the Defendant based on what they have read or heard on television or in the newspapers. That is the reason we ask you in the first place.

I need to ask you questions in the next thirty minutes, also, hopefully, to be able to explain to you exactly what will be required from your jury service on a capital murder case.

Before I do that, let me explain that this portion of the trial is very informal. Hopefully, we can explain to you exactly what will be required of you so there won't be question marks in your mind when it comes to

F2059-0062

the trial and you can make your decision based on the facts you have heard.

If you have any questions of me at all, don't hesitate to stop me in the middle of a sentence so we can get it cleared up.

If you have misstatements, tell us that as well. Many people tell us they have a feeling one way or the other about many aspects of the law that come up during the course of a trial, and that is fine, as long as they tell us now.

With that in mind, can you tell us what your feelings and opinions are concerning the death penalty, and whether your feelings and opinions concerning the death penalty would allow you to be a juror on a case where you felt it were being sought, and if you felt it were based on the evidence, would your feelings and opinions enable you to render a verdict resulting in the death penalty?

A. Well, I believe in the death penalty, and I think -- it may be my opinion, and you can stop me --

Q. Go ahead.

A. I don't think we have enough of it. I think we've got to have it more to curtail some of this

F2059 0063

crime.

Q Well, you pretty much sound like me, if I were to look in the mirror about how I feel, so I appreciate your telling me what your opinion is.

Let me explain to you: In our state, not all murders are punished as capital murders. Our legislature has set down ten instances in which a human being's life is taken, in which that criminal can be punished for the offense of capital murder.

The legislature has said if a man breaks into another man's home, a woman gets up to see what it's all about, and he kills her, he takes the life of somebody during the course of a robbery, robbery-murder, kidnapping-murder, rape-murder, arson-murder, they are all capital murder situations.

Also, murder for hire, to hire someone to kill, or to kill for money, and for a convict to kill anyone employed in the running of our penal institutions, regardless of who it is, guard, medical personnel, librarian, whoever it might be we employ to keep our prison system going, for a convict to kill those persons is

F2069 0064

capital murder.

To kill anyone during escape from a penal institution is capital murder as well, and finally, to kill a policeman or fireman during the course of their official duties is capital murder.

All other murders fall within this range of punishment of five to ninety-nine years or life, for a regular murder.

For capital murder, there is a life-or-death sentence.

Now, the way someone receives those punishments is by the jury answering the two questions that appear on the board to your left, and we will get to those in just a second, but let me explain something about those questions first.

If both questions are answered yes, the man receives the death penalty.

If a no answer appears to either one of the questions, the man receives a life sentence rather than the death penalty.

No one tries to hide anything from you. You know what the results will be.

Two yes answers, and it's the death

F2069 0065

penalty, and one no answer, the life penalty. All twelve must agree for a unanimous verdict resulting in the death penalty. It only takes ten noes for the life penalty. Ten for no and twelve for yes.

Now, the judge will also instruct you -- and this is important -- that when you are deliberating on what your answers to the questions should be, no juror is allowed to discuss how long the Defendant would have to serve on a life sentence. In other words, there can be no discussion about parole laws. The judge will tell you that is to be left to the Board of Pardons and Paroles and jurors --

MR. ELIZONDO: I object to the prosecutor stressing the law of parole, Your Honor.

THE COURT: Overruled.

Q (By Mr. Moen) The judge will tell you things this morning, and that is one of the things he will put in writing as well. Jurors can't do that. And I need a promise from you to keep your mouth shut about it and expect you to knock on the door and let the judge know if anyone discusses it, so we can get it stopped

F2069 0066

right away.

If they keep it up, that is for naught. That will be error, and we will have to start all over again, if they don't keep their mouths shut about it.

Let me look over these questions, and go over them with you.

Have you had a chance to read them?

A. I read them before.

Q. That first question asks you to make a determination about the conduct of the man on trial who has been found guilty of capital murder.

In the first stage of the trial, you hear evidence about whether the man did it; if the jury finds the man did it, we go to the second stage of the trial, and that is when these questions come into play.

The jurors come out and take their seats in the jury room and we can present at that time other evidence about the man on trial, for instance, also about whether or not he has committed other crimes of violence that the authorities know about, to help the jury decide what their answers to these questions ought to

F2069 0067

be, and the jury takes all that evidence about the crime committed, all the other evidence that might be known, they take all that back with them in deciding what the answers should be.

The first question is about the conduct of the man on trial. Was his conduct that we found him guilty of that caused the death of the deceased, was that deliberate and was it done with the reasonable expectation that the man would die?

Let me talk to you about that and where it comes into play.

Imagine a man who goes into a convenience store, confronts the cashier early in the morning, points a pistol at her, he takes her money and looks around and sees that there are no other witnesses. He decides to kill her. She is the only witness who could identify him in this robbery, so she steps on some type of alarm and the police are waiting for him outside. He runs outside, and they catch him. The jury hears the facts and find him guilty of capital murder and they should. That was the intentional and knowing taking of a life

2069 0058

in the course of robbery, capital murder.

They've got to the second phase of this trial. In deciding what the punishment would be, they have to decide whether the conduct that caused the death of the deceased, the pointing of the pistol at her, the place where he fired the bullets in her body, was that conduct on his part deliberate and done with the reasonable expectation she would die?

When you fire a gun at a person's head, is it reasonable to expect the death of that person?

The jury finds from the conduct surrounding the case or the conduct of the Defendant that that was deliberate conduct done with the reasonable expectation the deceased would die.

You see where that question was a rather straightforward question based on the evidence the jury would hear about the crime itself?

The second question would ask you to make a determination about what kind of person you have before you. Is the man on trial the type of person where the probability exists he

F2069 0059

will commit criminal acts of violence that would constitute a continuing threat to society.

Now, these questions -- and I apologize to you a little bit for the language -- were drafted by our legislature. They haven't given us any definitions we could give to prospective jurors that we could ask them to look at and apply to Questions 1 and 2, so we have some words underlined, and you will have to use your own definitions for these.

You will have to use your own definition for the word probability, own definition for criminal acts of violence, and own definition for continuing threat to society and criminal acts of violence.

Let me point something out to you about these words or phrases.

The question asks you to make a determination as to whether there is a probability that the man on trial would commit such acts. You do not have to believe to a certainty, beyond all doubt, or a shadow of a doubt, and I think you understand the reason why. The only person who could answer with that degree of proof is the Almighty himself,

F2069 0070

and our legislature and our courts do not require witnesses to place themselves in the position of the Almighty, to play God. They are to do the best they can with the facts and what they have.

If they find there is a probability that the Defendant would commit criminal acts of violence, you do not have to find that he would commit any specific type of violence, whether it be assaults or rapes or kidnapping or homicides or any other criminal act of violence. It includes the whole scale.

Is there a probability the man would engage in that type of conduct, and would that conduct constitute a continuing threat to society, whether he finds himself in the prison society or someday in the same society we live in.

Do you follow me on that?

A. Uh-huh.

Q. Do you feel like --

First of all, let me ask you: Do you have questions from me now about Questions 1 and 2 now that we have had a chance to go over them?

A. No.

Q. Do you feel, Mr. Phillips, those are the types

F2069 0071

of questions you could answer based on the evidence you might hear?

A. Yes.

Q. Let me explain something to you like I do to all the other jurors that come in.

Just because someone is found guilty of capital murder does not mean the answers to Questions 1 and 2 should be automatically yes. It is not the returning of a guilty verdict that indicates to the jurors what their answers to these questions should be. It is the evidence that should indicate to the jury what their answers should be.

Why is that?

Let me give you a hypothetical example where the jurors' answers to 1 and 2 might be no after they have heard all the evidence.

Imagine the same hypothetical we have talked about where a man goes in and shoots the lady who works at the convenience store, but imagine he is, say, thirty-five or forty years old and it's been shown at his trial he is an ex-convict and let's say that he solicited to help him with that robbery a seventeen-year-old boy. Let's say he has run away from home, got

F2069 0072

family troubles, and that's been shown in the trial, and he's fallen under this older man's influence. He has solicited the boy to go outside and wait and be a lookout, and if the police or anybody else comes by, to let him know, and he has put a gun in this seventeen-year-old's hand and he has acquired the weapons and given a gun to this seventeen-year-old, and the seventeen-year-old waits outside and does what he is told. He hasn't seen anyone come by. He hears shots, and he flees.

You see, however, under our law of parties, people who act together to commit a crime are equally guilty, and that seventeen-year-old can be just as responsible for someone else's death under the law of parties as the ex-convict would be who actually fired the bullets in the body.

However, at the seventeen-year-old's trial where he would be tried for capital murder, I think you would see in answering Question No. 1 on the part of the seventeen-year-old, was there any conduct on his part that caused the death of the deceased and was it done deliberately, the conduct that caused her death,

F2069 0073

and was his conduct done with the reasonable expectation she would die, I think you would see where the jury, in hearing that case, would decide that the answers should be no in the seventeen-year-old's case, and then when deciding what kind of person he is as to whether there is a probability he would commit certain acts again that would constitute criminal acts of violence that would be a continuing threat to society, you might very well say the answer to that would be no, too.

So, it depends on the situation as to what your verdict should be, and as to whether or not these answers should be yes.

Do you follow me on that?

A. Yes.

Q. Let me explain something else to you, another aspect of the law.

I have talked to you about the range of punishment for murder, and I am sure you have a question as to why I am talking to you about the range of punishment for murder. It is because every capital murder includes the lesser included offense of murder.

You see, a man could be charged with

F2069 0074

capital murder and the jury could hear the facts surrounding the accusation and they could decide there is no question in our mind the man is guilty of murder, but that the murder did not take place during the course of committing a burglary or robbery or kidnapping or rape.

In the hypothetical we were talking about, let's say, the man is charged with having killed the cashier and there are some witnesses in the store and they say, they swore this was a robbery, why else would he shoot her to death, and, of course, for some reason or other, the man's indicted for capital murder, robbery-murder.

But then, when the facts become known at the trial, they found out what this was, was the continuation of a boyfriend-girl friend argument, that they have been living together off and on for a couple of years; they recently broke up, and he had been bugging her at work, and he took a pistol and they had a confrontation at the store. He pointed his pistol and shot her, but didn't steal anything. He committed a cold-blooded act of murder, but not robbery-murder. The proper verdict would be to find

F2069 0075

the man guilty of murder, but not capital murder.

That is why we take time to explain this. I am not sure that is what your proper verdict might be, but I am trying to explain to you how the lesser offense of murder can apply in a capital murder case, even though the man has been accused of capital murder.

Now, the range of punishment is five to ninety-nine years or life for murder, and the jury can, in a proper case, consider giving someone probation even though the jury has found someone guilty of the offense of murder.

Now, I am going to ask you in a second if you could, in a proper case, consider probation for somebody who had been found guilty of murder, but before I stake you out and put you on a limb and try to saw it off, I am going to give you a hypothetical example.

It starts off a capital murder. The jury returns a verdict of murder and ultimately gives a person probation, and if I probably asked you to give me an example, I guess your response would be like mine. If I hadn't done this work for nine years, I wouldn't have the

F2069 0076

foggiest idea what we are talking about.

Let me give you an example and try to tie these in together. Imagine a situation where a couple had been married forty or fifty years and find themselves -- and I don't think it is too unrealistic a situation, probably exists more today than a few years ago -- but they have been married for forty or fifty years, and he finds himself at the hospital and he is dying, being basically kept alive largely as a result of our advances in medical technology, but the prognosis is for no recovery whatsoever. He has, let's say, from two months to six months to live, and she is down there, like this imaginary couple would be, and down there every day, and probably spends the night in the hospital room.

They talk about the fact that his being there at the hospital and his being prlonged in the fashion that he is is exhausting all the money they have saved for their comfortable retirement, and she is basically going to find herself with nothing.

They reach a remarkable decision, talk about it among themselves, and he asks her, and she decides to do it, to assist in

F2069 0077

taking his life, and she unplugs the equipment, and he passes during the night.

Under the definition of murder in our state, she has committed a murder because she has intentionally and knowingly committed an act of murder. Some people may consider that an act of mercy or act of love, but nonetheless, she has technically committed the act of murder.

Let's say the brothers and sisters on his side are extremely upset when finding out how the murder takes place. Let's say they engage in the insinuation that the only reason that she took part in the death was at the time the death took place, he owned some lots, and a builder was trying to buy them so he could build a resort, and now with his passing, and with selling the property, she's got more money than she thought she would have or either one of them thought they would have. She benefitted from his death. That is murder for money. He was opposed to selling that land when he was alive, so the Grand Jury indicts her of capital murder.

The jury hears the facts and they think that is the most preposterous bunch of

F2069 0078

poppycock they have ever heard in their lives, and they return a verdict of not guilty of capital murder, but find her guilty of the lesser included offense of murder and they have to assess a punishment for this lady, nevertheless.

She's never been guilty of anything in her life. They assess -- the jurors decide she ought to receive less than ten in the penitentiary, and they ask themselves whether they are going to recommend probation, and they do, and she receives probation.

I hope that hypothetical case ties all the concepts together we have talked about this morning: capital murder, lesser included offense of murder, the range of punishment for murder, and even, in a proper case, the jury giving probation for someone they have found technically guilty of the offense of murder.

Keeping that hypothetical in mind now, I would like to ask you now, Mr. Phillips, in a proper case, a case Mr. Phillips felt was proper, even though you had found someone guilty of the offense of murder, would you be able to, as a juror, to keep an open mind to that

F2069 0079

punishment and probation, and if you felt it was a proper case, recommend probation?

A. Yes.

Q. I think you understand how probation works. It is only if the jurors feel it is a proper case in their minds, and only if in unanimous agreement, the Defendant should receive ten years or less in the penitentiary.

Do you follow me on how that works?

A. Yes.

Q. Let me explain some things required of you by your jury service.

I notice you have never been on a jury panel before today.

The Defendant is presumed to be innocent. This is not to insult your intelligence. Just because he is presumed to be innocent doesn't mean he is. It is a legal presumption. It means that jurors who don't know anything about the facts whatsoever should keep an open mind and wait until the evidence is in and make their decision and base their verdict on the evidence.

I think you realize in our hypothetical a man caught coming out of a store after

F2069 0080

shooting someone to death, he is just as guilty the day he commits that crime as when he comes to the courthouse to stand trial for it, but nonetheless, people are to presume him to be innocent. They should wait until the evidence is in.

Do you follow me on that?

A. Yes.

Q. The judge will tell you about the Defendant's failure to testify. If the Defendant does not testify, you are not to consider his failure to testify as circumstance or evidence of his guilt. In other words, you base your decision on the evidence you have heard from the witness stand, not on what you have not heard from the Defendant.

That doesn't mean you can't wonder why, why didn't the Defendant testify, and wonder what he would have to say. What it means is you are not to find the Defendant guilty or use the Defendant's failure to testify as some indication the Defendant is guilty.

I anticipate in this trial he will testify. I am speaking strictly in hypothetical terms in trying to explain this, our law in

F2069 0081

regards to a Defendant not testifying.

I anticipate in this case he will, but I just wanted to cover this, hypothetically speaking, in the event he decides not to. Okay?

He can, if he wants to at his own trial, get on the stand for whatever reason, or stay off. The judge can't call him. I can't force him to get up there, but he can choose to remain silent.

Of course, he can jump up there if he wants to.

Do you follow me on that?

A. Yes.

Q. The judge will tell you the indictment is no evidence of guilt. It is a piece of paper and that is all. It is the equivalent of a starter's pistol in a footrace. Until the gun goes off, we can't go to trial, and you shouldn't give the indictment any significance of being anything more than that, just a starter's pistol.

The judge will charge you with, as well, the burden of proof, and he will tell you that the burden of proof in a criminal case always rests right here with Mr. Bax and myself. We've got to prove to you beyond a

F2069 0082

reasonable doubt that this offense took place as we have alleged, back on July 13th. If we don't, we believe you, Mr. Phillips, will be the type of person who will hesitate to vote guilty and you will come and tell Mr. Bax he didn't prove his case.

THE COURT: Just Mr. Bax?

MR. MOEN: And you will tell me that, too.

Q. (By Mr. Moen) I don't expect jurors to help me along because I have done a bad job on a case. I ask you to say by your verdict not guilty, if we do not prove it.

I expect you to say guilty if we do.

The Defense doesn't have to prove anything. The State has to prove something. We have to get started somewhere.

In our country where a man is accused of a crime, the burden is on the State to prove to the other members of the community that the man is guilty of what he is accused of. That is why the burden is on Mr. Bax and myself.

The Defense can call any witnesses they choose. These people will be rounded up, brought to the courthouse, and they can get

F2069 0093

whatever testimony they want elicited for the jury, but they don't have the burden to do that.

If, for some reason, they choose to remain totally silent, if they felt that was the best strategy, "Let's not call any witnesses of our own," if they felt that was the best strategy, they could do that, too. It is up to them.

They don't have the burden, but can do whatever they like. Cross-examine, not cross-examine, call witnesses, not call witnesses. They can do whatever they think is the best thing.

Do you follow me on that burden of proof?

A. Yes.

Q. Mr. Bax and I have the burden of proof, and it is to prove beyond a reasonable doubt. Before you can say by your verdict or any other verdict the man is guilty, you have to believe it beyond a reasonable doubt that he is, not beyond a shadow of a doubt or beyond all doubt. Those are words on Perry Mason shows.

That applies also to Questions 1 and 2.

F2069 0084

We have the burden of proof. The Defendant can remain totally silent at the punishment phase of the trial if he likes and doesn't have to call witnesses at the punishment phase of the trial if they don't want to, because the burden of proof that your answers ought to be yes is with Mr. Bax and myself, and that burden of proof is beyond a reasonable doubt, and I specifically call your attention to Question 2 and I think you would agree that before you could answer Question No. 2 yes, you would not have to believe beyond all doubt then because the only person who could prove that question to you beyond all doubt is the Almighty himself, and he will not be called as a witness in this case, not to be blasphemous, but to point out to the jurors when they answer that, there is no requirement that you will be required to play the role of God.

Are there any questions of me so far?

A. No.

Q. Finally, the judge will charge you that when you judge the credibility of witnesses, you are not to give any witness any more or less belief because of a witness' job.

F2069 0095

After a witness testifies, it is perfectly all right. After the witness testifies, such as a police officer, after the police officer testifies, the jury can look at him. How long has he had experience in traffic accidents, what is his experience, what type of technical training, what type of schools, et cetera.

The only thing a judge will tell you is that before a witness testifies, a witness in the eyes of the law is not more or less believable than any other witness just because of his or her job.

THE COURT: Mr. Phillips, if you would, please, sir, answer out so she can write it down.

THE JUROR: I sure will.

Q. (By Mr. Moen) Are there any questions of me so far, Mr. Phillips, on anything?

A. No.

Q. It seems like -- it seems like there is something else I want to talk to you about. I know the evidence in the case might show the Defendant is an illegal alien.

A. I didn't get the last.

Q. The evidence in this case might show the

F2069 0096

Defendant is an illegal alien. Okay?

The only thing I want to ask you is this, whether you can see whether the man's guilty or not guilty of this crime, you would not find him guilty or not guilty because he is an illegal alien?

Do you follow me on how that works?

A. Yes.

Q. He has the same rights as any person charged with a crime, I guess the same as if we were to find ourselves charged with a crime in Mexico. We would find ourselves with the same rights as anyone else.

I say that not to -- and I take it you are not the type of man, and I ask you not to find the man guilty or not guilty just because he is an illegal alien, and I take it you can do that?

A. Yes.

Q. You can, when answering Question 1 and 2, you can consider that fact as evidence, as indicative of what type of person that man might be, but that doesn't mean you would answer Questions 1 and 2 yes, because you felt he was an illegal alien.

F2059 0087

Questions 1 and 2 will tell you that part. You can take the whole package when you decide, especially in regards to Question 2 about what type of person is on trial. You can take the entire package, what part has the man played in the crime, what crimes he's committed in the past, the fact that he is an illegal alien. You can take the whole package with you then at that phase of the trial.

I am only talking about the guilt-or-innocence stage.

I notice you have a friend of yours by the name of Roy Graves?

A. Graves.

Q. What police agency is he with?

A. I just know he is a policeman with the Houston Police Department.

Q. The only reason I ask is just by way of explaining your obligations as a juror in judging the credibility of a witness.

Police officers aren't any more believable than anybody else, although they may be more believable after hearing their evidence.

I notice in World War II you were in the Army as a private.

F2069 0088

Were you stationed overseas at all?

A. Yes.

Q. Where were you stationed, sir?

A. In the South Pacific.

Q. Did you receive any type of commendation or awards for your service in World War II, the Purple Heart or any type of meritorious service award?

A. No.

Q. What was your function with the Army? Were you a rifleman or stationed in artillery or some other division?

A. I was what they considered intelligence, reconnaissance, whatever that meant. That is what it was classified as. We were trained for the European theater and with the Pacific.

Q. Sounds like the Army's still working -- my experience with the service indicates to me that things have not changed over the years.

Where do you like to play your golf at?

A. Municipal.

Q. Let me check with Mr. Bax to see if he has questions. I have exhausted my questions and myself as well, but let me check with him.

F2069 0089

(Consultation between attorneys.)

Q. (By Mr. Moen) Mr. Phillips, thank you for giving me some of your time, and I will pass you to the Defense, and they will have questions to ask you.

If you are selected to sit on the jury panel, I look forward to serving with you.

THE COURT: Before we do that, let's give Ms. Layne a break.

(At this time a short recess was taken by the court.)

EXAMINATION

QUESTIONS BY MR. ELIZONDO:

Q. Mr. Phillips, how are you doing today?

A. Fine.

Q. My name is Candelario Elizondo. I, along with Joe Hernandez, am representing Ricardo Aldape Guerra in the trial of this lawsuit.

As the Prosecution mentioned to you, this is a capital murder case. This, as in any type of trial in Texas, is divided into two parts.

The first part, of course, is the

F2069 0090

guilt-or-innocence stage, and the second part is the punishment stage.

The Prosecution usually talks about the punishment stage. I want to talk to you about the guilt-or-innocence stage.

The Defendant is presumed to be innocent. The State must prove each and every element of this case to you, a capital murder case, beyond a reasonable doubt. It must prove on a particular day in Harris County, Texas, this Defendant shot and killed a police officer in the lawful discharge of an official duty, knowing at the time he was a police officer.

They must prove all those elements to you beyond a reasonable doubt.

The term reasonable doubt will not be defined for you. There is no legal definition of the term reasonable doubt. The judge can't give you one. They can't give you one. I can't give you one. But all I can do is tell you that across the street at the civil courthouse where they try lawsuits over property disputes, over contract disputes, over personal injuries, over workmen's compensation cases, sometimes for millions of dollars, the burden

F2069 0091

of proof over there is by a preponderance of the evidence, the greater weight of the credible evidence.

Down here in the criminal courthouse, the legislature says before somebody can be put to death or before somebody's life is forfeited, the State can only prove that case to you beyond a reasonable doubt.

How do you feel about that?

A. Well, I hear what you are saying.

Q. Do you think the burden should be a little bit heavier in the criminal courthouse than in the civil courthouse?

A. I don't have an opinion about that really.

Q. What do you think the term reasonable doubt means?

A. Well, I would say the best evidence you could present.

Q. You mean the State?

A. I mean your side of it.

Q. Okay. In a criminal case, the State has the burden all the way through.

A. I understand.

Q. They have the burden to prove their case to you beyond a reasonable doubt. They will do that by

F2069 0092

presenting witnesses down here. They will come down here and take the witness stand and give their version of the facts.

After they are through presenting witnesses, they will then rest their case, which means in so many words, "That is all we have."

The Defendant can, if he chooses, he can put on evidence. He doesn't have to. The law says he doesn't have to.

Let me give you a little hypothetical example and ask you how you would react to this kind of fact situation. Let's assume for a minute the State has put on its case. They have put on all these witnesses and they have already rested their case and we rested right behind the State. We don't put on evidence at all.

You go to the jury deliberation room and you are thinking, "I think he did it. Maybe he did it, but I haven't been convinced beyond a reasonable doubt."

In that hypothetical, what would your verdict be? Keep in mind he didn't testify and we rested our case right behind the State.

A. It gets back to reasonable doubt. If I was convinced that he was innocent, that is the way

F2069 0093

I would vote for him.

Q. Okay. If the State didn't prove their case beyond a reasonable doubt, you could acquit the Defendant and find him not guilty; is that correct?

A. Yes.

Q. If the Defendant chooses, he can put on evidence. He can put on evidence; he can put on himself. If he puts himself on, the State can then discredit him, impeach him with any prior felony convictions within the last, say, ten years.

I can't do that. The State can do it when he takes the stand and testifies as to his version of the facts.

If, after you heard both sides -- I will guarantee you one thing, you would have heard two diametrically opposed stories, and you, as judge of the facts, it will become your duty, your job, your function to decipher the facts and resolve the conflicts that have arisen, and if in your mind, the State has not proven its case to you beyond a reasonable doubt, even though you might say to yourself, "There is a possibility he did it, however remote that might be, or maybe he did it," can you still come back

F 2069 0094

and say, "We find the Defendant not guilty"?

A. Yes.

Q. In a capital murder case, if you have found the Defendant guilty of intentionally and knowingly killing a police officer in the lawful discharge of an official duty, then, of course, we go to the punishment stage.

In the punishment stage, there are two questions that you need to answer, and how you answer them will determine what kind of penalty he gets. He gets life or death.

In regard to Question No. 1, would you automatically answer Question No. 1 yes solely because you have found him guilty of intentionally and knowingly killing a police officer?

MR. MOEN: I object to the form of the question, Judge. It implies he cannot consider the evidence surrounding the man's guilt or the crime, and as a result, he could properly answer that question if he found the man guilty of intentionally and knowingly killing a police officer. The form of the question is misleading.

THE COURT: Sustained.

Q. (By Mr. Elizondo) In the second part, there are

F2069 0095

two questions. You have already found the man guilty of intentionally and knowingly killing a police officer. Then you go to the punishment stage, the two questions, and the first question will ask you whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would result.

What do you think the word "deliberately" means?

A. Well, he intended to kill him when he went in there.

Q. Okay. Now, back in the first part of the trial, you have found him guilty of intentionally and knowingly killing a police officer.

Would you automatically, because of the fact that you have found him guilty of intentionally and knowingly killing a police officer, would you automatically answer Question No. 1 yes solely because of the first part, the guilt-or-innocence stage?

A. Well, you lost me there.

Q. Okay. What I am getting at is: A little while ago when you were talking with Mr. Moen, you said with regards to the death penalty, you

F2069 0096

didn't believe there was enough of it, and we needed to curtail some of this crime, et cetera.

I agree with you.

What I am trying to get at is every trial in Texas is divided into two parts. The first part is the guilt-or-innocence stage.

If you find him guilty, we go to the punishment stage. If you find him not guilty, that is all there is.

At the punishment stage, you have to answer two questions, and how you answer those two questions will determine what kind of sentence he gets, and what I am trying to get at is would you automatically answer those two questions yes, irrespective -- if there is such a word -- of any other evidence or of any evidence solely to give him the death penalty?

A. Well, to me, that second question there, it says the probability. To me, that would determine how I would go on 2.

Q. Well, what do you mean by that?

A. Well, if I thought the probability was -- if it was a case where I thought he would do that, well, I would go for the death penalty.

Q. But if you didn't think so, you would not?

F2069 0097

A. That is what it says, a probability.

Q. Yes, but the State of Texas must prove to you beyond a reasonable doubt whether there is a probability, a likelihood, that he will commit criminal acts of violence.

A. That is true.

Q. They have to prove to you beyond a reasonable doubt that there is a likelihood that he would commit criminal acts of violence that would constitute a continuing threat to society.

If they didn't prove that to you beyond a reasonable doubt, could you answer that question no?

A. Well, to me, I am back to the probability. If I think he is guilty of that, that would be my determination.

Q. But the second question is asking you more or less to foretell or forecast the future?

A. That is right.

Q. Whether you think in your own mind there is a likelihood that he will commit other criminal acts of violence?

A. That is true. I understand that, and if I thought that, I would go all the way.

Q. What if you didn't think that?

F2069 0098

A. I wouldn't go all the way.

Q. You would answer that question no?

A. Right.

Q. Would you have a preference as a punishment of life or death?

A. No. I don't understand that question.

Q. In a capital murder --

A. I don't believe in anybody being put to death --

Q. Some people have a preference that automatically they should die for that, and other people say they should not automatically die, give them life, and some people are in between, say they would hear the evidence first and make a determination as to what we should give them.

I wanted to know if you had a preference.

A. No, I don't have a preference.

Q. As the Prosecution mentioned to you a little while ago, murder is a lesser included offense of capital murder, and, of course, lesser included, by that, I mean the punishment range is less, anywhere from five years up to ninety-nine years or life, and a fine of ten thousand dollars may be imposed.

The Prosecution gave you an example

F2069 0099

about mercy killings, and I must admit I think that that is a pretty extreme example.

Would you agree with me there?

A. I understood what he was saying.

Q. Do you think it's an extreme example?

A. I don't know. I don't know.

Q. Could you consider five years' probation in a murder case in your own mind, as little as five years' probation?

A. No.

Q. Irrespective of any fact situation in your mind? I want you to think of any facts, including the example he gave you.

Can you consider in your own mind, as proper punishment in a murder case, as little as five years' probation and no fine?

A. I could in a case like that.

Q. So you could consider probation?

A. In a proper case.

Q. In a proper case in your own mind?

A little while ago -- I don't recall when it was, three or four months ago, and I am going to find out when it happened -- the Supreme Court came down and said the children of illegal aliens had a right to a free education.

F2069 0100

Q. What was your reaction to that?
A. My gut reaction when they said that was I objected to it.
Q. Any particular reason why you did?
A. No. I am not prejudiced against them.
Q. Well, you know, prejudice is a bad word, automatically says you are bad, but everybody's got biases and prejudices. I do, Joe does, everybody does, and you wouldn't be human if you didn't.
A. That is true.
Q. What I am trying to get at is: Why did you form your reaction, your initial reaction on that issue?
A. Well, I couldn't understand why we should support the children --
Q. The children of illegal aliens?
A. Right.
Q. They are in this country illegally and shouldn't be getting services illegally, correct?
A. That is true.
Q. You know, the Defendant, it might be shown he is an illegal alien. He is here in our country illegally and he is going to come in here and he is going to ask for all these same rights

F2069 0101

that a U.S. citizen has.

How do you feel about that? What is your reaction on that?

A. I think he has that right in the court. I don't have any trouble with that.

Q. Pardon?

A. I don't have any trouble with that.

Q. You wouldn't hold it against him in any way, shape, form, or fashion?

A. No. I might have some prejudice because he is an illegal alien, but not as far as getting a fair trial in the court.

Q. Okay. You said you had a -- and I hate to use the word bias or prejudice, because it denotes -- it is a bad term, and people automatically get rankled or upset by that term, but I can't think of another word.

A. Okay.

Q. You said you had a bias against, say, illegal aliens as a class, as a class of people. Let's say they are here illegally.

A. Not as a class of people.

Q. Well, you didn't like the children of illegal aliens having a free education. They are here illegally, of course.

F2069 0102

A. Yes.

Q. And they are getting services that we must pay for, correct?

A. Correct.

Q. So then, would it be a fair statement to say that you don't like the law, but the Supreme Court said you must abide by it?

A. What law is that?

Q. That is that children of illegal aliens have a right to a free education.

A. No, I didn't like the law.

Q. As a result of that, did you form any opinions in your mind in regards to illegal aliens?

A. Well, none other than it is a problem that we have. We need to do something about it.

Q. So then, would it be fair to say you have an opinion about illegal aliens?

MR. MOEN: I object to the form of the question as being repetitious, Judge. I think he has stated perfectly clearly what his feelings or opinions are concerning the education problem of children of illegal aliens.

THE COURT: Sustained.

MR. ELIZONDO: I don't think he has answered the question.

F2069 0153

Q. (By Mr. Elizondo) I am sorry. I asked you if you had an opinion about illegal aliens, not illegal aliens that were getting a free education.

Did you follow me there?

A. No.

Q. Do you have an opinion about illegal aliens as a class of people?

A. I told you not as a class of people, no.

Q. Let's assume we go to trial and the State of Texas puts on their evidence and we don't put on any evidence and he doesn't testify at all.

Would you hold that against him? Would that be a strike against him if he didn't testify?

We have been brought up to think there are always two sides to every story. I was brought up that way, and I am sure you were, too.

Would you want to know what his side is?

A. Not necessarily. The State would put on their side of it.

Q. Let's assume the State puts on their side, and you are back there in the jury deliberation room, and you are thinking -- you are saying

F2069 0104

to yourself, "Well, I am not sure they proved that case to me beyond a reasonable doubt, but he didn't testify." Would you find him guilty because he didn't testify even though the State hadn't really proven their case to you beyond a reasonable doubt?

Would you have thoughts that maybe he was guilty?

A. No.

Q. You would find him not guilty?

A. I wouldn't make my judgment on that.

Q. But you would find him not guilty if the State hadn't proven their case to you beyond a reasonable doubt, but you are back there in the jury deliberation room and you are thinking and saying, "Maybe he did it and maybe he didn't. I really don't know. There is a likelihood that he did. He didn't testify."

What would your verdict be in that case?

A. Well, if I was convinced he wasn't guilty, it would be not guilty.

Q. You know he has been indicted by the Harris County Grand Jury for the capital offense of murder.

F2069 0105

A. I didn't know that.

Q. Well, by an indictment, they call that a true-bill, and he is represented by two lawyers and an interpreter here, and, you know, do you think in your own mind that he might be guilty of something?

A. No, no more than I know -- I don't.

Q. I am not sure if they went into the facts. I think the judge did, a brief scenario of the facts. There were two people stopped by a police officer. The police officer got shot in the head three times, and a bystander was seventy or eighty feet away, and he got shot also.

An hour and a half later, another police officer received five bullets and he lived, but the man who shot him was killed. It happened six or seven weeks ago.

Do you remember any of those facts?

A. I remember something about it. There is so much in the paper, I can't keep them straight.

Q. What do you recall about it?

A. I just recall that the police officer was shot in the head. That is all I remember.

Q. Did you ever hear the name or read the name,

F2069 0166

Ricardo Aldape Guerra, when you were reading those reports?

A. Not that I recall.

Q. Did you form any kind of opinion on it when you heard or read about it?

A. I had one that bugged me pretty bad, and that was when we restricted our police officers so much that I think to have to wait until they are shot at before they do anything, I think we are getting death for them. That is my personal opinion.

Q. As a result of reading that, you formed that opinion?

A. Yes.

Q. So you think police officers then are constrained too much?

A. I sure do.

Q. So you think -- well, what do you think should have happened in that situation?

A. What did happen?

Q. No, what do you think should have happened in that situation?

You say police are restrained too much.

A. I don't follow you.

F2069 0107

qualifications or disqualifications as a juror.

MR. ELIZONDO: People who are charged --

THE COURT: Sustained.

Q. (By Mr. Elizondo) People charged with killing a police officer --

A. I don't understand what you're saying.

Q. Did you form any kind of bias against people that are charged with --

A. From what I read in the paper?

Q. -- knowingly and killing a police officer?

A. No.

Q. How about at all?

A. I have felt that way quite a while.

Q. Do you think in your own mind that people who are charged with killing a police officer and are later found guilty should automatically be assessed the death penalty?

A. No.

MR. ELIZONDO: We will pass him, and before we pass him, we challenge him by his bias based that he has formed an opinion from what he read in the paper.

MR. MOEN: We accept Mr. Phillips.

THE COURT: Overruled.

F2069 0109

MR. ELIZONDO: We would re-urge our motion presented before the trial to examine the entire venire.

THE COURT: That will be overruled.

Mr. Phillips, each side may -- the Defense has chosen to exercise one of their peremptory challenges in their case.

We appreciate very much your willingness to serve on jury duty. Thank you very much.

THE JUROR: My pleasure.

MR. MOEN: Thank you, Mr. Phillips.

TOMMY KENT BRIDGES,

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

EXAMINATION

QUESTIONS BY MR. BAX:

THE COURT: All right, Mr. Bridges. As I told you this morning, these lawyers are going to ask you questions, and I ask that you sit and we will visit with you for a while. I

F2069 0110

realize it is hot in this courtroom. If you would like to, remove your coat and be as comfortable as you possibly can.

Q. (By Mr. Bax) Good afternoon, Mr. Bridges.

A. Good afternoon.

Q. Were you able to find anyplace down here to get a decent lunch?

A. I work around here, and I had one of my co-workers pick me up and got a cheap meal.

Q. We have a terrible time trying to find a place to eat sometimes, and if you had found one, I was going to ask you where it was.

A. Uh-huh.

Q. My name is Dick Bax. Seated right behind me is Bob Moen. We are both with the District Attorney's Office.

We will be representing the State of Texas and the family of J. D. Harris in this case. J. D. Harris is a police officer killed on July 13th.

I believe you are one of the people who had indicated that you had perhaps read or heard something on television or in the newspaper?

A. I knew it happened. I was watching the 10:00

F2069 0111

o'clock news.

Q. And it was in the newspaper in the morning?

A. The morning.

Q. Anything in the newspapers or that you heard on the 10:00 o'clock news that caused you to form an opinion at this point as to whether the Defendant is guilty or not guilty of the offense charged?

A. Not really, no. Of course, newspaper accounts usually are slanted anyway.

Q. And there is nothing wrong with being a prospective juror and having read or heard something about a particular case. I think it would be quite impossible, especially in a case where a police officer is killed for any citizen not to have read or heard anything about this case.

A. I imagine so.

Q. The reason we ask that is that the law requires that the twelve people who take the jury box take the juror's oath with an open mind, that they have no preconceived notions of guilt or innocence.

I think you see if someone followed the case closely and decided to do research on

[2069 0112

their own, that person would not be a qualified juror on the case.

A. Uh-huh.

Q. But I take it you have done nothing more than the average citizen, opening and reading the headlines and seeing the lead story in the news.

Is there anything about that that would cause you at this point in time to have formed an opinion as to this Defendant's guilt or innocence?

A. No.

Q. As the judge also told you earlier, usually when we select a jury, it takes us three hours to do so. We bring over thirty or forty people and talk to them as a group, sit in different sides and strike different names off the list.

But since this involves the severe punishment of life or death, should this Defendant be found guilty, the law requires, and I think properly so, that we talk to the jurors individually.

Basically, you have the same obligations in this case as any other case, driving while intoxicated or petty theft case,

F2069 0113

but we need to know more how a person feels about the assessment of death as a punishment in certain cases.

At this point in time, everyone is entitled to their own opinion, and we are not going to sit here and have a debate on the pros and cons of capital punishment.

Really, what we want to do is get to know you better and see what your personal thoughts are and see if there are any religious beliefs or conscientious scruples that would render you unable to serve as a juror in a case such as this.

Oftentimes, people come before us and say, "I believe in the death penalty in a proper type of case. If the evidence is proper, I believe in the death penalty as an appropriate punishment."

Other people say, "Well, the death penalty issue is for someone else to decide. Personally, because of my beliefs, I could not participate in such a case without violating my personal beliefs."

You see, because we don't require anyone to be a juror where that jury service

F2069 0114

would violate their conscientious, moral, or religious scruples, we don't grab people by the back of the neck and say, "We don't care what you think. We are going to make you serve anyway."

A. Uh-huh.

Q. And although I want you to be true to us during this interrogation, for lack of a better term, more importantly, you should be true to yourself and let us know exactly how you feel on certain issues we talk about, and with the bottom line being we are trying to see if there will be anything that would prevent you, in this type of case, from being fair and impartial to both sides, and anything about your personal beliefs that would require you not to serve on a case like this, so the first sixty-four-thousand-dollar question, in twenty-five words or less is what is your position on the death penalty and how do you feel about it?

A. I have no qualms with the death penalty.

Q. Can you see where certain cases may require the death penalty and certain cases may require a life sentence, depending on what the evidence is?

F21869 0115

A. Yes. It would obviously have to be a clear-cut case and beyond a reasonable doubt.

Q. Let me go over with you the certain types of cases, I guess, where the death penalty is an optional punishment.

Optional means either life or death, and those two are situations where a jury has found a person guilty of capital murder.

Capital murder takes place in only ten specified areas. If a person -- first of all, you always have to have a death. You have to intentionally or knowingly have the taking of an individual's life.

A. Uh-huh.

Q. Now, you have listed on your jury information sheet that you filled out for us that you were interested, as I am sure everyone in our area is, in the Coral Eugene Watts case.

A. It was just so sensational.

Q. As bad a person as he was, under our law, he was not subjected to the possibility of the death sentence, because he didn't fall into the criteria I am going to list to you.

If a person kills a person during the course of a robbery, someone goes into a store

F2069 0116

and commits the crime of robbery, that is elevated to a capital murder.

If you kill someone after you have broken into their home or business or a worker in the office, if a rapist were to kill his rape victim, if someone kills during the course of arson or during the course of kidnapping, in those situations, murder plus one of those offenses, it is elevated to capital murder. Okay?

In the Coral Eugene Watts case, for the purpose of explanation, there was no way we had any proof even with his statements, if we were allowed to use those, that he had committed those murders during the course of a rape or kidnapping. We could never show those were ever anything more than someone with a sick mind who enjoyed seeing someone die, primarily women. Okay?

Although some people probably feel Coral Eugene Watts should have received the death penalty, his murders didn't meet the test, of murder coupled with another felony offense.

If someone kills a policeman or a fireman knowing they are such a person and that

F2069 0117

person is in the lawful discharge of an official duty, that is elevated to capital murder.

If you kill for money or if you hire someone to kill for you for money, that is capital murder, or if a prisoner either kills any employee of the penitentiary or if he kills any person during an escape attempt, that is elevated to capital murder.

Those are the narrow areas under which the death penalty becomes a possibility for punishment.

A. Uh-huh.

Q. And you can see if someone just guns down people as they come out of the courthouse today to further a political view, that would not be capital murder, although one of the most heinous crimes you can think about.

Unless it fits one of those areas I have talked about, that is not capital murder.

Do you feel those are the appropriate type cases where a person is eligible for the death penalty, though he does not automatically receive it, but he is eligible for the death penalty?

F2069 0118

A. I feel it is appropriate, especially I see it for the crime of killing a police officer and a fireman in the discharge of their duties.

Q. I guess most people feel this way because, you know, if we are getting into a situation where people don't have respect for these people who protect us, the community at large, then we are really in trouble --

A. Uh-huh.

Q. -- from a person like that.

Let me explain to you how the death penalty then becomes either the punishment, or life becomes the punishment.

Assume with me you have been on a jury and you, along with eleven other jurors, have found someone guilty of capital murder, be it any one of the situations we have talked about.

At that point in time, we would go to the punishment stage of the trial. It is two trials in one, really. The first trial, all the jurors are concerned about is did the person do what the State has alleged. Okay?

A. Uh-huh.

Q. If they find, in fact, he has committed the offense and is guilty beyond a reasonable doubt,

F2069 0119

the jury will come in the courtroom and tell the judge their verdict is guilty of capital murder.

Just because a person has been found guilty of capital murder, be it a police officer or the clerk at the Utotem, that does not automatically mean the person receives the death penalty. All right?

These two questions before you are submitted to the jury, and depending upon the way the jury answers Question No. 1 and Question No. 2, the judge assesses either life or death.

Again, for reason of background, up until 1967, we had the death penalty in Texas. You could get it not only for murder, but also rapes and robberies. In those situations, it was a very subjective test. The jury went back after finding a person guilty and decided is this person deserving of the death penalty.

That law was struck down by the Supreme Court of the United States, and they said, "No, we have to have a law that is fair to all people so there is more of an objective test."

A. Uh-huh.

Q. Our legislature, in 1974, came up with these

I 2069 0120

two questions, and ever since 1974, when the jury has come to the punishment stage of a trial in a capital punishment case, they have had to deal with these two questions, and I think you can see it is much more of an objective test, not based on your emotions, but the evidence before you.

If all twelve jurors answer Question 1 yes, and all twelve No. 2 yes, the judge must, by law, assess the death penalty.

If either Question 1 or Question 2 are both answered in the negative, then the judge assesses a life sentence.

So you may see you may have a fact situation where you may feel the Defendant should receive the death penalty, but if the other jurors don't agree, he will receive a life sentence.

Do you follow me so far?

A. Yes.

Q. Let's take the two questions and go into them in detail.

Question 1 is two questions in one. I will paraphrase it. No. 1 is: Was his conduct deliberate, and number two, was his conduct

F2069 0121

done with the reasonable expectation someone would die. Okay?

To get to this stage of the trial, you have already found that someone had acted intentionally in taking the life of another person.

The word deliberately is underlined because you won't have a definition for that term. The judge won't supply a definition and you will have to apply your common, everyday meaning for the word deliberately, reasonable, and every word you see underlined, your common, everyday meaning.

Deliberately, to me, means on purpose, and to a lot of people, quite the same as the word intentionally. Okay?

A. Uh-huh.

Q. Simply because you have found a person guilty of intentionally causing the death of a police officer or anyone else doesn't mean Question No. 1 is automatically answered yes, because even though it may be answered, as far as the word deliberately is concerned, it still has a second part of the question you didn't have to decide in the first stage, the guilt-or-

F2059 0177

innocence stage, and that is was it done with the reasonable expectation someone would die. Okay?

Let me give you two hypothetical cases that will help stimulate your imagination a little bit.

The judge will tell you what intentionally means. The judge will tell you a person acts intentionally if it is his purpose or objective to engage in the conduct. If his conscious objective is to point a pistol and pull the trigger, that is intentional. I guess you contrast that with accident, where the gun drops out of his hand and it discharges and kills soneone.

A. Okay.

Q. Imagine this situation: A man goes into a Utotem and decides he is going to take that person's money, the cashier's money, and while he is in there, he says, "I have my car outside, don't have a getaway driver, and don't want this person to chase me outside and get his license number, and he doesn't want the person to die, but wants to prevent him from coming outside, so consciously, he pulls the trigger

F2069 0123

on the gun and aims and shoots the man in the leg, runs out and jumps in his car, and lo and behold, when he shot the man in his leg, it severed an artery, and the man bled to death.

Under our law, since it was his conscious objective to engage in the conduct, he pulled the trigger, he has acted intentionally in that that act caused the death of someone. In the course of a robbery, it is capital murder.

Coming down to Question 1, after the jury has found that person guilty, you may find he has acted deliberately, but you may also find he didn't have the reasonable expectation someone would die. Okay?

So you can see in one instance, this could be answered yes, and in another, no.

Let me give you an example where both can be answered no by a jury.

Assume you have two people committing the offense. You have a thirty-five-year-old ex-convict who solicits the aid of a seventeen-year-old boy, talks him into committing this robbery along with him, gives him a gun and says to the seventeen-year-old, "You stand and

F2069 0124

look out for me. I am going inside and do the robbery."

While the man goes inside, the thirty-five-year-old convict goes inside, and he says to himself, "I don't want a witness left behind," and he points that gun and shoots in a vital area of the head or chest and discharges the gun.

Under our law of parties, if two people conspire to commit a felony and one of them commits a felony, that being the murder, all of the coconspirators are guilty of the felony committed, even if they didn't have the intent to commit that felony. If it had been anticipated in the first instance, a robbery -- and I think you will agree with me two people who agree to commit a robbery with a loaded gun, someone may be shot --

A. Uh-huh.

Q. Under our law of parties, the person who didn't pull the trigger is equally guilty of capital murder.

We come to the punishment stage at his trial. He didn't have any conduct that was deliberate in causing the death, and certainly

F2069 0125

didn't have a reasonable expectation of death. It is totally different answers than for the thirty-five-year-old ex-convict.

What I am trying to make sure you understand is that there is no automatic answers to any question in a trial simply because you have found a person guilty. It would be wrong for a jury at this point to say, "If I found that a person killed a police officer intentionally, I am going to say automatically yes, yes, and require the death penalty," because the law requires you first hear the evidence and base your answers on the evidence and not on feelings you have.

Do you think you can do that in Questions 1 and 2, based on the evidence?

A. I think I could.

Q. Question No. 1 really calls upon you to reevaluate the evidence you have heard. You may, after you have heard the evidence, answer that question to yourself. You have heard the evidence, but I think what you are telling me, you would not answer that question or any other question automatically, simply because you have returned a verdict of guilty.

F2069 0126

A. That's correct.

Q. Question 2 is a little different. Again, the word probability and criminal acts of violence are underlined, and I don't know why we have part of the word continuing underlined.

A. Ran out of ink.

Q. Or somebody thought they didn't want to underline that in the first place.

Or society.

Those words will not be defined for the jury, and you will have to use your common, everyday translations for those terms. I do not have to prove to you, and I don't think there is any way I can prove to the jury something is certain to happen in the future. There is no physical way I can do that.

Only one person, God himself, could tell us what is certain to happen in the future, and the law doesn't require the jurors to put themselves in God's position and make that type of determination, only that he is the type of person who probably, which to me means chances are, he would probably commit acts of violence which would be a criminal threat.

Criminal acts of violence could be

F2069 0127

capital murders, other murders, but not only those types of offenses, robberies, burglaries, where you break into someone else's home and automobile, or he may be the type of person who may enjoy going up and hitting people. I do not have to prove to you that he would commit a specific crime. The law only requires I prove to you he would be a violent-type person, a threat to society, whatever society he finds himself in, either the penal institution, or if someday he found himself back on the streets again. Okay?

A. Yes. Uh-huh.

Q. Do you think you could answer Question 1 and 2 based on the evidence, or is there anything about the way they are written that would make it impossible?

A. I would assume there would have to be evidence to provide this type of information. I can't imagine a snap judgment based on one act. There would have to be some evidence to prove that this person has a continuing record of violence or something that would make you want to answer like this. You couldn't say because he's done this, I am going to automatically say he is

F2069 0128

going to do it again.

No, I am sure there would have to be some type of evidence that would be presented to indicate to you that he is a continuing threat, or the likelihood that something like this would occur again, if this person --

Q. Certainly at the punishment stage. At the guilt-or-innocence stage, the only thing you can hear about is the guilt or innocence of that crime. The law doesn't allow us to go into other acts or things we don't know about.

A. Right. That is --

Q. At the punishment stage, we are allowed to introduce to you additional evidence, if it is available.

The law does not require us to bring additional evidence. The law is such that a jury can, depending on the evidence in this case, decide on those facts alone whether that person has the probability of committing criminal acts of violence.

Say a seventeen-year-old went to a Utotem and saw the clerk behind the desk move or make a movement and he got scared and shot one time running out of the store. Based on

F2069 0129

that evidence, you may have a difficult time ever answering that question yes, but can you imagine a situation or any situation in your mind, based on one series of events, that that could, in fact, tell you enough about the man that you could answer Question 2 yes?

Let me give you -- let me give you an example.

Ronald Clark O'Bryan was a fellow who, back in 1974 or '75 at Halloween, had poisoned one of his children and attempted to poison another one of his children by putting cyanide in their Pixie Sticks.

A. I remember the case.

Q. That was the case where the jury only heard evidence of that one crime.

MR. ELIZONDO: Objection, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Bax) That was a case where the jury heard one set of facts and decided that man was a continuing threat to society and probably would commit criminal acts in the future, and all I am trying to say is you can receive more evidence, but it is not required.

Do you feel you could look at a

F2069 0130

particular fact situation, and if it called for a yes answer based on that one transaction, answer yes, or would you always require more than one transaction?

A. If the evidence presented in the guilt-or-innocence stage was so bad that it would be obvious this was a premeditated act.

Q. You have to look to all the facts, how cold-blooded it was, was there justification whatsoever for the person's conduct, and based on all that, decide what the answer to that question should be.

A. Yes.

Q. Okay. Is there anything about Question No. 1 or Question No. 2 or anything we have discussed up to this point that would cause you any problem?

A. No.

Q. You can see where that is more of a clinical -- if there is such a term -- more of a clinical way to determine whether a person receives a life or death sentence than before?

A. It does make you stop and think. You can't reach in and make a decision emotionally, as you said.

Q. Exactly, and that is what the law requires, and

F2069 0131

it really requires the jury to base their verdict on evidence, and I can't see anything wrong with that at all.

A. No.

Q. Let me go over with you some of your basic obligations you would have as a juror in this case or any other type of case.

All Defendants at this point in time are presumed to be innocent. The fact that they have been indicted by a Grand Jury, the fact that they find themselves in a courtroom answering charges with attorneys providing a defense for them, the fact that we have a judge sitting up here listening to the questions and calling the legal shots and what not gives no rise to any inference of guilt, and the jury will be so instructed they can't consider those things against the Defendant, the fact that he's got lawyers and been indicted.

Could you give him that presumption of innocence?

A. Yes.

Q. Of course, I am not going to try to insult your intelligence. If a person were guilty back on the day they committed an offense, they would be

F2069 0132

guilty when they came into this courtroom, and they would be guilty until the day they died, but the law requires twelve people to take the law and listen to the facts with an open mind and no preconceived notions of guilt.

THE COURT REPORTER: Could you speak out, please?

THE JUROR: Yes.

Q. (By Mr. Bax) You are going to have to answer out, and a nod of the head is hard for her to put down.

A. That was a nod in the affirmative.

Q. A Defendant in a criminal trial doesn't have to do anything in his defense. He does not have to prove anything to a jury. The proof in a criminal case lies entirely on Mr. Moen and myself. We are the people making the accusations, and we are the people who have to go forward and prove the Defendant guilty beyond a reasonable doubt.

The Defendant can sit there and not call or cross-examine one witness and does not have to testify, so the only thing you can base your verdict on is what the State proves.

The law does not require anything of

F2059 0133

the Defense.

Do you follow me so far?

A. Yes.

Q. If the Defendant fails to testify, the judge will tell you you cannot use that failure to testify as evidence of guilt. You cannot go back and say, "The State almost proved it to me, but since the Defendant didn't testify, provide that lacking evidence, I find him guilty."

You wouldn't do that?

A. I wouldn't do that.

Q. And you wouldn't find him guilty in that situation if he chose not to testify?

A. Yes.

Q. I would have to prove, and I mentioned to you a second ago, I have to prove my case beyond a reasonable doubt.

The judge will not tell you what that is. I wish there was a definition for it, but there is not.

The only way I could ever prove anything to anyone beyond all doubt or a shadow of a doubt or beyond any doubt would be if those jurors were actual eyewitnesses to everything

F2069 0134

that took place, and even then, if you had twelve people that saw the same thing, you would probably have twelve versions of what they saw, although the ultimate fact is what they agree upon, so the law asks me to prove it beyond a reasonable doubt.

If you believe the person is guilty, then it has been proven to you. If you don't believe it, it has not been proven and you should find him not guilty.

That burden is the same, whether it is a theft case or the person is accused of stealing a pen and pencil set out of Foley's or a capital murder case. The principal is the same.

Do you have a problem with that, or would you hold the State to a higher burden of proof than the law requires simply because it is capital murder?

A. I have no problem with reasonable doubt.

Q. Okay. Let me see.

I am going kind of fast, but I think you are understanding everything I am saying.

I need some water, I think.

The judge will also charge you you don't have to remember everything I am talking

F2069 0135

about today. The law about everything we are talking about today will be given to you at the trial in the Court's charge. He will charge you that you are not to discuss, allude to, or mention how long a person would have to serve on any sentence that you may impose. He will tell you that that decision, how long a person has to serve on a sentence, is left to the exclusive discretion of the Board of Pardons and Paroles, and that if any juror, during your deliberations, brings up parole, the other jurors are under an obligation to tell those persons or that person that they are immediately to stop that discussion.

If the person or persons persist in talking about parole, even after that warning by the other jurors, then they will be told to let the judge know they are doing it.

The reason I bring that out is if it happens, we are going to spend four, five, maybe six weeks selecting a jury, perhaps a week or so putting on the testimony. If parole is discussed, how long a person would have to serve, if that is --

MR. ELIZONDO: I object to the

F2069 0136

prosecutor emphasizing the law of parole, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Bax) We would have to start all over again. It is reversible error for a jury to discuss parole in arriving at their verdict, and I feel you would not do that. If somebody started talking about parole, I think you would tell them not to discuss that.

A. That would indicate they are already presuming guilt if they are talking about the punishment phase of something.

Q. That may come up. More likely it would be if you found someone guilty. I doubt that someone would mention it during guilt or innocence, but assume with me you had found a person guilty and you are trying to decide what punishment should be assessed. That is when people talk about parole, and I think you would be able to tell that person, "No, we can discuss the law and the evidence, but not what the Board of Pardons and Paroles might do."

A. I can understand what the juror's role is.

Q. Okay. I'll go back to what I mentioned to you earlier, that we had the Coral Eugene Watts

F2069 0137

case where we talked about murder and not capital murder.

A murder case has a totally different range of punishment. We are no longer talking about life or death. When we talk about murder, the punishment range is from a minimum of five years all the way up to ninety-nine years or life, and in addition, a fine of up to ten thousand dollars if the jury feels that proper.

You can see right away it is a very wide range of punishment where someone could get five years or someone could get life for the intentional taking of another person's life.

Our law also provides if the jury, after hearing all the evidence, decides if the range of punishment in this case, because of the facts in the case, the circumstances and the person committing it, if the jury decides the range of punishment is ten years down to five years, the jury can, if they choose, recommend that that sentence be probated and that the person be released from custody and have to live up to certain terms and conditions of probation that the judge gives them.

Can you imagine, or if you felt that

F2069 0133

a case were ten years to five years and you felt it was proper, could you consider probation for the intentional taking of a life?

I know that -- and I may have -- mercy killings, you know, where there could be --

A. Mitigating circumstances.

Q. Exactly. Perhaps where a woman had been beaten time and again by her husband, and he is a drunkard and never supports the kids and she finds nobody else will help her and she takes the law in her own hands. That technically would be a murder case, but you can see in some circumstances, that may be a probation case.

Do you agree?

A. I could agree on probation under those kinds of circumstances.

Q. Sure, sure. And there is a situation where you could have a man who comes home and finds his wife has been severely beaten and sexually abused and she is about to die. His children have been savagely killed, and she says, "Joe Blow did it." Joe Blow lives down the street, and he goes with a .38 and Joe Blow comes to the door and says, "I did it and I liked it," and the man shoots and kills Joe Blow.

F2069 0139

I think you can see, though that is a murder case, all of us would be hard-pressed to find him guilty.

But if you were to follow your oath and find him guilty, you would probably recommend probation in a case like that.

A. That's correct.

Q. One other area: As you can see, the Defendant is having these proceedings translated for him from English into Spanish.

A. Yes.

Q. I believe the evidence may show he is not in this country lawfully. Would that cause you any bias or prejudice, or could you give him the same rights any citizen in our country would be entitled to if charged with this offense, or any other offense?

A. Yes, I could.

Q. I think most people feel that way. They may not agree with the right of whether they have the right to a free education, but when charged with a crime, they certainly have the same right as any other individual in our society.

You were in the Navy in '66 through '68?

F2069 0140

A. That's correct.

Q. Where were you stationed during that period of time?

A. I had very rough work. I spent six weeks in school in San Diego -- I mean six months in radio school in San Diego, and then I spent eighteen months in Hawaii, so I had shore duty in Hawaii.

Q. Had they offered you continuous service in Hawaii, do you think you might have re-upped

A. Probably, although very expensive on a service-man's salary, but still worthwhile.

Q. Your home was burglarized not too long ago.

A. Just exactly about a month ago.

Q. Was anyone ever apprehended or anything?

A. Never heard another word.

Q. Did they steal pretty much?

A. All my important things, the stereo, TV's, video recorder, and all my tapes and things like this.

Q. I hate to tell you, but you probably won't see that stuff again.

A. I am sure I won't.

Q. Unless you catch someone in the act, especially with burglaries.

F2069 0141

I don't blame it on the police. They've got so much else to do. Unless they catch someone in the act, it is hard to catch somebody.

The address is on Eastwood?

A. Yes.

Q. Where is that?

A. Off Navigation. It is an old house, been there forty years. My parents lived there before I did.

Q. Did you know this incident is supposed to have taken place at an intersection of Edgewood and Walker, somewhere around Harrisburg and Dumble? Is that in the same area?

A. Roughly about a mile.

Q. When you heard the news accounts and what not, did you realize that was something that took place very close to where you live?

A. On the 10:00 o'clock news, they said somewhere around Austin High School. That is where I went to school. They did not really specify or I didn't catch the specific street location, so I presumed it was over around Austin High School, Foley's Warehouse Store, around in there. That is where I presumed it happened.

F2069 0142

Q. Do you know where the intersection I am talking about is, Harrisburg and Dumble? That would have been within a half a mile or so?

A. I know that location. It is right across the street, I think, from Eastwood Park on Harrisburg.

Q. Right, right. In that same general area, just down over the railroad tracks, not too far.

Down Dumble is Walker, and make a left turn at Walker and you are there where it took place. That would be the same general area where you live, presently?

A. Yes. That is within a mile.

Q. Is there anything about the fact that you were burglarized that would cause you any concern about listening to the evidence in a case such as this?

A. They are two different cases.

Q. Well, you know, sometimes people say, you know, I have been burglarized, and I am tired of it. I am going to do everything I can.

That is the only reason I ask that question.

A. You can't punish somebody else for something someone else did.

Q. You've got a nephew that had just recently

F2069 0143

graduated, Russell Bridges, who has just graduated from the police academy?

How close are you to your nephew?

A. Pretty close. We have been to ball games and things together.

Q. Have you ever discussed with him the danger of being a police officer or things like that?

A. A little bit, but he is, you know, old enough, twenty-two years old, and knows what he is doing, but he just graduated about two weeks ago. I went to the graduation ceremony.

Q. I guess he's got his uniform now and is out there?

A. Yes.

Q. Is there anything about that fact that would be -- I am sure the evidence will show it was Houston Police officers that would be involved in this case, and is there anything about the fact that you have a nephew who is on the Houston Police Department, anything about that relationship that would prevent you from being a fair and impartial juror?

A. I would hope not. Obviously, if he were a victim, that would make the circumstances totally out of question.

Q. Sure, sure.

F2069 0144

A. But since I did not know the victim -- obviously now, with my nephew a member of the police force, I have a little more interest in what happens to them, but -- I am not in this particular instance, I wouldn't think.

Q. I think you understand that police officers are human like everybody else, and we've got good police officers, bad police officers, and that is something that will come up when you are judging the credibility of witnesses.

Simply because a person has a certain job, because they may be a minister, a police officer, a lawyer, doctor, plumber, engineer, does not entitle them to automatic believability or disbelievability.

The law requires that the jury first listen to the witness testify, and then after that, they can decide whether they believe or disbelieve the testimony.

Of course, after hearing a police officer or a doctor testify and they are testifying about something in their area of expertise, you can give them greater credibility than somebody else in that area, but the law requires you first listen to the witness before you

F2069 0145

assign any credibility or discredibility, if there is such a word, to their testimony.

Would you have any problem in that area?

A. No.

If this were a traffic case --

Q. Okay.

A. -- it would be something altogether different.

I have never won a traffic case yet.

Q. I don't know if you can. I just don't know if you can. I have been over in traffic cases, and it almost seemed like a kangaroo court sometimes.

A. A court where people come in, they have a trial, and don't know what is happening, and before they know what's happened, they have been found guilty of an offense.

Q. You have indicated you had an unpleasant experience with law enforcement while you were driving while intoxicated.

Were you mistreated?

A. No. It is just that unfortunate circumstances were involved. It was a thing I am not too proud of. It just happened.

Q. There is nothing about the way you were treated --

F2069 0146

A. No, they were extremely courteous to me, considering the circumstances.

Q. Okay. I imagine at some point in time the District Attorney's Office may have become involved in that, either when it was filed or what not.

Is there anything about the way the District Attorney's Office may have handled anything about that that brought a bad taste to your mouth?

A. None whatsoever. I was guilty, guilty as sin. There was no doubt about it.

Q. I don't know if I want this to be on the record, but I am sure we have all been in that same situation.

The judge is making a face, probably not the judge, I agree with that, but I think we have all found ourselves in that same situation at one time or another, not having the unfortunate experience of having a police officer there at the same time.

You worked with the Houston Post during high school?

A. I was a stuffer, like on the Sunday newspapers, stuffing that main part into the newspaper and

F2069 0147

getting it ready to be shipped out to all the various residences.

Q. Let me just ask you a few questions. Do you have brothers or sisters?

A. I have one brother.

Q. And what type of work is he in?

A. He is in the oil business.

Q. In what area of the oil business? That is such a --

A. He is in the marketing end -- oh, his primary duty is swapping oil with other companies. His company may have oil here that they will sell to a certain company, and in response, they need some oil somewhere up in the East and some company up there will sell oil under their name up there.

Q. How about your parents? Is your father still actively employed?

A. No, my father is deceased.

Q. What type of work was he in?

A. He was a bus driver for the Houston Transit Company, Rapid Transit, Metro.

Q. Whatever you want to call it?

A. Yes.

Q. How about your mom? Did she work outside the

F2069 0148

home?

A. No, she was strictly a housewife.

Q. Do you have any questions of me whatsoever, anything we have talked about or anything that may have popped in the back of your mind that may have caused you a problem or anything like that, that would cause you to not be a fair juror?

A. I have a silly question.

Q. Yes?

A. If I were selected as a juror, I understand the trial would be on the 4th of October. Would there be any kind of thing to be done between now and then, or would I be strictly told to come in on that day? I have never done anything like this.

Q. That is not a silly question.

THE COURT: I apologize for not explaining it to you.

Basically, you wouldn't have to stay here until that day.

THE JUROR: I wouldn't have to stay in a little room?

THE COURT: You will be able to go about your business. You would get a phone

F20F9 0149

call probably three or four days in advance saying we are going to start up next Monday or whatever day it is.

The trial will probably last five to seven working days, given a day or two, given the actual trial in the case.

While testimony is being adduced from the witness stand, you will be allowed to return home every day, I imagine around 5:00 or 5:30. We will start at 9:00 in the morning. Once the case goes to the jury for their deliberations, it will depend. You may be locked up overnight depending on whether the jury is able to reach a verdict or not, but all the accommodations will be taken care of for you. You can be put up in a hotel, and that will be the only time, while the jury is deliberating. That will be the only time.

Does that answer your question for you?

THE JUROR: Yes. I think that is everything that I have.

Q. (By Mr. Bax) You had mentioned earlier during a question a while ago, just briefly, especially in the case of a police officer. You felt that

F2069 0150

was one of the areas you felt more strongly about where the death penalty is concerned?

A. Yes, and also a fireman. I could see in the case of an arson or something like that, and those type of crimes, I think should be given more strong consideration simply because these people are working for the public, and they are putting their lives on the line for them.

Q. Okay. Would that make my burden of proof any easier when it came to these questions or would you still require me to prove it to you beyond a reasonable doubt to answer yes to these questions, before you could answer them yes?

A. Yes, I would require that.

Q. And even though this Defendant is charged with killing a police officer, you would put me to the test of proving he was guilty beyond a reasonable doubt? My job wouldn't be easier because it is alleged that this man did it?

A. I would not presume guilt until a verdict was rendered.

Q. Okay. That is all I have, Mr. Bridges.

I enjoyed talking with you, and I pass the juror at this time.

F2069 0151

EXAMINATION

QUESTIONS BY MR. HERNANDEZ:

Q. I guess, Mr. Bridges, it is my time to ask the questions.

I am Joe Hernandez. This is Candelario Elizondo. We are here for the task of defending Ricardo Guerra.

Now, I will ask you more personal questions than Mr. Bax did, and let me tell you from the initial start that these questions are not questions asked in order for me to pry into your personal life.

Basically, what they are, they are honest questions to seek out what we think would possibly be, or select twelve people that can be fair and honest and just in hearing this case.

A. I understand.

Q. So I am not here to ask you questions that might offend you or humiliate you in any way.

Any questions or any answers you might give me would be not right answers or not wrong answers. It is just what you believe. You have your own opinions, your own opinions

F2069 0152

and own beliefs, and rightfully so.

However, if by chance you are not able to serve in this particular case as a juror, it doesn't detract from the fact you are a good citizen and possibly could serve in another case, but basically what we are asking is sincerity and honesty in your answers. Okay?

A. Okay.

Q. In your beliefs -- and, of course, we understand that everybody has biases and prejudices, we all do, and that is what we are seeking, we are seeking to feel or to see how you feel basically about things.

For example, you just gave an answer to Mr. Bax that you felt more strongly in considering the death penalty when someone is convicted of the death of a police officer.

Well, that kind of scares me, simply because if that is the case, on top of that, you have a nephew that is a police officer now in Houston.

A. That is probably one of the reasons why I feel that strongly.

Q. And it tells me, "How can I, Tommy Bridges, walk up to my nephew and say, 'Yep, we heard the

F2069 0153

evidence, and the evidence wasn't there, and that's why I went not guilty.'"

Can you do that? Could you go up to your nephew and tell him that?

A. Yes, I could.

Q. And can you tell us whether consciously or subconsciously, feeling the way you feel, strongly about the death penalty, specifically when there is a police officer involved and you have a nephew, can you sit there with an open mind? Can you sit there without biases or prejudices?

A. I would certainly hope I could.

Q. Well, let me tell you that hope and could and saying yes are two different things, because it doesn't give me and doesn't give Mr. Guerra a benefit of the doubt.

We want to make sure before you cross this railing that we are sure who we have, and that is why I must ask you again: Would that affect you in any way?

Again, let me reemphasize this: I am not here to offend you in any way or embarrass you with your answers. All we are looking for is honesty and sincerity in your answers and there are no wrong and no right answers.

F2059-0154

Don't give me an answer you think I might want or Mr. Bax might want. I want an answer Mr. Bridges might feel good about. I want an answer of how Mr. Bridges feels up here, and again, would that affect you in any way once you got across the railing and heard the evidence?

A. No, it would not affect me.

Q. So it wouldn't affect you?

Let me ask you this: What was the percentage of Mexican-Americans attending Austin High School when you attended?

A. Oh, I left there in 1962, so it was probably about ten percent.

Q. About ten percent?

What is the percentage of Mexican-Americans in Austin High School right now?

A. I would guess sixty -- fifty to sixty percent.

Q. Would it surprise you if I told you it is eighty-nine percent?

A. A little bit, yes. I am a little surprised it is that high.

Q. All right. Well, you understand that this incident took place close to Austin High School?

A. Yes, sir.

F2069 0155

Q. And you live not too far from there, don't you, about a mile or half a mile or near Navigation?

A. Eastwood.

Q. Which is off of Navigation? That is a cross street, right?

A. Yes.

Q. What is the percentage of Hispanics, by the way, because there are multiple types of people, Mexican-Americans -- right?

A. Yes.

Q. Illegal aliens? Are there any illegal aliens living in the area?

A. I haven't canvassed them. I don't know any.

Q. Let me ask you this question: Can you tell an illegal alien from a Mexican-American?

A. No.

Q. You cannot?

A. No. I don't ask for identification, so I assume everybody is here legally.

Q. Living in that neighborhood and the incident happening in that neighborhood, would that affect your judgment in any way or would you have any preconceived --

A. A lot of my neighbors are Mexican-Americans, and most of them, quite a few of them have lived in

2069-0156

this area for a number of years and been my neighbors for a number of years, so I would not feel prejudiced in any way.

Q. If the evidence came out at the trial, which it will come out, that Mr. Guerra, our client, is an illegal alien, would that affect you in any way whatsoever in your thinking of this case?

A. No, sir. He is probably working and paying taxes, I would presume.

Q. Okay.

A. So based on that, he should probably be here just as much as anybody else.

Q. So you would give him and afford him the same rights in a constitutional trial that any citizen would have? Can you do that?

A. Yes.

Q. Let me go back to your strong feelings. That is what kind of scares me.

A. I can understand your fears.

Q. You know, I can tell you this, which shouldn't be a surprise to you. We are heading or going for a not guilty. That is what we are going to be asking for.

Can you weigh the evidence, can you

[2069 0157

listen to the evidence, and if the State has not proven its case beyond a reasonable doubt, which that is the burden they would have to carry, despite your strong feelings and despite the fact that you might one day have to tell your nephew, could you find this man not guilty?

A. If the evidence did not prove that he was guilty, I could do so.

Q. If they did not prove it beyond a reasonable doubt --

A. If they did not prove it beyond a reasonable doubt, I am not sure -- I can't sit here and tell you one hundred percent how I am going to feel when I talk to my nephew about this, but obviously, it would probably be a kind of touchy situation, but there again, if someone has not been proven guilty beyond a reasonable doubt, I don't see how I could be held to blame for it or something.

Q. The law presumes that my client is innocent as he sits here in this courtroom today.

Do you agree or disagree with that law?

A. I feel at this point he is not guilty until some evidence has been presented to the contrary.

F2059 0158

Q. Then would you agree with me that a Defendant, any Defendant, is presumed to be innocent until the State can overcome that proof beyond a reasonable doubt? Would you agree with that statement?

A. I would hope so.

Q. Okay.

A. Except in the case of traffic, something like that.

Q. Of course. Of course.

Then would you then agree with me that the Defendant has no burden of proof? In other words, what I am trying to say is that the law never imposes --

THE COURT: Hold on just a second, will you?

Excuse me. Go ahead.

Q. (By Mr. Hernandez) The law never imposes upon the Defendant or any Defendant in a criminal trial the duty to call witnesses or to present evidence.

Would you agree or disagree with that law?

A. I understand that.

Q. Then you understand and you agree with it?

A. It is the burden of the Prosecution.

F2069 0159

Q. And would you agree that the burden will never shift throughout the whole trial?

A. I would believe so.

Q. Okay. The law says that the Defendant or any Defendant has no burden. The State brought the charges. The State must prove to you and eleven other jurors beyond a reasonable doubt his guilt. The burden is upon them.

Would you agree with that?

A. Yes, I would.

Q. A Defendant or any Defendant has no burden. It can rest when the State rests its case. The Defendant can rest.

Would you hold it against my client if he decides not to testify?

A. No, I would not.

Q. Would the fact that you are in the deliberation room and you decide, "Well, I think he did it, but they didn't prove he did it, and he didn't testify" --

What would your verdict be?

A. If it's not proven beyond a reasonable doubt, I would have no alternative but to say not guilty.

Q. Despite the fact that he didn't testify?

F2069 0160

A. That is not required of him.

Q. And the judge will charge you on that.

A. Yes.

Q. Now, reasonable doubt, as we have been talking about, that they have to prove to you beyond a reasonable doubt is a heavy burden. It is much heavier than a civil case.

In a civil case, it is the greater weight of the credible evidence, basically whoever presents the most witnesses or credible witnesses. In other words, the scale of justice tilts one way and that is it. This is the winner.

Not so in a criminal case. It is much heavier. The burden is much, much heavier.

Considering that the law imposes this type of burden on the State, a heavy burden, to proof beyond a reasonable doubt, do you agree with that law or disagree with it?

A. I agree with it. I can see where in a civil case both sides may have some right going for them, you know, whereas in a criminal case, it will be definitely more important to prove, obviously, that someone is guilty.

Q. All right. Let me --

F2069 0161

Excuse me just a second.

(Conference between attorneys.)

Q. (By Mr. Hernandez) Mr. Elizondo and I work as a team, and I tend to forget half the questions, and I forget what are the questions.

MR. ELIZONDO: I always repair all my questions.

Q. (By Mr. Hernandez) The judge selects one of us to do it.

Do you feel that because of the fact Mr. Guerra has been indicted by the Harris County Grand Jury and represented by two attorneys as he is today, would you regard that indictment as any evidence of guilt?

A. No, sir. There has been no evidence presented.

Q. So, as he sits here today, and if you had to vote on a verdict, how would you vote?

A. With nothing being presented so far?

Q. Just as he sits today.

A. I would have to find him not guilty.

Q. All right. Would you make the State prove their case to you?

A. Yes.

Q. Would you expect my client to prove his innocence to you?

12069 0162

A. That is not his burden.

Q. Okay.

MR. BAX: Judge, I believe both sides have agreed to excuse Mr. Bridges from jury service.

MR. HERNANDEZ: We agree.

THE COURT: It sounds like a very difficult decision.

Mr. Bridges, thank you very much. We appreciate your presence.

GEORGIA WASHUT SMITH,

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

EXAMINATION

QUESTIONS BY MR. MOEN:

THE COURT: These lawyers are going to ask you some questions, and as I told you this morning, please relax and visit with us. This is a very informal part of the trial, but a very important and very necessary part.

F2069 0163

Mr. Moen, you may proceed.

MR. MOEN: Thank you, Your Honor.

Q (By Mr. Moen) Ms. Smith, my name is Bob Moen, and I am a member of the District Attorney's Office here in Harris County, Texas, and seated behind me is a fellow by the name of Dick Bax, also a member of the District Attorney's Office, and Mr. Bax and myself will be representing the District Attorney's Office and the family of J. D. Harris in the prosecution of this case styled the State of Texas versus Ricardo Aldape Guerra.

It is alleged that on July 13th he took the life of a police officer by the name of J. D. Harris at the intersection of Edgewood and Walker streets.

It is alleged the officer was shot three times in the face and died.

Seventy or eighty feet down the street a man was driving by with his infant son and daughter, and he died. A bullet struck him in the head and he was killed.

About an hour and forty-five minutes later, while the officers were looking for the suspect, another police officer was shot

F2069 0164

and killed (sic) in the ambush. He shot and killed the assailant.

Is there anything about the facts of that case, now that I have described them in a general fashion, that rings a bell of any kind in your mind?

A. I had read in the paper that this policeman was killed. I was not aware they were tying all this other in this case. I was aware of the other.

Q. It's all a continuous transaction lasting two hours from the time of the first officer's death until the arrest of the suspects.

There is nothing wrong with having read anything about a case you might be a juror on or having heard anything on television.

The only thing we ask is to check with jurors to see if they have formed conclusions or opinions about the guilt or innocence of a man based on what they have read or heard, and I take it you haven't formed a conclusion or opinion unless you tell us otherwise.

A. Not really. I don't know that much about it.

Q. Let me explain to you a little bit. I think

F2069 0165

you are entitled to an explanation as to why you have had to wait so long to come in and be interviewed.

In a capital murder case, the selection of the jurors is totally different than another case. We bring the people in and talk to them one at a time. We are required by law to do that. It is not what we desire, but what we have to do. The law requires it.

I suppose there are a number of reasons for that. Perhaps the most obvious reason is because the punishments are so serious. There are only two possible punishments a person can receive, and we want to make absolutely sure that the people who serve on a jury in such a case are made completely aware of all the aspects of the law that may come up during the course of the trial and that they are informed exactly of what is required of them to be jurors on such a case.

Also, we want to know what the jurors' feelings and opinions are concerning these aspects of the law, particularly the death penalty, because no juror is required to serve on a capital murder jury where their

F2069 0166

feelings or opinions concerning the death penalty would be violated by being a juror on such a case and returning a verdict that would result in someone receiving the death penalty.

People who are opposed to the death penalty do not have to be jurors on a capital murder case.

However, the only way we know that is by bringing all the people out, seeing how they feel on such an issue, and telling them to give us an answer as to what their feelings and opinions are.

We ask all the jurors to be honest and frank and if they have any disagreement to state their disagreements with respect to any aspect of the law, so we can talk about it and clear it up if we can.

Also, if you have questions, don't hesitate to ask me at any time and we will see if we can get those answered for you.

Frankly, no one cares what your feelings and opinions are. We do -- when we say that, we don't mean to be disrespectful, but I hope we can make you understand what will be required of you, and if your feelings and

F2069 0167

opinions will allow you to serve on a jury, fine, but if not, it is just as fine.

All we ask is that you be as true with your answers as you can, give us an answer you will be able to live with.

In the future, if you are called upon to render a verdict that would result in the death penalty, we want to be sure that your feelings and opinions would enable you to do that.

So, with that in mind, can you tell us what your feelings and opinions are concerning capital punishment and the death penalty? Would they allow you to serve on a capital murder jury or not, and allow you to return a verdict that would result in someone receiving the death penalty or not?

A. Yes. I think I could. I would certainly have to look at the case. I don't think you could give that quickly and easily, but more and more, frankly, over the last few years, I have felt that perhaps we should go back to capital punishment, to be honest with you.

As I read some of the things in the paper and see things on TV, I frankly am

F2069 0168

one of the ones who's beginning to believe we are treating the criminals with more consideration than we are the victims, and I think that has become very obvious in some of the recent things that have been in the news, so I don't know, you know, whether I could or not in any case, but --

Q. Speaking in general terms?

A. Certainly, yes. I feel that I could probably consider it, yes.

Q. Okay. The way that the death penalty is applied in our state is not to all murder cases. I say "obviously," but to someone who doesn't work at the courthouse day in and day out, that is not always obvious.

Our legislature has said in ten instances of where murder takes place, a person who commits that murder can stand liable to be sentenced by a jury to the death penalty.

The offense of murder has an entirely different range of punishment. For someone to intentionally or knowingly take another human being's life, the range of punishment for that crime is from a minimum of five years to a maximum of ninety-nine years or life. That

F2069 0169

is the range of punishment for murders, but our legislature has said that when someone kills during the course of a burglary, breaking into a person's home, and the homeowner or some other occupant in the house goes to see what the racket is about or however they might get their demise, it is capital murder. Rape-murder, kidnapping-murder, arson-murder. Those are all examples. If someone commits one of those crimes and causes the death of a human being, he has committed a capital murder.

Our legislature has also said to murder for hire is a capital murder, and to murder a policeman or fireman in the course of their official duties is also capital murder.

It is also a capital murder to kill someone employed in the penal system, and finally, for a convict to kill anyone during the course of an escape or attempted escape is capital murder.

All other murders, no matter how gruesome or horrible they might be, fall into the other range of punishment, five to ninety-nine years or life.

F2069 0170

Do those strike you as being the type of cases where you feel capital punishment would be a possible proper punishment for someone who has committed a crime as I have described it to you, one of those crimes?

A. Yes, sir. Possibly. You are saying like in the case of a policeman or someone like that?

Q. Speaking strictly in general terms, not considering evidence.

A. Murder for hire?

Q. Those strike you as being the type of offenses where the death penalty could be a possible punishment depending upon the evidence?

A. Uh-huh. Yes.

Q. How long have you been of the frame of mind you have been of today concerning the death penalty? Have you ever at one time of your life been of a frame of mind and then because of things you read or things you heard on radio or television, stated the conclusions you have reached today?

A. I don't know. That is difficult to say. For example, a few years ago -- I am by profession a registered nurse, and I would have thought everyone's life is extremely valuable, and I

F2069.0171

still think that -- but I have also thought that perhaps there is some validity in looking at mercy killing, if you want to use that term. I don't really like that term -- that there might be circumstances when the idea of pulling the plug and not keeping someone alive -- at one time, I had mixed emotions like that. I think that is something everybody has to work through. I have taken numerous classes on that and other subjects, but it all comes into how you consider another person's life, but in that process, I now feel there are times when there are too many people getting away with the bad things, and they are not locked up, and if they are locked up, they are turned loose again.

Q. There would be --

A. To be frank and honest with you, I have to say the taxpayers' dollar, too. We are looking at children starving to death today, and we are paying out money for these people, who are really -- I question are they going to be worth anything to society, and I am definitely for rehabilitating anybody who can be rehabilitated, so when I answer this question, I can't say six years ago because of this -- it isn't one thing, but

F2069 0172

it is a feeling.

Q. I appreciate your frank answer. It is exactly the type of feedback we like to get from jurors. We like to know how you feel.

There are no simple answers --

A. No.

Q. -- really to this question, and your thought process has helped me to learn about you, so I appreciate your telling me that.

Let me explain to you how the death penalty is assessed in a capital case.

The jurors answer questions after they find someone guilty of the offense of capital murder. They come out and get in their seat in the jury box again, and then they can hear additional evidence to help them answer additional questions here on my left, because depending upon the jurors' answers to those questions, the Defendant either receives the life sentence or the death penalty.

If both questions are answered yes, the Defendant receives the death penalty. If a no answer appears to either one of the questions, the Defendant receives a life sentence rather than the death penalty.

F2069 0173

Two yes answers, the Defendant receives the death penalty. A no answer to either one, and the Defendant receives the life sentence.

The judge will tell you while you are back there deliberating, regardless of what your answers should be, jurors are absolutely forbidden to discuss among themselves how long a Defendant would have to serve on the life sentence portion of the capital murder trial. They just can't talk about that, how long they would have to serve.

MR. ELIZONDO: I object to the prosecutor emphasizing the parole laws, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Moen) How long he would have to serve is left totally to the jurisdiction of our Board of Pardons and Paroles. The judge will put that in writing.

Before a question can be answered yes, all twelve jurors have to unanimously agree that is what their answers should be.

However, it only takes ten jurors to answer in agreement no. There is a slight

F2069-0174

difference.

Let me ask you, if you haven't had a chance to read the questions, to go ahead and read them to yourself, if you haven't had a chance to read them, and I want to discuss some of the language we've got underlined in the questions.

Let me direct your attention to the first question over here.

The first question, which I have just stated, is presented after the Defendant's been found guilty, after the conclusion of the entire trial; the last thing that happens in the trial is for the jury to go back and deliberate, and your answer to this first question would ask you to make a determination about the conduct of the man on trial that has been found guilty of capital murder.

Was the conduct on the part of the man, we, the jury, have found guilty, was that conduct that caused the death of the deceased deliberately done, and was it done with a reasonable expectation that the deceased or another would die?

Let me give you a hypothetical case

2069 0175

and show you how that question would apply.

Imagine a man who goes into a convenience store and he confronts the woman cashier. It is in the early morning hours, and he says, "Give me your money." She is frightened and afraid, obviously scared to death. She turns the money over to him.

He thinks there are no other witnesses, and he fires two bullets and kills her, fires one bullet in the head and one in the chest and she dies.

Unbeknownst to him, she steps on an alarm which alerts the police and they are waiting for the Defendant as he runs out of the store, and he is arrested. He has committed the offense of capital murder, robbery-murder.

At this trial, after the jury has found him guilty based on the evidence presented, they decide on the conduct of the man. Was the conduct of that man, the robber, the taking of the pistol to the store, the pointing of the gun at the clerk, the discharging of the bullets at her body, the portion of her body struck by the bullets, was that deliberate conduct on his part that caused her death, and

F2069 0176

when you shoot someone in the head or chest area with a bullet, is there a reasonable expectation the person will die from such a wound?

You see how that first question asks you to make a determination about the conduct of the person on trial based on the evidence you have heard surrounding the conclusion you have reached in finding the person guilty?

So it's a question you basically answer from the evidence that you have used to return a guilty verdict on the case, a pretty straightforward question.

The second question asks you to make a determination, not about the conduct of the man on trial. Of course, you have considered the evidence you have heard, as well, in answering Question 2, but it asks you to make a determination about what type of person do you find yourself in the courtroom with. Is the Defendant the type of person where there is a probability he would commit criminal acts of violence that would constitute a continuing threat to society?

The legislature drew those words up,

F2069 0177

gave us those words -- I say us -- gave the jurors those words -- of course, I have never been a juror on a capital case, but I have been on capital cases, so working with the words and explaining them with jurors -- the first word is probability.

Before you could answer the first question yes, you would have to find there is a probability. Is it a probability he is that type of person that would commit criminal acts of violence that would constitute a continuing threat to society? Will he engage in the type of acts, criminal acts of violence, whether they be assaults, burglaries, arsons, rapes, any other type of criminal violence we can think of. Is there a probability, does the probability exist he could commit such acts, and would those acts constitute a continuing threat to society, wherever the Defendant finds himself, in whatever portion of society he finds himself, whether in the type of society you and I move freely in or the prison society.

You will have to use your own definition for the word probability. You will have to use your own definition for the word

F2069 0178

society.

The only thing I point out is that the word is probability and not certainty, and I think you realize why.

To believe beyond a reasonable doubt that a man would certainly do something, I think the only person who knows the answer to that is the Almighty himself, and you are not required as a juror, nor is there any necessity for us to call Him as a witness.

In other words, you don't have to play God in answering the second question.

The second question will ask you to make your determination, your best judgment from all the evidence surrounding the crime as to whether the man is the type of person where there is a probability he would commit criminal acts of violence that would be a continuing threat to society.

Before you could answer the first question yes, you don't have to believe that he would commit a specific type of criminal violence, only that he would engage in those types of acts, and whether those acts would constitute a continuing threat to society.

F2069 0179

Do you have any questions of me now that we have had a chance to go over this? Do you have any questions of me?

A. No. I think they are clear.

Q. Do you feel like those are the types of questions you would be able to answer, not whether you would be able to answer them yes or no, depending on the evidence, but is there anything about the way the questions are worded that would make it impossible for you to answer them yes or no, or do you feel those are the types of questions you would be able to answer, depending on the evidence you would hear?

A. I think so.

Q. Are there any questions of me now that we have had a chance to go over them? Is there anything that confuses you even slightly?

A. No. I think they are okay.

Q. The same thing with the word deliberately. In the same instance, you will have to use your own definition for that, your own working definition.

Let me explain one other thing for you before I pass from this aspect.

It's just the thought of capital murder.

F2069 0160

I mentioned earlier that the punishment range of capital murder is different from the offense of capital murder. The only reason I spent any time or talked about it with you is by way of explaining this: Every capital murder case includes the lesser included offense of murder.

Now, murder is not a lesser offense in my book or anybody else's book, but there are two elements that go into making up every capital murder case: burglary-murder, et cetera. The murder has to take place during the commission of one of those felonies we were talking about, or in the case of a convict escaping from a penal institution, the murder does have to take place during the escaping or attempting to escape.

Murder for hire has to be murder for hire.

There has to be this aggravating circumstance that takes place along with the murder to make a case a capital murder.

For instance, if a man is charged in a hypothetical with having killed this lady during the course of a robbery, if the jury were to hear the facts surrounding that case

F2069 0161

in which the man has been charged with capital murder and then they heard all the facts and they believed, "Yes, a murder took place, but it did not take place during a robbery," you discover during that hypothetical trial really what it was was a boyfriend-girl friend dispute, and they have been living together off and on for a couple of years, had violent arguments about breaking up the last couple of weeks, they had had an argument today, and it had escalated to the point where he faced her with a pistol and he produced his gun and shot her to death, and we find it wasn't a capital murder after all. It was not a robbery-murder. It was a murder between two people living together, and he has got a hot temper and he had a pistol at that time.

The offense would not be capital murder because the circumstances did not exist, the robbery did not take place. But yet, he would be guilty of the offense of murder.

Do you follow me on how every capital murder case includes the lesser included offense of murder?

A. Yes.

F2069 0182

Q. And in that case, the jurors' proper verdict would be guilty of the offense of murder, and then the jury would have to decide, could possibly decide in a capital murder case, whether or not they were going to recommend probation for someone they have found guilty of the offense of murder.

Are you familiar with the phrase or term "probation" at all, as it applies to criminal law offenders?

A. I am not sure.

Q. Let me explain how it works. Any man who has been convicted by a jury of any felony offense, regardless of what it is, aggravated rape, aggravated robbery, murder, can ask the jury to consider giving him probation, even though the jury has found him guilty of that crime, and a jury can give a person probation for any felony offense in our state, even though the jurors found the man guilty of that felony offense, and, of course, the way the jury assesses his probation is by deliberating among themselves first to make a determination as to what the punishment ought to be.

If the jury feels like the proper

F2069 0183

punishment for this person they have found guilty of some felony crime should be ten years in the penitentiary or less -- they arrive at that unanimous decision, first of all -- that the punishment should not exceed ten years, that is the first decision the jury must reach, then the jury can discuss among themselves whether or not they are going to recommend that the man be given probation rather than actually having to go to the penitentiary for that ten years.

If the jury recommends that probation be given, the judge must give the Defendant probation.

Now, probation means release by the Court. The man does not go to the penitentiary, and he is released under terms and conditions imposed by the Court, such as reporting to a probation officer once a month, working faithfully at suitable employment, not violating any laws of this state or of the United States, supporting his dependents, remaining within the limits of Harris County unless he has permission from the probation officer to leave, remaining at a specific specified address,

F2069 0184

avoiding persons or places of disreputable or harmful character, avoiding injurious or vicious habits such as the use of narcotics or habit-forming drugs.

Those are basically the terms and conditions of probation. That is what it means for a person to receive probation from a jury for a crime.

Now, there are many different fact situations that can occur between human beings that fall within the definition of the offense of murder, which is the intentional or knowing taking of another human being's life, and that would apply to the situation you were talking about, euthanasia or mercy killing.

Our law doesn't realize a specific exception to the murder, and someone who participated in that crime, no matter how much an act of love, would be still guilty of the offense of murder, of the intentional taking or assisting in taking of another person's life.

The only thing I wanted to ask you is this: Do you feel like if you were a juror on a case where someone were charged with murder and you had, in fact, returned a verdict of

F2069 0185

guilty to that offense, and after hearing all the evidence, you felt like it was a proper case for probation, could you conceive of a set of circumstances or facts in your mind where you would be able to recommend probation for someone, even though you had found him guilty of the offense of murder, in a case where you felt like it was proper?

A. Well, the case that you gave me an example of was, I assume, ten years and then probation, but wouldn't that be a little hard to believe that it was an actual case of murder with only ten years, or would there be such a thing?

Q. Let me give you an example rather than a hypothetical. Let me give you an example of tying everything together, this theory of lesser included offenses, how it might apply in a capital murder case, and also this question of probation.

Imagine a couple married for forty or fifty years, speaking in terms of mercy killing or euthanasia, and they find themselves in the hospital and the jusband is dying and being kept alive by modern medical technology His prognosis is two to six months of living

T2069 0186

without the life-support equipment. He would probably pass away without that. He and his wife discuss it. His stay in the hospital is eating up all the money they have saved for retirement for the last few months of their lives, and they reach a rational decision; however rational, I suppose people are entitled to argue over that, but they decide to remove the life-support equipment and she does and he passes.

She admits freely her part in actually what took place and they decide and manage to convince the Grand Jury the taking of the husband's life was not an act of love, as so stated, or a mercy killing, but he or she had a retirement lot that a builder wanted to buy to complete his acreage for a resort community, and now that he was out of the way, she stands to gain all this money as a result of selling that acreage.

Okay. That is murder for money, murder for remuneration, capital murder, if you could convince someone that is the case.

The jury hears the facts and finds that is the most preposterous thing they have

F2069 0187

ever heard in their lives. They follow their oath as jurors and find her technically guilty of the offense of murder because she has intentionally or knowingly assisted in the taking of another human life, yet they have to decide what this lady's punishment ought to be. She is in her seventies, and has never violated a law in her life. They have to decide whether sending anyone like that to the penitentiary would do anyone good or not, and they decide it would not. They give her five years' probation, being the absolute minimum punishment they would assess for the offense of murder.

You see, with that hypothetical example, all of the terms fit together.

A. I would have to go along with that, I am afraid.

Q. Capital murder, murder, even murder with probation, even though someone is found guilty of that offense, which sounds so awful at first blush, the intentional taking of another's life, and there are many, many different facts which fall within this definition of murder, which it is, but the range of punishment is five years' probation up to ninety-nine years or life in the penitentiary if it is that, so again, that

F2069 0188

explains the only thing I wanted to check with Ms. Phillips -- excuse me -- Ms. Smith is if there were a proper case, you could keep in mind, you would at least be able to recommend probation in the case of a murder?

A. Yes.

Q. I hope you see ultimately what I am getting at.

A. I do, yes.

Q. Examples are better than trying to describe it in words.

Let me talk to you briefly about some of the things required by your jury service.

The Defendant is presumed to be innocent, and the judge will tell you to presume the Defendant innocent. The presumption of innocence does not mean the Defendant is not guilty.

I think you realize from our hypothetical, many people caught in the act of the crime are just as guilty the day they are caught as the day they go to answer for that crime before a jury, but the law says jurors who don't know anything about the case are to presume the Defendant innocent and base their testimony on the testimony they receive from

T2069 0183

the witnesses on the witness stand.

Do you follow me on how the presumption of innocence works?

A. Uh-huh.

Q. The judge will also charge you if the Defendant does not testify in this case, you are not to consider his failure to testify as evidence of his guilt. The Defendant has a right, if he chooses, to remain silent even though this may be the most important day in his life. If he decides he wants to remain silent at his trial, he can, and the judge will tell you in that regard, that you to consider the witnesses that you heard as the evidence in the case, not what you have not heard from the Defendant.

Do you feel like you could abide by that instruction?

A. Yes.

Q. All right. The judge will tell you also, the Grand Jury indictment is not evidence of the Defendant's guilt and you are not to consider it as evidence of his guilt, the fact that he has been indicted by a Grand Jury in Harris County, Texas.

The analogy I draw for jurors about

F2069 0190

the indictment by a Grand Jury is this: You shouldn't give it any more significance than the starter's pistol in a race. Until the gun goes off, you can't begin a race, and without the indictment, you can't begin a trial. That is the only thing it means.

The burden of proof always rests with Mr. Bax and myself, always rests with the District Attorney's Office.

We have the burden of proving this crime took place as alleged, that J. D. Harris was killed by this man on July 13th, 1982 -- that is our burden -- and that he knew he was a police officer when he caused his death.

We don't have any idea what motivation he had to take another's life. Those are things we don't know. Those are only in the mind of the accused. We have no burden to prove those things, only that in Harris County, Texas, on July 13th, on or about that date, this man caused the death of J. D. Harris who was a police officer, and that he knew at the time he took his life, he knew he was a police officer, and if you believe that, you should say "guilty," and if you don't believe it, you should say

F2069 0191

"not guilty."

The Defendant doesn't have the burden to prove anything. A trial is a wide open proceeding. The State or the Defendant can call any witness they like. They can call the clerk for a subpoena to be issued, and that subpoena will be issued and that witness will be made to come to the courthouse. They can call witnesses if they want to. The expense is to the State.

They don't have the burden of proving it. Mr. Bax and I have the burden of proving this case. Our burden of proof applies not only to these questions, but to the guilt-or-innocence phase of the trial. We have to prove to the jury beyond a reasonable doubt, not beyond any, all, or a shadow of a doubt, as we so often hear on the lawyer shows on television, and I think we realize why.

To be convinced in your mind beyond all doubt, to be convinced beyond all or a shadow of a doubt, I am going to have to be present and view a crime take place. I am going to always have some doubt about what people tell me from the witness stand. The test is

F2069 0192

not to prove to all twelve people, all witnesses beyond a reasonable doubt, beyond all doubt.

You talk to anyone, people who were not present and prove to them beyond a reasonable doubt, not any, all, or a shadow of a doubt. That is the burden of proof, and as the judge mentioned earlier, and it is true, we can't give you a definition for that, what beyond a reasonable doubt means. You have to use your own definition for that.

If you are convinced from the evidence, say so by your verdict, and if not, say so by your verdict as well.

That burden of proof applies to the second question as well. We have to prove beyond a reasonable doubt before you can answer either question yes, and I point that out in regards to Question 2. The burden of proof is beyond a reasonable doubt that there is a probability, not beyond all doubt, or any doubt, or a shadow of a doubt, and that gets back to what we talked about earlier.

Before we could answer Question 2 beyond any or a shadow of a doubt, you would have to hear from the man upstairs himself, and

F2069 0193

you are not required to do that. You are to make your judgment about the man on trial based on your best evidence.

Do you follow me on that burden of proof?

A. Yes.

Q. And finally, the judge will charge you on the last thing. He will tell you when you are judging the credibility of the witnesses, and, of course, that is what jurors do, they decide whether or not they are going to believe what someone has told them even though the person is under oath when they are telling them what they believed or saw, the jury can disbelieve everything the witnesses told them, even under oath, or disbelieve what all the witnesses say.

That sounds crazy, disbelieving someone under oath, but I wish we lived in the type of society where there were no people in this world -- wouldn't it be nice to think every time a person got on the stand and said, "So help me God, I will tell the truth," they did exactly that, that there were no people in this world who would lie.

F2069 0194

We probably wouldn't need jury trials, but it would be nice to know that every person would never tell us a lie or untruth. It would be strange at best, but, unfortunately, I mean I just can't tell you from what you read in the paper and I tell you from a practical standpoint from what I have seen in the courthouse, there are many people who will take a stand under oath and look at a juror in the eye and tell them it is untrue.

The jurors will have to decide whether to believe their testimony and ask themselves, "Does their testimony make sense in fact? Do they have biases and prejudices?" Those are the tough decisions the jurors make.

The only thing the judge will tell you in that regard is that you are not to give a juror any more or less credibility just because of a witness' job. That is before a police officer testifies, a doctor, a lawyer -- we are not entitled to any more or less belief than any other human being.

After we get off the stand, depending on how our job is related, such as a medical nurse or someone in the medical registry, I

F2069 0195

think you could see how your job, your qualifications would enter into your testimony, and then it would be proper for a jury to consider occupation, only after a juror testifies.

There will be other things about electing a foreman, but those are the things that directly affect your jury service.

Do you have any questions of me at all so far about anything we have talked about?

A. I don't think so.

Q. Okay. By way of explanation, I do wind up doing so much of the talking and am just not able to stop and get as much feedback as I like, but I take it so far I haven't managed to confuse you on anything yet?

A. No.

Q. Have you ever talked to your husband and do you know what his feelings might be on the death penalty? Is it a topic you have discussed?

A. Yes, I would say we have talked about it.

Q. I take it the fact that you are still married, you must at least be somewhere near to agreement on the issue?

A. Yes.

Q. Okay.

F2059 0196

A. At least where we would certainly weigh -- you would have to definitely weigh each one. I mean, you couldn't put a blanket we've got on it for every case of murder or capital murder.

Q. It's the facts --

A. It would be something, as we have said, we would have to consider.

Q. It's the fact -- I think you have struck the nail on the head, it's the facts that control in every capital murder case.

I intend to be asking the jury to be answering both questions yes based on the evidence, but that is my personal opinion. The only thing I ask the jurors to do is view the evidence and do the best job they can and do their best to assure a fair trial to both sides, not only the Defendant, as the law requires you to, but I think you hit the nail on the head, to give a fair trial to J. D. Harris as well. That is the only thing we can ask of a juror, to go back and reflect on these issues, keeping that in mind.

All your children are students? How about the nineteen-and-a half-year-old?

A. T.W.U. in Denton.

F2069 0197

Q. And your eighteen-year-old?

A. Sam Houston in Huntsville.

Q. And your fifteen-and-a-half-year-old?

A. At Westchester High School.

Q. During the course of his lifetime, if he is not still alive, what was your father's occupation, please?

A. My father's?

Q. Yes.

A. He is still alive, and he worked for Montana-Dakota Utilities Company for many years as a manager in a small town in Wyoming, and I was raised there, and about the time I went away to college when I was nineteen, my mother had inherited the money, and they bought what was a real propane-butane business in town, and he and my mother owned that business and they have since sold it.

Q. Any brothers and sisters in your family?

A. I have four younger sisters.

Q. When you had your home burglarized back in 1980, were any of the individuals involved in that crime ever apprehended?

A. No.

Q. How about any of your property? Did you ever

F2069 0198

get any of your property back at all?

A. No. They stole all the sterling, cut out a window and stole all the sterling, and we were told it was probably melted down in a van within two or three hours.

At that time, there was a lot of that going on. There was a lot of it in our neighborhood.

Q. That is probably a correct statement as to what happened to it, too.

Is there anything about the way that case was handled by the police or District Attorney's Office, if they got involved, that made you feel like you got unfairly treated at all?

A. No. No. In fact, we did not realize -- this was on a Saturday night when my son was playing varsity football. It was a dead giveaway we were not home, and they went through a back window, and we did not discover it until Sunday afternoon that the window had been broken, and did not discover until Monday night that anything was stolen, because they did not touch anything else in the house.

My small dog was at home, and she was

F2059 0193

skittish for a few days, but usually was anyway.

It was a few days before I put that together, and didn't find a thing out of place, but found a piece of broken glass on Monday, where they had slammed and broken it, and that is how I discovered it, so the police department came out, you know, and we had all the windows -- we had them screw checked. They had to cut the glass and get the screwdriver and take the screw out of the window and left the glass and screw laying down on the base of the house in the back, and the screw, they put by the garbage can in the back door for us.

Q. How neat.

A. That is funny they would do it.

I was glad my thirteen-year-old was not at home. She was old enough to leave the home with a friend, and they didn't kill the dog or injure anything.

Q. Property is bad enough. Maybe you can't replace the property, but you can get over that as opposed to an injury.

A. Yes. I found it hard, but it was a replaceable pattern.

Thinking of them being in our house is

F2069 0200

very upsetting.

Q. It is an intrusion.

Just to sidetrack a little bit, I had a burglary myself, and it's an intrusion you hardly ever get over when you come back or keep coming to the house.

Okay, and the only case you have ever served on was a traffic case? Was that this civil case?

A. It was a traffic accident that had been five years before, and they were --

Q. Fighting over damages or something?

A. Yes, and the one man was now dead, and we had to listen to numerous physicians, because he had died of natural causes and the kids were claming damages for a back injury from five years before and this sort of thing.

Q. Who is the H.P.D. officer? Do you know his name? Who is your security agent?

A. Oh, yes. Sergeant Monrow.

Q. Sergeant Monrow?

Mr. Bax has promised me he will not smoke during this trial if you are selected as a juror. I cannot give you the same guarantee by the other jurors. They put us back here

F2069 0201

in this small room and immediately they had three cigarettes.

I wouldn't have made it so long if we had sat there three hours with cigarettes in that room.

I make fun of it, but it really is a problem. I can't guarantee there won't be people who will smoke. We will handle that as best we can if you are selected on the jury panel.

To be serious, do you feel it would cause you serious health problems?

A. Not if fairly well ventilated.

Q. I don't think there will be problems in the courtroom, but back in the jury room, it is stuffy. You will have to fight for yourself, if selected.

A. Okay.

Q. Ms. Smith, I have exhausted myself and I will pass you to the Defense, and they will have questions to ask you, and I appreciate your kind attention, and if you are selected, Mr. Bax and I look forward to serving with you.

THE COURT: Let Cindy stretch her fingers a minute.

F2059 0202

(At this time a short recess was taken by the court.)

EXAMINATION

QUESTIONS BY MR. ELIZONDO:

Q. Hello, Ms. Smith. How are you doing? Tired?

A. Not too.

Q. You are our number sixty-four juror. We have been doing this about three weeks now.

A. You should be tired.

Q. We are.

This is known as the voir dire examination.

Voir dire examination, they tell me, is a French word which means to speak the truth, and the reason you are here today is so we can talk to you and get your innermost feelings about how you feel about certain things, because it is very important for me and for Mr. Guerra to see how you feel about certain things.

This is a capital murder case. As in every case in Texas, the State has the burden of proof. The burden of proof is to prove their case to you beyond a reasonable doubt, that it happened in Harris County, Texas, on a particular

F2069 0203

day, this Defendant shot and killed a police officer in the lawful discharge of his official duty, knowing that he was a police officer.

They must prove that to you beyond a reasonable doubt. The term reasonable doubt is a legal definition, and it will not be defined for you. The judge won't give you a definition; I won't give you a definition; he won't give you one. There is no legal definition.

But I can give you, by reason of comparison or analogy, an example. Across the street in the civil courthouse where they try lawsuits over traffic disputes, over personal injury disputes, over workmen's compensation claims, sometimes for a lot of money, sometimes for thousands and thousands of dollars, sometimes for millions of dollars, the burden of proof over there is by a preponderance of the evidence, the greater weight of the credible evidence.

In the criminal courthouse, our legislature said before somebody's life is forfeited, literally in this case, the State of Texas will have a higher burden, proof beyond a reasonable doubt, before they can come in and restrict anybody's life and liberty, and

F2059 0204

they have to prove that case to twelve jurors' satisfaction beyond a reasonable doubt.

How do you feel about that?

A. I think it should be proven beyond a reasonable doubt since someone's life is involved.

Q. Okay. Let me go a little bit further then, and give you an example or tell you how they go about with their burden.

First of all, they go ahead and call witnesses and offer exhibits, et cetera into evidence, and finally, when they get through presenting their witnesses, they will rest their case. That means, "That is all we have."

The Defendant can, if he chooses, also rest his case right behind the State.

Now, let's assume that happens and you go back in the jury deliberation room and you are sitting back there and you are thinking to yourself, "I think maybe he did it, but it hasn't been proven beyond a reasonable doubt that he did it. The State hasn't proven that to me yet, even though I think he did it. Maybe he did. It is probable he did, but I have not been convinced beyond a reasonable doubt."

In that situation, what would your

F2068 0205

verdict be?

A. If I wasn't convinced beyond a reasonable doubt? Well, if I wasn't convinced beyond a reasonable doubt, then I would feel I couldn't say he was guilty.

Q. Okay. You could come back and say "not guilty" of the offense of knowingly and intentionally killing a police officer?

A. If they had truly convinced me beyond a reasonable doubt that he had not done it.

Q. No, they've got to convince you beyond a reasonable doubt that he did it.

A. That is what I mean. If you are saying that I wasn't convinced that he had done it, would I therefore not say that he was not guilty?

Q. And could you and would you?

A. Yes. I think I could make that decision.

Q. Because, as Mr. Moen told you a little while ago, if they got to the punishment stage, they will be asking for the death penalty.

I will tell you one thing: At the guilt-or-innocence stage, I will be asking you to find him not guilty, and it will be your job to resolve any testimony conflicts, to decipher the evidence, and to come back with a verdict.

F2069 0206

If they have proven their case to you beyond a reasonable doubt to your satisfaction, then it will be your job to find him guilty. If they haven't done that, it will be your job, under your oath, to find him not guilty.

A. I understand that.

Q. Okay. If the Defendant doesn't testify -- let's assume back in our hypothetical example where the State has rested its case and we go ahead and rest our case also and do not put on any evidence whatsoever, and you go to the jury deliberation room and say to yourself, "I think he did it, but I haven't been convinced beyond a reasonable doubt, but the Defendant didn't testify, so I am going to supply that. By virtue of that, I am going to give the State of Texas a little boost that it needs to find him guilty beyond a reasonable doubt."

Would you do that?

A. Do you mean because the Defendant doesn't get up and say he did or didn't?

Q. Or didn't testify at all.

A. At all? Doesn't say anything?

Q. Would you hold that against him?

A. I don't think so. I can't think of any reason

F2059 0207

why. I haven't been through one of these, so I couldn't tell you.

Q. When you say "I don't think so," it makes me leery.

To give you an example, if I go and put my hand where you are sitting and you've got a mallet in your hand and I say, "Are you going to hit my hand if I put my hand on that little piece of Formica," and you say, "I don't know," I would not put my hand there; however, if you said you won't or will, I will make a more intelligent decision.

A. I am not sure what you meant me to say. If he doesn't testify --

Q. I don't want you to say anything. I want to know how you feel.

A. That I am totally influenced one way or the other by the fact he does or doesn't testify?

Q. Correct.

A. No, I think I wouldn't be influenced by that. I would be influenced by the facts I have already heard, and that is what I am going to hear.

Q. From the witness stand?

A. Correct.

F2069 0208

Q. So, it wouldn't affect your deliberations in any form or fashion in your opinion, and you would base your verdict on what you hear from the witness stand?

A. That is right.

Q. The Defendant can testify and he can call witnesses, and if he does, then they will come in and also give their version of the facts. They can also be impeached or discredited by the State of Texas.

If the Defendant testifies, he can also be impeached or discredited by proof of any prior felony convictions within, let's say, the last ten years, and based, you know -- after you hear both sides testify, then you, as a juror, can determine who is telling the truth. You, as a juror, will be the judge of the facts. Judge Oncken will be the judge of the law.

Your sole job, your sole function is to decipher the facts, because I can guarantee you one thing, and that will be there will be two diametrically opposed stories about this case.

It will be your job and your function

F2069 0209

to resolve the conflict, and like I said, at the end of the first phase, the guilt-or-innocence phase, we are going to come back and ask you to find this Defendant not guilty, and if they haven't proven their case beyond a reasonable doubt, can you do that?

A. Yes, if they haven't proven it to me beyond a reasonable doubt, I think I can do that very easily.

Q. I want to make very sure on that. I want to get a commitment from you.

So you would make the State prove this case to you?

A. Yes. I would make them prove it to me, if I was going to be on a jury, not make anyone put them in jail, not to speak of ninety-nine years or life unless they were proven guilty.

Q. You wouldn't make our Defendant prove his innocence?

A. As I understand it, they have to prove his guilt.

Q. Right. They have the burden of proof. They have brought the charges against him, and they have to prove it.

A. I understand that.

F2069 0210

Q And that burden of proof never shifts to us. We can sit back there and not even ask one question, and any citizen is accorded that right.

If, after you have heard the evidence -- and I am going to have to touch on it just to see how you feel about it -- if after you have heard the evidence and if you come back with a guilty-of-capital-murder verdict, then we go to the punishment phase.

If you come back with a not guilty, that is all there is. We go home.

If you come back with a guilty, it will become your job again as a juror to assess punishment.

Now, there are only two possible punishments for capital murder in this state, and that is life or death, and that is determined by how you answer those two questions right there.

Do you believe beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would

F2069 0211

result?

That is pretty straightforward?

A. Uh-huh.

Q. The word deliberately is underlined.

A. Yes.

Q. There is no legal definition for the word deliberately. The judge won't give you one. I can't give you one. He can't give you one.

All I can do is give you another comparison and another analogy.

During the guilt-or-innocence stage, you will go into the jury deliberation room. There you will deliberate, ponder or think about it with measurable consideration.

Some people say the word deliberately means premeditated. What do you say?

MR. MOEN: Objection to what some people say until we can have identification of where he got that from.

MR. ELIZONDO: I believe Webster's International Dictionary gives that.

THE COURT: Overruled.

Q. (By Mr. Elizondo) What do you think the word deliberately means?

A. I don't know that it necessarily has to mean

F2069 0212

premeditated. Premeditated I think of as something somebody's been thinking of doing for a long time. But I think somebody can deliberately kill or injure someone without thinking of it six months.

Q. Sure, sure.

A. And that is still a deliberate act.

Q. Sure.

Well, let me go back a little bit. If you found the Defendant guilty of intentionally and knowingly killing a police officer, you would have found him guilty of intentionally and knowingly killing a police officer, intentionally and knowingly.

Then we go to the punishment phase. At the punishment phase, would you automatically answer Question No. 1 yes solely because you have found him guilty in the first phase, without any regard to any evidence that the State may or may not have in the first phase?

A. Well, are you asking me that if the fact -- the fact is someone was killed, a police officer, as you mentioned.

Q. Yes.

A. And then, just because of that -- are you then

F2059 0213

saying that in all cases this was a deliberate act?

Q. Correct.

A. No, not as a blanket deal. I would assume it wouldn't always have to be. I would assume that would also come from the testimony.

Q. You could weigh the testimony and consider whether it was committed deliberately and with a reasonable expectation that the death of the deceased would result, correct?

A. Correct.

Q. Then we go to Question No. 2. Question No. 2 is asking you whether there is a probability the person would commit criminal acts of violence that would constitute a continuing threat to society. That question is more or less asking you to forecast or foretell the future, correct?

A. Yes. I would assume.

Q. Before you could answer Question 1 yes, you would have to believe beyond a reasonable doubt that there is a probability or chances are or more likely than not that the Defendant will commit criminal acts, more than one act of violence, that would constitute a continuing

F2069 0214

threat to society.

Do you agree with that or disagree with that?

A. Yes, sir. I am assuming you are asking -- this, again, has to be based on the testimony. The testimony at this trial is going to say whether this particular person has in the past committed other acts before this one, and one thing and another, and I assume his character is going to be somewhat delved into, and I would have something to base this on.

Q. His character will be delved into in regards to any felony convictions gotten in the past twelve years in the guilt-or-innocence stage.

Now, if he testifies, the State can ask him all those questions.

MR. MOEN: The only objection I would have to that, Judge, is whether or not it is known to us so we can ask those things, whether or not he truthfully responds, and whether, in fact, we know about it.

MR. ELIZONDO: I object to the prosecutor's arguments during the voir dire examination.

MR. MOEN: I object to him asserting

F2069 0215

this evidence will come out as a matter of fact, when he knows there are many intangibles. I know he objects to my responding to his objection, but I would hope she would not interpret this as a matter of fact and truth.

THE COURT: Go ahead.

Q. (By Mr. Elizondo) The Prosecution can ask him, you know, if he's ever been convicted of a felony within the last ten years. They can ask him that, so his character might become an issue in the guilt-or-innocence stage, and you can ask yourself, as a potential juror, and base his credibility on his prior acts, by his biases, motives, et cetera, the same way you would anybody else. Okay?

A. Okay.

Q. A lesser included offense of capital murder is a murder, and lesser included because it carries a lesser penalty, anywhere from five to ninety-nine years or life.

I believe you told us a moment ago you could consider five years' probation as a proper punishment in a proper case in your own mind, in a murder case?

A. That's right.

F2059 0216

Q. You also told Mr. Moen -- and I wrote it down here because it got my attention -- you said to him, "People get away with crime."

A. You don't see that on the radio and newspaper and TV every day?

Q. I am not quarreling with you there. I am just hoping you will not use any opinions you may have, use that against Ricardo Aldape Guerra.

Do you get what I am getting at?

A. I know what you are getting at, vengeance, or whatever, you know.

Q. You might think somebody might have gotten away with a crime, so we are going to go ahead and get Ricardo Aldape Guerra, although the State hasn't proved their case.

You see what I am getting at?

A. I understand the State will have to prove their case, and I understand if I am chosen to be a juror, I have to weigh it on the basis of that information and that testimony.

Q. Correct, and you can --

A. What I am saying, I think, is that on that basis, I am not sure we should therefore turn around and turn people loose once that has been proven.

F2069 0217

Q. Okay. I realize that. Okay.

But if it is not proven to your satisfaction beyond a reasonable doubt -- and it is a pretty horrible crime --

A. Yes, I agree.

Q. -- you can come back and you can say not guilty if it hasn't been proven to your satisfaction beyond a reasonable doubt? Can you do that?

A. If they haven't proven it to me beyond a reasonable doubt, yes. I can do that.

Q. Okay. You lived in San Pedro --

A. Sule, Honduras.

Q. -- Sule in Honduras. You lived there two and a half years?

A. Uh-huh.

Q. What brought you down there?

A. My husband built a refinery down there for Texaco.

Q. Did you ever learn any Spanish while you were down there?

A. Some. He speaks excellent Spanish. He conducts business in Spanish. I guess I would have to say I speak a little kitchen Spanish. Actually, my three-year-old daughter helped me learn rapidly.

F2059 0218

Q. Your fifteen-year-old?

A. My youngest daughter was born there.

Q. She has dual citizenship?

A. I beg your pardon?

Q. Dual citizenship?

A. Yes.

Q. During the trial of this case, if the Defendant got an interpreter, I guess it would be pretty common knowledge he is not a citizen of this country. You could assume that?

A. That's right.

Q. How do you feel about that?

A. I hadn't really thought about it until you asked me right now. You mean how do I feel about this?

Q. Being charged with a crime, indicted by a Grand Jury, represented by two lawyers, charged with a horrible, horrible offense. How do you feel about the fact that he is an illegal alien, in this country illegally to begin with? Would you hold that against him?

A. I have some feelings about all these people coming in here and what our tax dollars are asked to do, but no, I don't think I would hold that against him when he is being asked to put up his life. You can't weigh somebody's

F2069 0219

life against the fact he is here illegally. That's not in the same category.

Q. Somebody might say, "He is here illegally, and must have committed the offense."

A. No.

Q. The reason I am telling you this, once you get in there, I can't talk to you anymore.

A. I realize that. No, I don't think I would hold it against him if he is an illegal alien. I think the only thing I could hold against him is whether the testimony shows he committed the crime.

Whether he is a citizen or not, I hadn't thought about it until you mentioned it, but now I am aware he wasn't, and I had read it in the paper so long ago I forgot.

Q. What did you read in the paper?

A. I think probably when it happened, I read it in the Post.

Q. Did you ever read his name?

A. I don't think I even remember his name at all. I think I read the policeman's name and that is all.

Q. A lot of times, we read things in the paper and say, "My God. This man went ahead and did this,

F2069 0220

and I can't believe he did that."

Coral Eugene Watts was an example. I can't believe he did that. People form an opinion immediately about Coral Eugene Watts.

My question of you is: Did you form an opinion?

A. When I read it?

Q. Uh-huh.

A. No, because I don't remember reading that much about it. I remember hearing one thing on TV about it; what it was, I don't know, to tell you the truth. I don't remember his name at all.

Q. Did you form an opinion on the Coral Eugene Watts case?

A. Well, when they said that he had done all those things, I was amazed that this had been going on so long and no one had discovered this man out there doing this. A lot of people I talked to said, "How can they possibly give him the probation --" or that is not the word they used -- that they were giving him.

What was it? Plea bargaining?

Q. Sixty years.

A. After -- I don't know that I formed any opinion

F2069 0221

until I had seen more of it on TV and they interviewed somebody's wife and parents and they said at least they knew what had happened and they felt that was worth something and it solved a lot of cases that might not otherwise have been solved.

Q. As I mentioned earlier, this is a pretty emotional case. You are probably going to see Officer J. D. Harris' wife testify, et cetera.

Are you going to separate your verdict on fact, separate your emotions and base it on the evidence you might hear from the witness stand?

A. I would think so. I have never had to do this, so when you asked me could I do this, I have never had to do this, never had to separate emotion from fact. I have had to do it, but not in this circumstance.

Q. Again, the word "think" worries me.

A. It might be hard to do. I don't know.

Q. Can you promise me that you would?

A. I really think I would and I could get up there and try to be --

MR. MOEN: I object to him asking Ms. Smith to make a commitment she would not feel

F2069 0222

emotions in the case. She is entitled to have emotions as she views it.

The only thing she is required to do is base her decision on the facts, and it's not not to have emotions.

MR. ELIZONDO: The only thing I am asking --

MR. MOEN: I don't mind his asking if she would base her verdict on the facts; I object to his insinuating she can not have emotions at the trial.

To put it out of her mind, she has agreed to.

MR. ELIZONDO: I object to the prosecutor arguing his case right now.

THE COURT: I don't blame you.

Q. (By Mr. Elizondo) All I am asking is, do you think you can separate emotion from facts?

A. Yes. I can do that.

What you are asking me is when they finally outlined what happened, the actual facts, that that is what we would decide on?

Q. Correct. Correct. That is all.

Does your husband work downtown?

A. Yes.

F2059 0223

Let me backtrack a little bit more.

On the Hinckley case, did you form an opinion on that when he was found not guilty?

A. When he was found not guilty? I don't know that I -- I was not totally surprised because I am somewhat aware -- have read a number of things on that insanity thing that was going on -- so in some ways, I knew, according to the way the law read, they were probably going to prove it was due to insanity even though it is a known fact he shot the people, and on the basis of that, what I therefore hoped would happen is that no matter what, they weren't going to turn around and let him loose, and I personally hope they change the laws. I am one who thinks the law ought to be adjusted for the insanity plea. Everybody can't go out and claim insanity and turn around and be turned loose on society again. Insanity isn't exactly a black and white line. It is a big gray area out there.

Q. You can imagine the pressure the jurors were under.

A. Yes.

Q. Or received, probably after the verdict.

A. Yes. I thought that was probably quite traumatic

F2069 0224

at the time.

Q. That is the same kind of pressure you might be under.

A. I thought about it. I hadn't thought about it today, but when they interviewed a couple of people, I thought I didn't know whether I would have been able to make that decision. It might be a difficult one to make.

Q. It sure would be, and this might be a difficult decision to make, and you can imagine the pressure they were under in the Hinckley case, and they came back with a verdict they believed to be the law in the case.

A. I think anytime you have to look at a murder case, anything that involves capital murder, it would have to be a difficult decision. I don't think anytime you consider the fact you are looking at someone else's life, you could say it's not difficult. I would think it would have to be difficult.

Q. Do you have a preference on punishment, let's say, life or death?

A. Do I have a preference?

Q. A preference.

A. No. I have never really totally thought about

[2069 0225

it. I think my biggest preference is when they give someone ninety-nine years. We haven't had many death sentences handed down. The sentence is life imprisonment, and you immediately pick up the paper and they are going to get out in ten years. That I am definitely against. If the crime was so bad somebody gave them life imprisonment and they had done past murders, the Manson case, I don't want to meet them in society in a dark alley or back hall somewhere.

Q. Would you consider that when you are deliberating on the issues of punishment, that fact that you have mentioned parole? Would you consider parole in deliberating or trying to answer Questions 1 and 2?

MR. BAX: Just for economy of time, the judge will instruct them they are not to consider that as a matter of law.

THE COURT: That will be part of the instructions, that any sentence you impose, you are not to consider how long they would actually serve.

THE JUROR: When you -- what you are saying is when you choose -- if the punishment

12059 0226

should be life imprisonment and not the death penalty, at that time, you are not allowed to consider --

THE COURT: Yes, ma'am. In every charge that I give or any other judge gives in a criminal case, it carries with it a paragraph that says you are not to consider how long a Defendant would serve any sentence you are to impose. That is a matter for the Board of Pardons and Paroles and the governor to assess.

Could you follow that?

THE JUROR: Yes, if that is what you say. I could certainly follow that.

Q. (By Mr. Hernandez) Based on that, would you lean more toward the death penalty rather than life imprisonment, knowing what you just told the judge or told us?

A. You are asking me to base this all on something hypothetical, since I really --

Q. Correct. I can't talk about the facts.

A. First of all, I have to know about the facts of the case.

Q. I can't talk about the facts.

A. I know you can't. I wish you could.

F2069 0227

I don't know. I hadn't thought about that because I wasn't aware that whatever, you know, if you gave the one instead of the other, that you had no -- that the probation or whatever had nothing to do with it. You had no opinion on that.

Q. Knowing that now, would you lean more towards the death penalty, knowing you couldn't consider or talk about how long a person would serve?

A. I would say it this way: If I had the decision to make and I somewhat favored the death penalty and I wasn't quite sure, and then if it was my thought that possibly this person was going to be out in twenty years and I was still considering the death penalty as something to be considered, I might very easily tend to think that the death penalty might be the answer rather than twenty years.

There is a big difference in twenty years and ninety-nine years and the death penalty.

Do you understand what I am saying?

Q. I think so. Correct me if I am wrong, but subconsciously, or consciously, you will consider the laws of parole in assessing punishment?

F2069 0228

It would be in the back of your mind, right?

A. It might be. I don't know. I wasn't even -- or hadn't thought about it because I wasn't aware of that ruling at all. I had never read that ruling.

Q. Okay. Well, now, you know the prosecutor will tell you when you give a life sentence, you are, for all purposes, to consider that he was going to spend the rest of his life in the penitentiary.

MR. MOEN: I won't say that at all, Judge.

MR. ELIZONDO: I know they said it before.

Q. (By Mr. Elizondo) I know you can't talk about it or think about it, but would you consider it in assessing the punishment in the punishment phase, consider parole, I mean? Would you consider the fact that he might get out on parole in assessing punishment, and as a result of that, give him the death penalty?

A. No. I don't think so. I really don't. I know what you are asking me, you know, to say rather than give him parole I don't want to see him have, would I then choose the death penalty.

F2069 0229

Q. Uh-huh.

A. No, because taking someone else's life is rather serious.

Q. Drastic.

A. Yes. I would really have to say I would have to look back to the crime and have it fit that.

Q. If it is --

A. I am not saying I wouldn't be for the death penalty to begin with, depending on what I heard.

As I said before, I am not totally against that.

Q. So you know for a fact life is not life, really?

A. Pardon?

Q. You know, don't you, that life is not life in the penitentiary? Do you know that?

A. That life is not life in the penitentiary?

Yes. I know. I also know if everything I read is correct, it seems like we are giving them an awful lot of benefits these days. Now we have to have big rooms.

There are poor people that don't live in as big a space as prisoners. Tents aren't good enough. We have to give them fancy rooms and a playground.

F2069 0230

As someone said to me, the next thing they will want is country clubs for the prisoners, and everyone will be fighting to get in.

Q. Would that affect your deliberations, knowing all of that, knowing that they have, you know, big rooms?

A. Color TV's.

Q. Their life is not life. Would that affect your deliberations on life or death?

A. No, I don't think it would affect my deliberations on giving life or death.

Q. There you go again. I don't think.

A. I guess what I am saying, I guess you think it is crazy, the whole thing is back to my original statement I made earlier, that we seem to be awfully concerned about the rights of prisoners and not too concerned about the rights of victims anymore, and that bothers me. I know that doesn't enter into this particular thing, but the questions you ask me, that enters into it.

Q. Like I say, there are no right or wrong answers, and all I want is to know how you feel and if you consider, during the punishment phase, that

F2069-0231

he might not get a "life" sentence, would you automatically consider the death penalty as a result of that?

A. No, I would not automatically. I don't think I could ever automatically consider the -- you just can't automatically do that. You will have to decide that this person had nothing to offer society and was not to be rehabilitated and had done something so terrible that he couldn't be or wouldn't be.

Q. Do you think that a person can change his mode of operations, mode of behavior, mode of conduct?

A. After what age?

Q. I don't know.

A. Maybe if you gave him to me at twelve.

Q. Well, is it a probable statement?

A. Yes. I think people can change, but I think I would have to take a hard look at the environment they are going to have, and prison doesn't do too much for too many people, as far as really --

Q. Just a little while ago, you were talking about how the victims of crimes are not taken into consideration and everything, while everybody's trying to be real nice to the people accused

F2069 0232

of the crimes and people convicted of the crimes.

How strongly do you feel about that?

A. That, you mean, that the criminals are -- I don't know how strongly. I haven't thought about it, but it seems that we are being bombarded with a lot of things about the rights quote, unquote of criminals, and when I say this, I am talking about someone who has already been convicted of a crime.

Q. Already been convicted?

A. The prisoner. He has undoubtedly committed the crime. He is in jail or on the way to jail. We are getting them out on bail and this sort of thing. I think we would have a lot less crime if this didn't happen.

Q. You stated -- anyway, you could set those feelings aside in deciding the guilt or innocence of the Defendant in this case?

A. Yes, because basically, you have said I have to consider the facts of the case as they present it on whether or not he actually committed the crime, and then on that basis decide.

Q. And even though you know that life is not life, you could still --

F2059 0233

MR. MOEN: I would object. That's been asked and answered. That's repetitious.

THE COURT: Sustained.

MR. ELIZONDO: Excuse me just a moment.

We would challenge her for cause.

THE COURT: Overruled.

MR. MOEN: Judge, we will accept Ms. Smith.

MR. ELIZONDO: Prior to excusing Ms. Smith, I would respectfully urge our pre-trial motion to be able to examine the entire venire at the end of the voir dire so we can intelligently exercise our peremptory challenges.

THE COURT: That will, for the sixty-fourth time, be overruled.

Ms. Smith, thank you for your visit with us.

F2069 0234

OSCAR EUGENE BROWN,

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

EXAMINATION

QUESTIONS BY MR. BAX:

THE COURT: All right, Mr. Brown, please relax and visit with us just a moment and let these lawyers ask you some questions.

Go ahead, Mr. Bax.

Q. (By Mr. Bax) Thank you.

It's been a long day, Mr. Brown, and I appreciate your waiting back there patiently for us.

I am sure you probably understand what we are going through out here, trying to select a jury.

This is four weeks, and so far, we haven't been able to select but seven jurors. We need five more and one alternate juror. It is a rather long and tedious process.

In an ordinary case, it takes two to three hours to pick a jury and we start with testimony that same afternoon.

F2069 0235

As you can see, this takes a month, month and a half, just to get to the position where we can start to look for testimony to begin.

As the judge told you earlier, my name is Dick Bax. Bob Moen is out of the courtroom now.

Together, we will be representing the District Attorney's Office and the family of Officer James D. Harris. Officer Harris was killed back on July 13th of this year, back a few months ago, on the east side of Houston. I think the intersection is Edgewood and Walker, which is near Harrisburg and Dumble, to give you a general idea of the area.

Do you recall hearing or reading anything about this case from the judge's brief commentary of the facts he gave you this morning?

A. I think I heard about it, yes.

Q. There is nothing wrong, of course, with having heard or read anything in the newspaper accounts or seeing things on TV concerning the particular case.

I don't know if there is any way

F2059 0236

for a citizen in our community to avoid such contact with cases, especially when we are talking about a police officer being killed in a case of that magnitude.

The reason the judge asked you that question and the reason we are going into it briefly is to determine whether anything you may have read or recall seeing, whether that in any way caused you to form an opinion one way or the other as to the Defendant's guilt here today?

A. Well, the events -- there were several shootings in the last few months, so I can't really recall just exactly. I can't make it out in my mind which one it was.

Q. Which one it is?

A. I have read of different cases.

Q. And that is fine, and that is really what the law requires, what we are looking for, and what would disqualify you as a juror would be if you came in here and said, "Yes, I remember reading that case or remember seeing it on TV, and because of what I read or saw, I'm already of the opinion that the Defendant is guilty or not guilty."

F2069 0237

You see, the law requires that the twelve people who take the jury box have formed no preconceived notions, but rather enter the jury box with an open mind and make their decisions based on the evidence they hear in the courtroom and not what they have read or heard outside the courtroom.

Do you follow me so far?

A. Yes.

Q. And I take it from your response, you may not know what case this may be of several you have read about, and you have not formed an opinion at this point in time?

A. No, I have not, really.

Q. The reason we are conducting the jury selection individually is really two-fold. Number one, it is because the law requires it and I think number two, if the law didn't require it, this would be the proper way to do it when we are talking about a situation where a man would be sentenced to one of two possible punishments, life or death if someone found him guilty.

At this point in time, no one is going to try to have a debate with you on pros and cons of capital punishment. Whatever your

F2069 0238

opinion is, you are entitled to that opinion, and no one is going to change that opinion, but what we need to know is what is your opinion and whether or not your views concerning capital punishment would allow you to sit on a jury if it was called for, if it resulted in the death penalty being assessed. Okay?

We have many different types of people coming through and talking to us. Some people believe in a proper case, under the proper circumstances, they can participate in a death penalty case, and see the appropriateness.

Other persons come before us and say, "That is fine if some people feel that way, but personally, because of my personal beliefs or my religious beliefs or the way I was brought up, I personally could not sit in judgment on that type of case. I could not put aside my type of feelings and participate in a verdict that would cause a person's life to be forfeited." Most of those people are of the opinion no one here on earth has the right to take a life, be it a criminal or be it the State of Texas through some trial procedure or through a jury system as we have here, and

F2069 0239

there is nothing wrong here, whichever way people feel.

Certainly, everyone is entitled to their personal beliefs and no one is required to sit on a jury where that jury duty would violate their personal beliefs, where it would cause them to come in conflict with what they truly believe.

That is the reason we talk to people individually, to see, number one, how they feel about the death penalty. Do they agree with the death penalty or not agree with the death penalty, and would their jury duty in such a case -- would it prevent them from being a juror because of their feelings.

The easiest way to get into a conversation about that is to ask people, "How do you feel about the death penalty? Are you in favor of the death penalty in certain cases or do you not believe in the death penalty and believe it doesn't serve any purpose?"

A. I would be for it in certain cases.

Q. Let me give you an example of certain cases where the death penalty comes into play, the possibiliity of the death penalty.

F2069 0240

Not every murder is a capital murder. Murder is one-half of the element of capital murder. To elevate the offense from murder to capital murder, there has to be an additional factor besides the intentional taking of a life.

If a person takes a life intentionally during the course of a robbery, during the course of holding up a Utotem store and he shoots and kills a clerk, that makes it capital murder. If you kill scmeone during the course of a burglary, kill someone in their home or business, kill during the course of a rape, a kidnapping, or an arson, any one of those five felony offenses, they become elevated or aggravated, I guess, in that regard, and become capital murder.

If you kill a certain class of persons, kill a policeman or fireman, knowing that person is a fireman or policeman who is in the lawful discharge of his duty, that is elevated to capital murder.

If you kill for money or hire someone to kill for you for money, that becomes capital murder, and the last situation involves a

F2069 0241

prisoner.

If a prisoner kills anyone in an attempt to escape from a prison or if he kills an employee of the prison, or kills someone when he is trying to escape from the prison, in those circumstances, it is elevated to capital murder.

So you can see, first of all, it is a very limited of cases where a person even subjects themselves to the possibility of the death penalty. Okay?

Do you feel that those are the appropriate types of cases where a person should be held accountable and have the option of receiving the life or death sentence?

A. I do, yes. To me, you know, somebody that comes -- you shoot somebody like that in a robbery or something like that -- in other words, he is shooting somebody, and it wouldn't make any difference who was there.

Q. And usually the motive in those types of cases, if you are killing someone during a robbery or a burglary or killing a police officer --

A. You are not getting discriminate. In other words, I would be more lenient if somebody

F2060 0242

killed somebody out of passion.

Q And the law is also, I think what the law is trying to get at in those situations, trying to deter people, like that robbery situation, I think the one person a person might kill in a robbery situation is to eliminate a witness. Hopefully, if a person is doing a robbery, if they are knowledgeable of that fact, it may stop them from killing somebody to prevent a witness from coming forward and testifying.

Just because a person is found guilty of one of those offenses, let's say we are talking of robbery-murder or murder of a police officer or murder of a prison guard, simply because a person is found guilty of one of those offenses doesn't mean that automatically they will receive the death penalty if they are found guilty.

They have now put themselves in a position of either life or death, one of the two.

These two questions determine, at the punishment stage of a trial, whether that person receives life or death. If both questions are answered by the jury yes, yes, then the

F2059 0243

judge assesses punishment at death. He has got no choice in the matter.

If either Question 1 or Question 2 is answered no by the jury, then the judge assesses life imprisonment, so the jury doesn't go back and say, "We found him guilty. Does he deserve the death penalty," but you can see by the way you answer these questions, you dictate to the judge what punishment he will assess. Okay?

A. Yes.

Q. Just by reason of explanation or purpose of explanation, up to 1967, the death penalty was available for anybody who committed robbery, murder, or rape. You didn't have to have a death involved.

Okay. The way that was decided, all in one stage, the jury would decide whether or not he was guilty, and if they did, they would assess punishment from two years to life or death, and basically what they said was, they went back and said, "Does this person deserve the death penalty?" It was a very subjective type of process back then.

Because it was so subjective, the

F2069 0214

Supreme Court of the United States struck that law down, and said it was not appropriate. It told Texas and many other states, "You need to come up with a more objective case, something based on the facts rather than emotions."

In 1974, these questions were created by the legislature, and I think you can see by looking at the questions this really does put it in a more objective light and does not require the jury to assess the death penalty on emotions, but assess it on the facts in a given case.

Let's go through these briefly.

The first question asks you two questions in one. Number one, was his conduct, the Defendant's conduct, deliberate, and, number two, was it done with the reasonable expectation that someone would die as a result of that conduct?

Okay. Based on the evidence, the jury answers that yes or no. You have already found a person -- and let's go through this -- to get to this stage, before you can be confronted with Questions 1 and 2, you have had to find a person intentionally and knowingly

F2069 0215

took the life of a police officer or took the life of someone during a robbery or burglary or what not. You had to find he acted intentionally.

The word deliberately in Question 1 is underlined, and that is underlined because the judge will not give you a definition of what deliberately means. You have to use your everyday meaning for the word deliberately.

To me, deliberately means on purpose.

A. Yes.

Q. To some people, it may mean the same thing as intentionally.

I don't know what your exact definition is, but even if deliberately means the same thing as intentionally in your mind, simply because you found he acted intentionally in the first phase of the trial, to find him guilty doesn't mean this question is automatically answered yes, because it goes beyond the first part, was it deliberate, and also asks was it done with a reasonable expectation someone would die?

You see, you didn't have to find this part at the guilt-or-innocence stage, just did

FROM OFFICIAL

he intentionally cause the death.

Do you follow me so far?

A. Yes.

Q. Let me give you a couple of examples. I know it's a little more difficult to think in terms we are talking about. Let's talk about two situations the law will define.

The judge will define what intentionally is. The judge will tell you a person acts intentionally if it is his conscious objective or intention to engage in the conduct. Okay?

If it is his conscious objective or intention to engage in the conduct, you have acted intentionally.

Assume a situation where a man goes into a Utotem and he has no thought process. He does not want to kill anybody. All right? But he nonetheless doesn't want anybody to follow him out the door to get the license plate on his car when he has done his deed in this Seven-Eleven, so he says, "One way I can keep this clerk from going outside is if I shoot him in the lower portion of his leg. I am sure that will give me time to go away." It is his conscious objective to point the

F2069 0247

weapon and discharge his weapon, and he shoots the man in the leg, not thinking he is going to die, and he jumps in his car and drives off.

He didn't know he severed an artery in the man's leg which caused the man to die from the loss of blood.

Under the definition intentionally caused the death by his conscious activity, he caused a man to die. He would be guilty of capital murder. He would be looking at life or death.

But I think you can see, when you come to Question 1, this is not automatically yes now. You may find his conduct is deliberate, but when you answer the second part of the question, was his conduct done with a reasonable expectation that someone would die in that situation, you would find he didn't have a reasonable expectation someone would die, because look at where he shot the man. He shot him in the leg. If he wanted him to die, he would have shot him in the chest or head.

Do you follow me?

A. Yes.

F2069 0218

Q. Another example is: Assume the man who was in the store is a thirty-five-year-old ex-convict, and he solicits the aid of a seventeen-year-old boy and he says, "Look, all I want you to do in this crime, I want you to be the lookout for me. Just stand in front and see if the police or anyone comes by."

The seventeen-year-old says, "Fine."

The thirty-five-year-old man goes in the store, and this time, besides shooting him in the leg, his objective is to silence any witness available. He pulls out his gun and fires one bullet into someone's head and one bullet into the clerk's chest, which kills the clerk, comes running out and is caught right in front of the store. He and the seventeen-year-old are both caught in front of the store.

Under our law of parties, if two people conspire together to commit a felony and that is a robbery case, okay -- they agree to commit a robbery, if someone commits another offense, which is capital murder, both of the people are involved and are guilty, even though one of them may not have had the intent to commit the greater offense, if the greater offense

F2059 0249

should have been anticipated as a possible offense of the first conspiracy, i.e., the robbery.

So, under the law of parties -- the boy is standing outside, and I think you agree anytime people conspire to commit robbery using a loaded weapon, they should anticipate someone may get shot or something like that -- the boy with the gun is just as guilty of capital murder as the man inside the store.

He may be guilty of capital murder, but when we get to Question 1, what conduct there was, there was no conduct on the part of the seventeen-year-old that was deliberate that caused the death of anyone.

Can you see where this question, depending on the evidence, could be answered yes or no --

A. Yes.

Q. -- when you answer these questions?

Stop me if I am going too fast. I know I am going rather fast, and it's been a long day.

A. I understand.

Q. That is all the law asks of a juror at this

F2059 0250

point, not to come in with a preconceived idea of the guilt or innocence of a person, and if they find at the guilt-or-innocence stage the Defendant is guilty, the law requires that no one come in here and say, "I will automatically answer those questions yes."

The law requires the juror to base the answers to Questions 1 and 2, base them on the evidence and not on any personal feelings that a person might have.

Do you follow me on that point?

THE COURT REPORTER: Would you please answer out?

THE JUROR: Okay.

Q. I am sorry. She is taking down everything we say, although I think she memorizes this, and when you show a nod of the head, she puts down juror nodded head, and we don't know if it's an affirmative or negative nod, and she will remind me from time to time also.

A. Okay.

Q. Is there any question you have about Question 1?

In this case, it calls for the juror to look back and make a judgment based upon

T2069 0251

the evidence. Okay?

A. Yes. Yes, I see.

Q. Question 2 asks the juror what is the person like that we have on trial, what is he like? What were his tendencies? And it states whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Probability will not be defined for you. To me it means chances are, more likely than not, something more than fifty percent.

Would you agree with that, or do you have a different term that you would use for that?

A. No, I would say that would be about right.

Q. The only thing I need to point out to you as far as probability is concerned is the law does not require or do I have to prove to a juror what is certain to happen in the future. There will be no crystal ball to look into the future with, and the only person who can predict the future is the Almighty himself, and the law doesn't require jurors to be placed in the position of God to answer Question 2. It only requires we prove the person would be

F2159 0252

likely to commit criminal acts of violence.

Do you see that?

A. Yes. I see that.

Q. Criminal acts of violence does not mean he would have to kill again. That would include murders, breaking into people's homes, assaults, robberies, rapes, as long as I prove he is of that general tendency to people or places, I would have met my burden, and again, there is no way I could prove to a probability a person would commit a specific type of crime, but just that he is of the general nature he would probably be a violent-type person.

Do you follow me?

A. Yes. I see that.

Q. And that that type of activity would be a continuing threat to society, no matter what society he would find himself in, be it the penitentiary or perhaps out on the street again.

A. Yes.

Q. Okay.

A. Yes. I see that.

Q. Do you feel that that is a fair type of question to answer, based on the facts you may hear in a particular case? Do you feel you would be able

F2069 0253

to answer Question 2?

A. I believe I could answer it, yes.

Q. You certainly could hear other evidence besides the evidence for which the person is on trial, but that is not required by law before you could answer the question.

The law requires that in the facts of a particular case your answers can be based solely on those facts alone and the State is not required, although we have the opportunity, to bring you other evidence other than the case for which he is on trial. Okay?

A. Yes. I see.

Q. I think you know, have a general idea, if there is a finding of guilt and a yes answer to No. 1 and a yes answer to No. 2, the judge will next sentence the Defendant to the death penalty.

If there is a guilty verdict and No. 1 is answered no and No. 2 is answered no, or both are answered no, the judge will assess the punishment at life imprisonment.

Is there any doubt about the system?

A. I understand what you are saying.

Q. I am talking a mile a minute. She will probably be telling me to slow down any minute.

F2069 0254

You don't have to remember this. This will be given to you in the Court's charge.

I want to make sure there is nothing in the law that would cause you problems in answering these questions or being a juror in this type of case.

You have said you are in favor of or believe in the death penalty, and now that I have gone over these questions with you, have you generally been of that opinion all of your adult life, or has there been anything that has changed your opinion through personal experience or anything you may have read that has caused you to change your opinion to what it is?

A. The only thing I ever went by was some of the crimes I have read about. I have had an opinion of how I thought it should go, personally. I thought it would be a little better deterrent to some of the crimes we have been having rather than the sentences they have been giving in other different trials.

Q. Okay, and I think that is probably a fair assessment.

You know, we have had, since 1967,

F2069 0255

two hundred people currently on Death Row, and not one of which -- where jurors have come back and answered these questions yes, yes, where they are waiting on Death Row and not one of them has been executed at this point in time, but for the purposes of our discussion, you must assume if you answer these questions yes, yes, that this Defendant would receive the death penalty and that that would be carried out, and if you answer no, you must assume he would spend the rest of his life in prison.

Do you see that?

A. I see.

Q. Have you ever discussed the death penalty with your wife? Do you know if she is of the same opinion you are or if she believes in it in an appropriate case?

A. Well, my wife really doesn't -- well, she really didn't get into anything like that. It more or less will depress her where she don't want to hear about it.

Q. She had just as soon not hear about it?

A. My mother is of a different nature.

Q. How does your mother feel?

A. My mother is more or less of the same opinion

F2069 0256

I am. It depends on the crime. You can't just lump it all in one lump, but still there's been cases, the way I thought, they need a stiffer penalty, and I have read different things where I thought a person needed a lighter sentence. It depends on what they do.

Q. Okay, but you understand it would depend on the facts?

A. That's right.

Q. And you feel that the facts would be the main determination in your mind as to how you answered these questions, and not the crime rate or --

A. No. It would have to be facts.

Q. Let me go over with you, as fast as I can -- if I am going too fast, throw me down or throw something at me, your ashtray or something -- there are certain obligations you have as a juror, whether it be a juror in this type of case or a juror in a five-dollar-theft case. All of these are pertaining to both types of cases.

Number one, the Defendant is presumed innocent. The fact that he has been indicted by a Grand Jury, the fact that he is represented by attorneys and finds himself in this situation

[2069 0257

here today is no evidence of his guilt.

Do you feel that you could afford this Defendant that right and at this point in time presume him to be innocent?

A. Yes. I don't know any facts of the case. I don't know the man.

Q. I don't think you could give a better answer than you did right there.

Usually I give the example of where I read the indictment and ask you to go in the hallway and decide whether he is guilty or not guilty. You would have to find him not guilty, because you haven't heard the evidence.

A. I don't know the man.

Q. A Defendant in a criminal trial does not have to testify. The State is the one which brought the charges. The State has the entire burden of proof. We must prove to you the Defendant is guilty. He doesn't have to prove he is not guilty. He can sit there, and his lawyers can sit there throughout the whole trial and never say one word, never examine one witness, never call one witness to the stand, and you must look to the State to prove it.

If we don't prove it, you have to find

[2069 0258

him not guilty, even if they don't do one thing in the defense. I could call thirty witnesses to the stand and they don't call one witness, don't cross-examine any witnesses, and he doesn't testify, and if you had a reasonable doubt, the law would require you to find him not guilty.

Could you do that?

A. Yes. In other words, I couldn't -- I couldn't just take a man's life and just treat it lightly. It would have to be proven.

Q. And all the proof you have to look to is over here. Okay?

The State has to prove it to you. The Defense doesn't have to prove anything. They don't have to prove anything.

If I don't make it, if I fall down in my job, whether they did or did not do anything, the law would require you to find him not guilty. They don't have to do anything.

Do you think you could do that?

A. You would have to prove to me the man was guilty. It's -- I couldn't just come in here -- like I say, I don't know the man, don't know the circumstances, don't know the evidence. I don't know if you even got the right man, as

F2059 0259

of right now.

Q. You haven't heard anything.

A. That's right.

Q. All you know is something about the fact he has been indicted and here he is today.

A. I read in the paper where they had a man for five years and they discovered they had the wrong man, and that the other man was the man that should be there, and the man they had should be let out.

Q. I think we heard of that in the Coral Watts case.

A. The man there and other cases in the last month or so in the papers.

So you would -- it would have to be, you know, proven.

Q. And if it was proven to you, you could find him guilty?

A. That's right.

Q. And if it wasn't proven to you, you could find him not guilty?

A. I believe so. Yes, sir.

Q. The judge would instruct you that in deciding punishment if you were to reach the punishment stage, okay? If you found a man guilty, when

F2069 0230

you get to these two questions, you are not to consider how long a person would have to serve on a life sentence in determining whether he gets a life or death sentence.

The only thing you can consider, whether he gets life or death, is the evidence, but the fact -- you can't talk about how long he would have to serve. That is in the discretion of the Board of Pardons and Paroles, or what they might do.

MR. ELIZONDO: I object to the prosecutor emphasizing the parole laws, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Bax) You can't talk about whether he receives parole or not, but only base your verdict on the evidence which is before you, okay, and not upon what the Board of Pardons and Paroles may do sometime in the future.

Let me do it this way. Suppose you heard all the evidence and you believe all the answers to the questions should be no.

Would you go ahead and answer one of the questions yes, which would mean that the death penalty would be assessed, because the Board of Pardons and Paroles may someday

F2069 0261

decide to parole the man, or would you follow your oath as a juror and answer your question no as the evidence called for?

I hope I haven't confused you with that one.

A. No. I would have to answer however I felt about it at the time. Well, I don't have any way of knowing what the parole board is going to do, either.

Q. You have to go by the evidence that is before you?

A. I would have to. Yes.

Q. One thing I forgot to mention, and I will go over it.

I have to prove to you that the Defendant is guilty beyond a reasonable doubt. I am sure you have heard that term before. That term will not have a definition tied to it when a judge gives it to you. That is something individual and personal to each and every juror.

I believe in my own mind if you have heard the evidence and if you are convinced the man is guilty, it is proven beyond a reasonable doubt. If you are not convinced

F2069 0282

after hearing the evidence, of course, it has not been proved beyond a reasonable doubt, and you should find the Defendant not guilty.

It's not -- I can tell you what it is not. I can't tell you what it is, but I can tell you what it is not. It is not proof beyond all doubt or a shadow of a doubt or beyond any doubt. The only way I could prove anything to people beyond all doubt or a shadow of a doubt would be if twelve jurors who were deciding the case were witnesses to each and every transaction that took place, and even then, if you had twelve people that saw the same thing, they may have twelve versions of what happened.

The law doesn't put us in that type of situation and won't have a videotape replay like you have with football and basketball games. We won't have that luxury.

You must listen to the evidence in the courtroom from different people about what took place back on July 13th. The law doesn't require us to prove it beyond all doubt, only beyond a reasonable doubt. That same proof is used in all criminal cases from driving while

F2069 0263

intoxicated cases to capital murder cases. My burden of proof is the same. It doesn't get higher because it's a possible capital punishment.

Do you feel that is a proper burden of proof, and do you feel you could just hold the State to that burden of proof and not a higher burden of proof?

A. Well, it would be -- like I say, I would have to base it on the evidence, and if I felt like he was guilty, I would feel like he was guilty, and if I didn't, I wouldn't.

Q. As I juror, you are going to have to listen to different witnesses testify, and if the Defense chooses to put different witnesses on the stand, you may hear two totally different stories. You may hear the State's witnesses come in and say, "That is the guy. I saw him," and you may hear the Defense witnesses or somebody else come in and say, "No, it wasn't. It was somebody else."

That fact alone, because you have two sides or two different stories, doesn't automatically mean there was a reasonable doubt. If that were the case, I don't think

F2069 0254

we could find anyone guilty of an offense.

Do you agree with me there?

A. Yes.

Q. In that situation, it will be the jurors' job to resolve the conflict in the testimony and decide, based on the facts, who was telling the truth or who was in the better position of telling us what they were telling us.

Do you feel you could listen to a case where there are two different sides and resolve that conflict and decide which side is the more believable?

A. Well, I tell you, I was in the service station business fifteen years, and if you are in any kind of a business for any length of time, you get to where you can pretty well know what is going on.

Q. That is all the law requires of you as a juror.

You go into the jury box and take your common sense with you and judge the witnesses as they testify. You ask yourself: Do they have a motive? Is it reasonable? Does it fit in with everything else I know, and you base your decision on whether it is credible or not credible, and I think your answer is

F2069 0265

you have to do that every day in determining who is being honest, who is being honest and who is not?

A. Yes.

Q. Nobody takes the stand with immediate credibility. No one, the minute they walk in, the jury says, "We believe that guy."

The law requires they take the stand and testify, and then the jury decides whether they are telling the truth or not and they don't prejudge their believability or non-believability because they may be a police officer or may be the Defendant in the case.

A. There's one thing. When I filled out that form, I think I put golf and horses, too, but I do hunt.

Q. What type of hunting do you like to do?

A. Deer hunting and dove hunting. I wasn't thinking about that. I got to thinking, it has something to do with guns, and I do have guns, so --

Q. Are there any questions about anything we have gone over up to this point?

A. No.

Q. The evidence may show that the Defendant is unlawfully in our country and was here

F2069 0266

unlawfully back on July 13th when Officer Harris was killed.

The law would require, of course, you don't consider that as evidence as to whether or not he did this offense, but just look to the evidence alone in deciding that.

Can you give him the same rights you would give any citizen charged with this offense?

A. I believe so. That wouldn't enter into it as far as I am concerned.

Q. It wouldn't enter into it when you look at the questions? That wouldn't affect the way you answered the questions, whether he is here lawfully or unlawfully? If I almost proved the case where you said, "Bax, you did a pretty good job. You and Moen almost convinced me, but not quite, but since he is an illegal alien, I will find him guilty because of that."

You wouldn't feel that way, would you?

A. I have known too many Spanish people and got some Spanish-speaking friends. That wouldn't enter into it.

I have probably met quite a few

F2069 0267

illegal aliens I didn't know were illegal. I do know some who are beginning to talk English right now.

I couldn't base it just on that one deal.

Q. You do know a police officer who is where? San Jacinto College?

A. Right.

Q. Is it a close friend, or how would you characterize your friendship?

A. I have known him for a year and a half or two years. He does horse shoeing on the side and puts horseshoes on my horses, and I have known him down at the barn, and it hasn't been anything really, you know, social or anything, but I know him to speak to him and get along real well with him.

I have known police officers in Galveston. I had the service station and always had police officers stop.

Q. To check with you to make sure everything's all right?

A. They would come by and we would drink a Coke with them, and that sort of thing. I had a service station, and it got broke into quite

F2069 0268

frequently.

Q. Is there anything about the fact -- of course, this case is going to involve an allegation that a Houston Police officer was shot and killed by this Defendant. Is there anything about your relationship with either this police officer at San Jacinto College or any other relationship you may have with some other police officers that would affect you in listening to facts in the case?

A. No, I don't think so. I've got a policeman who still owes me some money.

Q. Are you a member of the National Riflery Association, N.R.A.?

A. Yes, sir.

Q. You served on a jury once before on a driving-while-intoxicated case?

A. Yes, but they plea bargained or something, and we never got to decide the case. We came in and came out, and they had let him go.

I think they fined him two hundred dollars or something. I didn't understand exactly what they did, but we wasn't needed.

Q. And nobody bothered to explain exactly what happened when it was over?

F2069 0269

A. Kind of explained. It's been two years ago. I have kind of forgotten it now.

Q. Is there anything about that case that would affect the way you would decide a case like this?

A. I don't believe so.

Q. What school does your fourteen-year-old daughter attend?

A. Right now, she is going to Deer Park, the north campus.

My older one is going to the south campus.

Q. I know I have gone through everything quickly with you.

Do you have any questions about anything? Let me --

Well, one other question: You have been the victim of a burglary? Was that back when --

A. That was when I was with the service station. I have been out of that eighteen years, but I had a service station out on the outskirts of town, and they had broken into it at night. I never was robbed, but I was broken into a number of times.

F2069 0270

Q. You had mentioned -- let me go over it for a second -- you had read about cases, and even with the Coral Eugene Watts case, known situations where people were convicted and actually sent to the penitentiary when later on it turned out they weren't, perhaps, the right person for whatever reason.

Do you feel, especially when we are talking about a death penalty case, that where you had two sides to the story, where you are going to have, possibly, people coming in on the one hand and saying one person did it and people coming in and saying another person did it, and perhaps the evidence would show at both points of time, both of the people alleged to be the shooter were both together at that point in time, do you feel you would be able to resolve a conflict such as that based upon the evidence and based upon the believability of the witness at the time, to make a decision, or would that automatically cause you enough doubt to be unable to render a verdict of guilty, or to answer Questions No. 1 and 2?

A. I would have to analyze whatever they said.

Q. It wouldn't automatically, because you were

F2069 0271

going to hear two sides, wouldn't automatically make you do anything, but would depend on the testimony, right?

A. I would have to analyze whatever they said and go from there.

Q. I imagine you would look at their viewpoint and go from there, because it wouldn't mean witnesses would come before the jury and actually tell a falsehood or lie, but you would have to determine who was in the best position to tell us about it.

Would you feel you would be able to do that and resolve a conflict, whether it be one way or another?

A. I believe I would be able to resolve any way I believe it was.

Q. Are there any questions of me?

I will let you go and let Mr. Elizondo or Mr. Hernandez talk to you.

Do you have any questions at all?

A. No.

MR. BAX: That is all I have. Thank you very much.

THE COURT: Go ahead.

F2069 0272

EXAMINATION

QUESTIONS BY MR. HERNANDEZ:

Q. Good afternoon, Mr. Brown. My name is Joe Hernandez. This is Candelario Elizondo. We are representing Mr. Ricardo Aldape Guerra at this time.

I guess it is my time to ask you personal questions. I don't want to ask you personal questions, but I guess we have to. We ask you this honestly or in good faith, should we say, in that we are looking for people that are -- or we are looking for twelve people we can select that can be honest, fair, and just in rendering a verdict, and that is why we tend to pry a little bit into your personal affairs, and, believe me, this is done in good faith and not done to embarrass or humiliate you in any way whatsoever.

What we want to do is look for people that can come in here that we know will be coming in here with beliefs and principles, and we want to know whether their beliefs and principles can afford this young man a fair and impartial trial, is basically what we are doing.

F2069 0273

We appreciate your sincerity and your honesty in your answers, so I guess, like I said, it is my turn to ask you personal questions.

Let me ask you the first big question. What kind of horses do you have?

A. Quarter horses.

Q. Quarter horses? How many do you have?

A. Two.

Q. Where do you keep them? Where you live, or where you reside?

A. I keep them out there at Willis. It used to be La Porte. It used to be Lomax, but it is actually part of Deer Park now.

Q. Actually, where is New Orleans street?

A. It is in Deer Park. It is about in the middle -- well, it would be on the west side of Deer Park.

Q. Deer Park?

A. Yes.

Q. Okay. Tell me a little bit more about your feelings towards the death penalty. Are they strong or are they in the middle, or are they so-so?

A. Well, you know, depending on the crime. It is

F2069 0274

just -- I think there are some crimes that need the death penalty. I believe it is needed as a deterrent for crime, but it is not necessarily, you know -- my feelings on a verdict would just depend on what it was.

Q. You wouldn't happen to know a young man by the name of Randall L. Woods, would you?

A. Randall L. Woods?

Q. Or Randall Woods?

A. I know a Ronnie Woods.

Q. Does he live by your house?

A. No.

Q. All right.

A. I can't think of where --

Q. Do you know where 1306 New Orleans street is?

A. It would be down from my house.

Q. It would be close, wouldn't it?

A. It would be down from my house, yes.

Q. He happened to pass through here, too. As a matter of fact, you are number sixty-five.

Can you imagine that today is our fourth week?

A. I can't. I don't know --

Q. That is all right. That was just a little side question.

F2069 0275

A. That would be a block or so down the street from me.

Q. I see. Okay.

Now, you stated to me it always depends on the facts of the case.

A. Yes.

Q. The fact there was a police officer involved, would that present any strong feelings toward the death penalty? Would that present any problems in rendering a verdict, a just verdict, an honest verdict for this young man?

A. No, I believe -- well, to me, it would be on the facts more than it would be on who it was. In other words, me, you know, if you prove somebody actually killed anybody, more than who he was.

Q. Well, let me go by the three basic concepts of a criminal trial that Mr. Bax was talking to you about that is required by you to assess.

Number one is the presumption of innocence and the burden of proof and beyond a reasonable doubt.

The law presumes as this young man sits today in this courtroom, presumes him to be innocent, and by virtue of him having been indicted by the Grand Jury then, there is no

F2069 0276

evidence of guilt whatsoever.

Would you agree or disagree with that law in any way?

A. No. Well -- I guess he hasn't had the trial yet, is the way I would look at it.

Q. So the fact he has been indicted by the Harris County Grand Jury and is represented by two attorneys would not affect you whatsoever? The presumption would still be innocent as far as you are concerned?

A. I would just be getting into it personally. I would just have to take -- like I said before, it would depend on the evidence presented to me.

Q. What I am driving at: The fact that he's been indicted by the Grand Jury, the Harris County Grand Jury, and is before us at this time, would that be a strike against him in any way in your mind?

A. I don't believe. To me, it would be new to me, because like I say, I am just getting into it.

Q. Also, the law places the burden upon the State to present its evidence against my client or any Defendant in any criminal case, and that burden never shifts throughout the whole trial.

F2069 0277

The burden will always be on the State's shoulders.

Do you agree or disagree with that law?

A. No, I agree with it. It was made to protect the innocent parties, is what it was made for.

Q. So you would agree with me, would you not, that the Defendant, or the law never imposes upon the Defendant the burden of proof by any evidence or presenting witnesses in a criminal case?

Would you agree with me there?

A. Well, the way I think, if he had any witnesses, it would be just for their favor. Of course, the other side, they would have to have witnesses to prove otherwise.

Q. But would you agree that the burden is never placed on a Defendant or any Defendant to present evidence or to present witnesses at any time during the trial?

A. Well, that would be just like it always has been. You have to have evidence that somebody committed a crime before you can convict them of it.

Q. Would you expect my client to prove his innocence to you?

A. No, I can't say that I would. It would have to

F2069 0278

be proven he is guilty.

Q. Would you demand that the State prove their case to you?

A. Yes. They would have to prove he was guilty.

Q. All right, and they would have to prove it beyond a reasonable doubt?

A. Yes. It would have to be. I couldn't have any doubt that he wasn't guilty, if I was depending on convicting him. Yes.

Q. And as Mr. Bax was saying to you, beyond a reasonable doubt cannot be interpreted or defined for you. The judge won't be able to, and as Mr. Bax says, he won't be able to, either. It is just basically your common sense.

A. Right.

Q. Or the doubt found within reason or in reason?

A. That's right.

Q. And that burden is a heavy burden. It is a heavier burden than the civil side, in a civil case.

Would you agree with me there?

A. Well, anytime you put yourself in that position, to be holding somebody else's fate in your hands, it is heavy, yes.

Q. So you would demand that the State present its

F2069 0279

case, prove its case to you beyond a reasonable doubt?

A. Yes. I would have to be convinced.

Q. Is that fair enough?

A. Yes. I think it is fair enough.

Q. Okay, then. Let's go to Question No. 1, and let me read it with you: Whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

There is another word underlined, deliberately, that also will not be defined for you.

What do you think the word deliberately means, or what would you define it as?

A. On purpose. In other words, you would be trying to do something.

Q. All right. How about intentionally?

A. Intentionally, that means you mean to do it, whatever it is.

Q. Would you think that is synonymous with deliberately?

A. What? Intentionally or deliberately? Yes. I

F2069 0280

think if you deliberately do something, you have an intent to do it.

Q. All right. As Mr. Bax was explaining to you, there are two stages in a criminal trial. There is the guilt-and-innocence stage where the State presents its evidence to you, and you go back to the jury deliberation room once the State has rested and the Defense has rested and find him guilty or not guilty.

If you find him not guilty, everybody gets to go home.

If you find him guilty, you have the second stage of the trial which is called the punishment stage of the trial.

At the punishment stage of the trial, you will be asked to answer these two questions.

Hypothetically, if you have found him guilty, hypothetically speaking, of intentionally and knowingly taking the life of someone, causing his death knowingly, and causing the death of a police officer, and you are asked to answer those two questions, especially No. 1, whether the conduct of the Defendant that caused the death of the deceased was committed deliberately, would you say those two are the same basically

2069 0281

or they are different?

In other words, you have found him on one hand, you have found him guilty of intentionally and knowingly causing the death of someone.

On the other hand, you are asking -- they are asking you to answer whether the conduct of the Defendant that caused the death of the deceased was committed deliberately.

Can you, in your own mind, decipher both of them?

A. That he would deliberately do it, you mean?

Q. On the one hand, you find him guilty of intentionally and knowingly taking the life --

A. Yes.

Q. -- and on the other hand, it is asking you to answer whether it was committed deliberately.

A. Yes.

Q. You understand what I am driving at now?

A. I haven't really worked it out yet.

You are saying he intentionally did something and want to know whether I think it's deliberate?

Q. Right. Would the fact that you found him guilty of intentionally and knowingly causing the

F2069 0282

death, found him guilty on the first stage --

A. Yes.

Q. -- and then you are asked to answer these questions, whether it was committed deliberately --

MR. BAX: Objection. It goes beyond the word deliberately. There is another part.

THE COURT: All right, sir.

A. Well, if it's intentional, it is deliberate, the way I look at it.

Q. So you wouldn't automatically answer the question yes, would you, simply because you find him guilty of intentionally and knowingly killing someone, finding him guilty and then having to answer that first question, whether the conduct of the Defendant that caused the death of the deceased was committed deliberately?

A. Well, like I said a while ago, if it was intentional, it would be deliberate, the way I look at it.

Q. All right.

A. If I am following what you are asking me.

Q. Well, what I am asking is: If you found him guilty of intentionally and knowingly causing the death in the first stage --

F2069 0283

A. Right.

Q. -- and you are asked to answer this question or these two questions, but addressing the first question right now, would you automatically find him guilty or answer it yes simply because you found him guilty of intentionally and knowingly taking the life?

A. Yes, if it was intentional. To me, it would be deliberate.

MR. BAX: Our only objection, again, Judge, is that he has not once, through this conversation with the juror, embraced the entire question, whether he would also automatically find it was done with the reasonable expectation that someone would die.

MR. HERNANDEZ: That is fine.

Q. (By Mr. Hernandez) Let's complete the rest of the question: "With the reasonable expectation that the death of the deceased or another would result."

Basically, what I am asking is: In the punishment stage, the State can or cannot present evidence to you as to the background of this man.

A. Yes.

F2069 0284

Q. Okay?

A. Yes.

Q. Now, what I am trying to say to you hypothetically is if they did not present evidence to you --

A. If they did not --

Q. Okay, and in the first stage you found him guilty of intentionally and knowingly causing the death of someone, then you are asked to answer this question.

Would you automatically answer that question yes?

MR. BAX: Judge, my objection is he has offered no evidence. Obviously, the evidence offered would be the evidence the jury already heard to find him guilty. That would be the evidence.

THE COURT: Sustained.

Q. (By Mr. Hernandez) If they didn't offer additional evidence --

MR. BAX: I object to that as to Question 1, no additional evidence other than the evidence for which he is on trial.

THE COURT: Sustained.

Q. (By Mr. Hernandez) All right. Let's go this way. If you have found him guilty in the first

F2069 0285

stage --

A. Uh-huh.

Q. -- of intentionally and knowingly causing the death of someone --

A. Uh-huh.

Q. -- would you want additional evidence in order that you could base your answer to No. 1 yes or no?

A. If I figured out and if it's intentional, to me, it is deliberate.

In other words, if they give me evidence to where it was intentional and knowingly that he did it, it was a deliberate act.

Q. So you are not saying that intentional and knowingly finding him guilty in the first part of the trial is the same thing as Question No. 1? Is that what you are saying?

A. Well, what you are saying now is that during the trial, we find he is guilty? All right? Then what you are asking me then is after the man is found guilty, whether I can say yes to this question?

Q. Yes, automatically.

A. If he is guilty, I can, yes.

F2069 0286

Q. If he is guilty.

If you find him guilty in the first stage?

A. Well, from what I understand, if he is found guilty, then you want to know if I can say "yes" to this question?

I can. Yes.

Q. Automatically?

A. Yes.

If he wasn't guilty, I couldn't do it, but if they proved he was guilty, I could say yes to this.

Q. So, are you saying then that you would scratch your head and say, "Wait a minute. We just found him guilty of intentionally and knowingly causing the death of someone and they are asking me the same question and deliberately is the same as this one"?

MR. BAX: Judge, I think he's gotten the juror to the point where he thinks if he answers the question deliberately, he's answered the whole question. There is more to that question: done with the reasonable expectation someone would die, and he is putting the juror in an unfair position.

F2069 0287

THE COURT: Sustained.

Q. (By Mr. Hernandez) Let me give you a hypothetical. Say a thirty-five-year-old goes into a Seven-Eleven and he takes a young man, a seventeen-year-old with him. Both of them are carrying pistols. Okay?

Hypothetically speaking, the young man goes in and buys a loaf of bread. The thirty-five-year-old with a prison record holds up the cashier. The young man, not knowing --

MR. HERNANDEZ: Excuse me.

(Consultation between attorneys.)

Q. (By Mr. Hernandez) Okay. The young man, not knowing that he is going to shoot, that the thirty-five-year-old is going to shoot the cashier, and the thirty-five-year-old thinking, "Well, I don't want the cashier to follow us, so I am going to shoot him in the leg." Okay? He shoots him in the leg, and unbeknownst to him, later on he dies with a severed artery. He bleeds to death, in other words.

Now, the question -- and you found him guilty of intentionally and knowingly causing the death during a robbery, and now you are faced with answering Question No. 1.

F2069 0288

With that set of facts, how would you answer Question No. 1?

MR. BAX: I am confused as to whether he is talking about the seventeen-year-old or the thirty-five-year-old, and I further object to trying to commit him to a specific fact situation.

THE COURT: Sustained.

Q. (By Mr. Hernandez) All right. Let's go to Question No. 2.

Do you believe or do you think people can change? There you are asked to forecast the future.

A. Well, I believe people can change, yes.

Q. So then you are saying that you wouldn't automatically answer Question No. 2 yes, if you already answered Question No. 1 yes?

A. Not just right off, no.

Q. All right. Now, they may or may not, the State may or may not present evidence to you in the punishment stage. If they do not, hypothetically -- strike that. I think Mr. Bax was fixing to get up.

If they do not, then you would have to answer Question No. 1 and 2 only through or

F2059 0289

based on the evidence you had heard during the guilt-or-innocence stage.

Now, based on this evidence and finding him guilty of intentionally and knowingly causing the death of someone or a police officer, would you automatically answer 1 and 2 yes?

A. Well, I don't know. You have kind of confused me. You said if they didn't come up with evidence. If they didn't have evidence, he wouldn't be convicted to start with.

Q. No. In the second stage, the conviction stage or the punishment stage, they may or may not present evidence to you.

MR. BAX: Judge, we are running into semantics here. The evidence in the case itself, the jury can use that in 1 and 2, and this is like telling the juror how do we get here with no evidence? How do we get by a guilty finding?

THE COURT: All right, sir.

Q. (By Mr. Hernandez) What I am trying to say is: If they did not present additional evidence, you would have to base your decision on 1 and 2 on the facts and evidence already submitted to you during the guilt-or-innocence stage. That is what I am trying to get at.

F2069 0290

Are you with me?

A. Yes. I would have to make up my mind according to what the trial evidence came out as.

Q. Yes.

You wouldn't automatically answer yes if you had already found him guilty of intentionally and knowingly causing the death of a police officer?

A. The only thing I can say is if the man was convicted, if we decided he was guilty and I figured -- if the evidence showed it was deliberate, I would have to say yes, it was deliberate. If it wasn't deliberate, I couldn't say yes, but if it was deliberate, I would have to say yes, I thought it was deliberate, but otherwise, I would have to say no.

Q. I am digging a hole, but I will try to get out of it again, and that is, did you say the word deliberate to you means the word intentional?

A. Deliberate to me means intentional.

Q. Then, would you answer that just because of your definition on that? Would you answer No. 1 yes? That is what I am trying to get at.

A. If I felt like it was deliberate, I would, or intentional, I would have to vote yes.

F2069 0291

Q. So, you would automatically answer Question No. 1 yes?

A. If that is the way it came out.

MR. HERNANDEZ: I want to challenge for cause at this time.

MR. BAX: May I ask a few questions?

EXAMINATION

QUESTIONS BY MR. BAX:

Q. I think we are all confused.

Let's go over your feelings, and whatever your feelings are, that is fine.

No matter what answers you give to Question 1 and Question 2, it has to be based upon the evidence?

A. Right.

Q. When we reach the punishment stage, that punishment evidence can be on the crime alone, and I submit to Question 1, the only evidence you can look to is to the evidence that's been presented to you.

As to Question 2, look to the evidence already heard plus any additional evidence, if available.

F2069 0292

Simply because you have found a person guilty of capital murder, intentionally causing death -- that is the law, I think -- simply because you have found a person guilty of intentionally taking the life does not mean No. 1 is automatically answered yes. If that were the case, if the case were that everyone found guilty of intentionally taking the life of another person, you can see, we wouldn't need to submit this question to a juror. We would only be talking about Question No. 2.

Okay. There are many different cases in which a person can be found guilty of taking a life intentionally and knowingly.

In our hypothetical, you have two people who commit a crime together. Okay? The one person is the triggerperson. He is the one who actually goes in and does the killing. The other person is the getaway driver.

If, under our law of parties, under the facts, the person outside in the getaway car should anticipate someone would shoot and kill somebody, the person outside would be just as guilty of murder as the person inside pulling the trigger, and under our law, he would be

F2069 0293

guilty also of intentionally causing the death of another person, even though he never pulled the trigger.

Do you see what I mean?

A. Yes.

Q. Okay. Under the law, the charge would be the same, intentionally caused the death of Joe Blow during the course of robbery. Okay?

But we know only one of them pulled the trigger and one of them was outside.

Based on that evidence, say you were on a jury trying the guy who was outside and you have found under the law, he acted intentionally because he, under the law of parties, the action of the triggerman are the same as his acts, so you go back and decide with eleven other jurors, "Yes, under the law of parties, he was a party to the robbery and he acted intentionally." Okay?

But when you get to the punishment stage and you are asked this question about the triggerman, you see where you would say he didn't have any conduct that was deliberate in causing the death. He didn't have a reasonable expectation somene would die, and you can see

F2059 0294

where this question would be answered no. Okay?

A. I can see that.

Q. You can see where this question is not automatically answered yes?

You may, in trying the other person, the person who did the shooting, in that case, you are listening to the same evidence, not basing it upon the fact you found him guilty, but basing it on the facts you heard. You, in that case, you may find the person pulled the trigger deliberately, and he may have the question answered yes.

You see where someone may be convicted of acting intentionally in causing the death of someone, but that doesn't automatically mean the answer to the question is yes. You have to look to the evidence to determine the role about what their conduct was and was that conduct deliberate.

The question doesn't stop at was it deliberate. It goes on to a second part: with a reasonable expectation someone would die.

So I think you can see someone could deliberately and intentionally shoot a gun at

someone's leg, but in doing that, you would look at that evidence and say, "Wait a minute. He didn't expect, have a reasonable expectation the person would die. He should be held accountable for it, but he didn't have a reasonable expectation someone would die, even though he intentionally did it."

Can you see where that answer would be no?

A. I can see where you would want to give him a lighter sentence. Is that what the law requires, a life sentence rather than the death penalty?

Q. But are you telling us no matter what the facts are, you would answer the question yes but based on the evidence?

A. It would have to be on the evidence.

Q. Does that make it clearer now?

A. I was a little more confused on the other deal.

Q. I am sure Mr. Hernandez was not trying to confuse you.

But do you understand?

A. I think everybody understands there was an accomplice outside that didn't actually do the shooting, but he would still be a part of it, but he wasn't expected to get as great a

T2069 0296

sentence as this man who did the shooting.

Q. Unless the fact is that the getaway driver, they had planned it ahead of time that while he was in there, he would kill everybody in there, then that would change the facts of the getaway driver.

A. That would change it again.

Q. You see how the facts would change this question and it would not be simply because you found someone guilty?

You may find someone guilty, as the triggerman, or you may find he was the triggerman and didn't have the reasonable expectation someone would die.

You would have to base this on the evidence before you and not prejudge it and say if you found someone guilty, not tell us that, but base it on the evidence.

Am I right or wrong?

A. I would have to look at the evidence. I couldn't --

Q. Okay. You couldn't say right now what you would do just because you found someone guilty, but you would have to look back on the evidence and make that decision?

F2069 029

A. Depending on what it was, yes.

MR. BAX: That is all I have. I believe he is qualified.

EXAMINATION

QUESTIONS BY MR. HERNANDEZ:

Q. Your definition of deliberately and intentionally is basically the same?

A. Like I say, it depends. In other words, I can follow along with his reasoning. You can like shoot a man in the leg. That is deliberate and intentional. You did a crime, but you are not trying to kill a man.

Q. So, the hypothetical Mr. Bax was giving you, let's say hypothetically you have a triggerman and he's found guilty of knowingly and intentionally causing the death of someone, and now you know how deliberately might not become the same as intentionally?

A. Yes. I can see that.

Q. And you could base your decision on the evidence that might be presented to you?

A. Yes. I would have to just look at the evidence more than anything. I mean, like right now, I

F2059 0293

don't know anything about none of it. There is no way I could have a verdict either way.

Q. Is it fair to say you would base your decision on both Question No. 1 and Question No. 2 on the evidence presented to you?

A. Right.

Q. Fair enough.

(Discussion between attorneys.)

Q. (By Mr. Hernandez) Now earlier, you said you heard and read in the paper about this incident involving our client and the --

A. I am sure I read about it, heard about it, but like I say, there's been several instances, and I can't differentiate which one it was. I remember different instances, you know, with police officers.

Q. After the initial occasion where you read it or saw it, did you follow it up because there were repeated articles and newscasts on it, or did you just didn't follow it particularly or specifically?

A. I didn't really follow it up. I will read the headlines and I might glance through part of some story and then go to another story. It's -- I don't know. Most of the time when I read

F2069 0299

the paper, I glance through to see what the headlines are doing and that sort of thing.

Q. So, it would be fair to say you would not be making a decision or have an opinion whatsoever on reading about this case?

A. I don't really follow the paper that much on that sort of thing. Really, the only reason I take the paper is the crossword puzzle. Most of the news you will hear on TV, and I work shift work, and right now, I am supposed to be working graveyard. I don't hear much news when I am working graveyard.

Q. Would it be an inconvenience to you if you were to be selected on the jury?

A. It would right now.

Q. And how is that?

A. Well, I am supposed to sign papers on the house today, and I am supposed to be building a house and moving up the country.

Q. Well, if you were to be selected, I don't think this trial will start until October 4th, and it will probably last five days to a week.

Would that interfere in your working in any way?

A. October the when?

F2069 0300

Q. 4th. In about two weeks.

A. Well, I am supposed to go to Chicago on, I think, about the 20th.

Q. If you were to be selected as a juror in this case, could you keep an open mind throughout the whole trial and base your decision on the facts alone and not on emotion? This case might be an emotional case.

A. Well, I believe I could be fair. That is all I could say.

Q. I am sure that is all we would ask, and I'm sure that is all Mr. Guerra is asking, is for you to be fair.

A. I am not any different than anyone else.

Q. Excuse me a moment, and let me see if Mr. Elizondo --

How do you feel about these people that were incarcerated and later found out they were not guilty?

A. Well, I think it would be a tragic thing to happen to anybody. I wouldn't want to be put in that position. I know anybody that's ever put in an institution and they come back, I don't care if it's a mental institution or penal institution, when they come back, you've

F2069 0301

got a stigma against you, whether you are right, wrong, or otherwise. People never know all the facts, and they guess at most of them before they form their opinion.

Q. I guess it depends on the importance of this case, and based on the evidence that will be presented or might be presented to you and the heavy burden that the State must carry to overcome the presumption of this young man's innocence.

A. Yes, I can see that; the way I feel about it, I feel like the people that commit crimes should be punished. I think if they are innocent, they should be set free.

Q. Thank you. Thank you.

MR. HERNANDEZ: That is all we have.

THE COURT: What says the State?

MR. BAX: May we have one moment, Your Honor?

We accept this juror, Your Honor.

MR. ELIZONDO: We will accept him.

THE COURT: All right, Mr. Brown. You will be the eighth member of this jury, and let me give you a couple of admonishments at this time.

F2069 0302

First of all, this case will generate some publicity, if not between now and the time we get started, certainly at the time we begin evidence. I will caution you now to scrupulously avoid reading, watching, or listening to anything concerning this case. Your verdict must be based upon the evidence you hear in this courtroom and on nothing else, so you will neither read, watch, or listen to anything should anything come on the television or radio or be in the newspapers. Turn it off or fold the paper over or whatever immediately.

Do not gain any information concerning this case outside this courtroom.

As I have told you, we are striving to begin the evidence in this case on or about October 4th, and between now and then, you will be allowed to go about your normal activities, home work or whatever.

As a matter of fact, if you need to leave town between now and then, there is no prohibition against that.

The only thing I ask you to do is keep in touch with us and let us know your whereabouts in case there is a possibility we

F2069 0303

can begin evidence before that time.

THE JUROR: I will tell you there is one thing -- I don't think it would have any bearing, but I am selling this house in Deer Park and I am supposed to sign papers on it today, and I will be moving to Cleveland.

THE COURT: When will the move take place?

THE JUROR: Well, I am trying to get thirty days to stay in the house, but I don't know if I can get it, but moving to just woods, I've got to clear it and put a house on it.

THE COURT: I don't see any problem with that.

Now, I am giving you a sheet of paper that has the court number, my name, and I have written in the name of Scott Gordon. He is the coordinator for this court.

Should you need to leave town or anything of that nature, please give him a call at the number on that sheet of paper and let us know where you are.

I anticipate we will be calling all the jurors we have selected to give them some idea as to exactly when we will begin. We will

F2069 0304

try to give you two to three days' notice when we will begin so you can get your affairs in order.

We have anticipated it will take maybe five or six days of trial time in this case.

Do you have any questions of me at this time?

THE JUROR: I will be working near Deer Park anyway. It's October the 4th?

THE COURT: About two weeks from today is when we anticipate to start the evidence.

THE JUROR: Probably be right there in town.

THE COURT: Like I say, if you do for any reason, or if an emergency arises and you have to leave town to go to a funeral or have a death or something like that, be in contact with Mr. Gordon and tell him where you will be and how long you will be gone so we can keep tabs on the jurors and keep in touch.

THE JUROR: For one day or a longer time than that, we will be in town.

THE COURT: If you are going to be gone all day, I don't see any problem with that,

F2069 0305

but a couple of days, just let us know.

THE JUROR: That will be fine.

THE COURT: With that, you are now excused until we contact you to come back here.

Would you raise your right hand and be sworn as a juror?

(At this time, Mr. Brown was sworn as a juror.)

THE COURT: You are now excused until we contact you.

THE JUROR: Thank you.

(Mr. Brown left the courtroom.)

THE COURT: All right, with regard to the number six juror on the panel today, Jerry Edwin Ross, it is my understand that both sides agree to excuse Mr. Ross by agreement? Is that correct?

MR. BAX: Agreement of the State, Your Honor.

MR. ELIZONDO: Yes, Your Honor.

(At this time court was recessed for the day.)

F2069 0306