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RICARDO GUERRA

VOL XIX

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Vol. XIX

Ana Petty
pp. 3452 - 3517

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CAUSE NO. 359,805

THE STATE OF TEXAS

IN THE DISTRICT COURT

VS.

OF HARRIS COUNTY, TEXAS

RICARDO ALDAPE GUERRA

248TH JUDICIAL DISTRICT

VOLUME XIX
STATEMENT OF FACTS
VOIR DIRE EXAMINATION
CONTINUED
OCTOBER 1, 1982

FILED IN
COURT OF CRIMINAL APPEALS
OCT 12 1983
Thomas Lowe, Clerk

3438

I N D E X

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VOLUME XIX

October 1, 1982

VOIR DIRE EXAMINATION, CONTINUED

NEW JURY PANEL EXAMINED BY THE COURT

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Ana Petty

Examination by the State (Moen)

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VOIR DIRE EXAMINATION, CONTINUED

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1 (At this time a panel of four
2 prospective jurors were seated in the courtroom,
3 after which the following proceedings were had.)

4 THE COURT: As I call your names, please
5 raise your hand.

6 Rosalyn Penrice, Ana Petty, Jewel
7 Compton, Constance Whiteford.

8 Are y'all ready?

9 MR. ELIZONDO: Ready, Your Honor.

10 THE COURT: Good morning, ladies. My
11 name is Henry Oncken. I am the judge of the 248th
12 District Court, and what we are in the process of
13 doing is selecting a jury to try a capital case, and
14 that means that the State is seeking the death
15 penalty as punishment for this particular Defendant.

16 The Defendant is charged with the
17 offense of capital murder. He is Mr. Ricardo
18 Aldape Guerra, seated down at the end of the table
19 in the black and white shirt, and the lady next to
20 him, speaking with him, is Linda Hernandez, who is
21 an interpreter. She is telling him in Spanish
22 everything that we say in English.

23 He is represented by Mr. Candelario
24 Elizondo and by another attorney by the name of
25 Joe Hernandez, who is no kin to Ms. Hernandez and

1 will be here shortly.

2 The Prosecution is represented by Mr.
3 Bob Moen --

4 MR. MOEN: Hi.

5 THE COURT: -- and Mr. Dick Bax.

6 MR. BAX: Good morning.

7 THE COURT: The lady in front of us is
8 Ms. Cindy Layne, and she is a court reporter and
9 she is taking every word we say in this courtroom,
10 so when you get your turn to be in this chair
11 right in front of me here, please remember she must
12 take down everything you say and she cannot record
13 the nod of the head or whatever, so if you will,
14 just respond to the questions, please.

15 I want you to relax and realize you are
16 in a strange setting and not familiar with what is
17 going on, but believe me when I tell you we are
18 not going to try to embarrass you or do anything
19 like that. We need to visit with you concerning
20 your qualifications as a juror in this particular
21 case.

22 Now, during the time I am speaking with
23 you, I need to have you think about how you feel
24 concerning capital punishment; that is, sentencing
25 someone to die for a crime that was committed,

1 because that is the nature of this proceeding.

2 The State will be putting on evidence
3 and seeking, at the close of that evidence, to
4 find the Defendant guilty. Obviously, the Defense
5 will be seeking a not guilty verdict.

6 If the jury convicts this Defendant of
7 the offense of capital murder, Mr. Bax and Mr.
8 Moen will be asking that jury to sentence this
9 Defendant to die, so I need for you to think about
10 how you feel, about that and whether or not you
11 could participate in that particular proceeding.

12 Let me give you a very brief overview of
13 the case. I cannot go into the facts of it, but
14 I can tell you, generally, what it is about.

15 It is alleged that on July the 13th of
16 1982, Mr. Guerra took the life of one James D.
17 Harris, a Houston Police officer, while Officer
18 Harris was in the performance of his duties as a
19 police officer, by shooting him three times in the
20 face.

21 It was also, just about a minute or so
22 or a minute and a half later, that a citizen who
23 had two small children in the car was killed, and
24 then about an hour later, after the Houston Police
25 Department had received information, they went to

1 a location to try to arrest some individuals, and
2 another Houston Police officer was shot five times.

3 He returned the fire of the individual
4 who shot him and killed that individual.

5 Now, with the brief statement of the
6 facts that I have given you, do any of you recognize,
7 or do you know anything about this particular case,
8 heard anything about it on the radio, television,
9 or read it in the newspapers or anything?

10 (Several prospective jurors nodded their
11 heads in assent.)

12 THE COURT: Several of you indicate you
13 have heard something about it. Let me ask you
14 simply: Have you made up your minds concerning
15 the guilt of anyone involved in this case?

16 THE PROSPECTIVE JURORS: No.

17 THE COURT: Would you be able to, if
18 you are chosen as a juror in this case, would you
19 be able to listen and sit and listen to the
20 evidence and base your verdict on what you hear
21 in the courtroom and not what you read or saw in
22 the media?

23 Of course, it is not wrong for you to
24 have read anything about it. It is sort of hard
25 for you to be in the city of Houston and not hear

1 something about the case, but it would be wrong
2 if you formed an opinion as to the guilt of anyone
3 connected with it.

4 Now, the lawyers are going to visit with
5 you in great detail after I finish my remarks to
6 you.

7 I want to tell you generally things that
8 are applicable to all criminal cases and point out
9 a few things that are specific to a capital murder
10 case.

11 First of all, any person charged with a
12 criminal offense is presumed to be innocent until
13 his guilt is established to a legal standard of
14 beyond a reasonable doubt, so as Mr. Guerra sits
15 here today, he is presumed under the law to be
16 innocent, and it is up to the State, since they
17 brought the charges against him, to prove his
18 guilt. It is not up to Mr. Guerra or his attorneys
19 to prove anything to you. They don't have to ask
20 any questions of any witnesses. They don't have
21 to put any testimony on. Mr. Guerra doesn't have
22 to take the witness stand and deny he did this
23 offense. The State has the burden of proof, and
24 if they rest and you are not convinced that Mr.
25 Guerra committed this offense, that is sufficient.

1 They do not need to put on any evidence.

2 The burden of proof, as I have already
3 stated, will stress again, is upon the State. They
4 have that burden of proof to prove him guilty
5 beyond a reasonable doubt.

6 Now, there will be many terms defined
7 for the jury in a written instrument technically
8 called a charge that I will give to the jury at
9 the close of all the evidence, and that charge
10 contains all of the law that is applicable to this
11 particular case. I can't tell you everything that
12 is going to be put in it. I have to listen to the
13 evidence first to see what issues are raised, but
14 there are some things that are in a charge that
15 are standard to every case.

16 One of those is the presumption of
17 innocence that I have told you about, and the
18 terms that are defined will be set out specifically
19 for you, but I will not define for the jury what
20 the term beyond a reasonable doubt means. I can
21 only define those terms that the legislature tells
22 me a meaning for, and they have told me what
23 beyond a reasonable doubt means. To me, it means
24 common sense, and that if you are convinced after
25 hearing all the evidence that you hear that he

1 committed the offense, then you find him guilty.
2 If you are not convinced, you find him not guilty,
3 but it will not be defined for you.

4 The first thing the jury will hear, after
5 we start the case, I will ask the State to present
6 the indictment to the jury. The State will stand
7 up and read an instrument. It is a legal document
8 and it is called an indictment. It is a legal and
9 formal method by which this case gets to trial
10 in this court.

11 I will tell the jury in the charge at
12 the close of the case that that indictment, that
13 legal instrument, is absolutely no evidence of
14 guilt. It is a legal pleading and it's not to be
15 considered as evidence for any reason. It is the
16 same thing as if you were injured in an automobile
17 accident and you filed a lawsuit across the street
18 for damages. You set down in writing what you are
19 seeking to prove and then you would have to go
20 into that courtroom and prove it.. It is the same
21 principle here.

22 The State has brought those charges, and
23 that instrument contains those charges and they
24 have to prove them.

25 Because the State has the burden of

1 proof, they get to go first. They will talk to
2 you first as a juror and they will put on evidence
3 first. They have the right to open and close the
4 arguments, so they get to go first. That is
5 because they have that burden of proof, and for
6 no other reason.

7 The jury, in any criminal case, is on
8 an equal footing with the judge in that case. We
9 have separate but equal functions.

10 The judge -- and in this case, it will
11 be me -- rules upon objections, rules upon the
12 admissibility of the evidence, and gives you the
13 law, but the jury decides the facts. No judge has
14 any -- when there is a jury involved in the case --
15 has any function in deciding facts in a case. That
16 is the jury's function.

17 You have the duty, the power, to believe
18 all of, part of, or anything of what any witness
19 tells you. You sit there and you decide whether
20 you believe it or not. I have nothing to do with
21 that.

22 During the course of the trial, the jury
23 cannot ask questions. You can at this point, if
24 you are up here being examined by these lawyers
25 and have a question you want answered. You are

1 perfectly free to ask that question, but once
2 the jury is chosen and the evidence begins,
3 the jury cannot examine a witness or cross-examine
4 a witness or anything of that nature.

5 Now, a trial, a criminal trial, is
6 divided into two portions. The first portion of
7 the trial is to determine the guilt or innocence
8 of the Defendant charged with that crime, and that
9 is the only issue at the first part of the trial
10 is is he guilty or is he not guilty, and then and
11 only then, then if the jury finds the Defendant
12 guilty, and only if they find him guilty, is there
13 a second part of the trial.

14 Bear in mind there are two separate
15 trials, all involving the same Defendant and the
16 same jury. It is two separate trials actually.

17 First, to determine the guilt or
18 innocence, you hear facts about the event which
19 occurred, and you decide whether or not the
20 Defendant who is charged with that crime committed
21 that crime and caused that event to have occurred.

22 If you find that he did, there is a
23 second phase of the trial and you decide what
24 punishment should be set.

25 If we were trying a murder case as

1 opposed to a capital murder case, the jury would
2 be given a charge on the punishment stage that
3 would tell you that you are to assess the punishment
4 of the Defendant at any term of years not less
5 than five nor more than ninety-nine or life in the
6 penitentiary, and if you chose to do so, you could
7 in addition to any penitentiary time you gave that
8 Defendant, you could give him a fine, so you
9 could go back there and you could say, "Okay. We
10 have heard all the evidence, and we have decided
11 this individual ought to get fifteen years for
12 the crime he's committed, and you can tell me
13 that, and I would sentence him to that."

14 Now, in a capital murder case, it is a
15 little bit different. On the punishment phase of
16 the trial, the jury answers two questions, and if
17 we might turn those two questions around, instead
18 of having them facing the way we have them --

19 Mr. Moen, good morning.

20 Would you turn the board around so they
21 can read the questions, please, sir?

22 The jury in a capital case goes back and
23 considers those two questions in light of all of
24 the evidence that you have heard concerning the
25 case and the Defendant.

1 I will give you just a second to look
2 at those questions.

3 All right. The jury goes back and they
4 either write yes or no to those questions. A yes
5 answer to both of those questions will tell me that
6 you assess the punishment of this Defendant at
7 death.

8 If you come back and answer one of those
9 questions yes and one of those questions no, that
10 will tell me under the law to assess the punishment
11 of the Defendant at life in the penitentiary.
12 Those are the only two possible punishments if the
13 jury finds the Defendant guilty of capital murder:
14 death or life.

15 Are there any questions that you have
16 of me at this point?

17 All right. Normally in another type of
18 case, we bring over a whole bunch of folks,
19 thirty-six or forty people, and they are seated
20 out there on the benches and we talk to all of
21 them at the same time. It takes two or three
22 hours to pick a jury, and we hear the case.

23 We have been at this process now five
24 weeks trying to select a jury in this case. In
25 a capital case, it is done on an individual basis.

1 I bring over -- today, four jurors, and normally,
2 we bring over six, and we go through this little
3 procedure and then bring you out one at a time
4 to visit with you about the situation.

5 These lawyers, as I said earlier, are
6 going to ask you a bunch of questions. I want
7 you to understand they are not meant to be personal.
8 They are not trying to pry into your personal
9 affairs, but we are in the process of a very
10 serious proceeding and they have the right to know
11 how you feel about certain things.

12 They are not going to argue with you about
13 how you feel about anything. If you don't agree
14 with death as a possible punishment for the
15 commission of a crime, please say that.

16 I would ask that you take a position
17 on that and not be wishy-washy concerning your
18 views on capital punishment. You either believe
19 in it or you don't. You can either return a
20 verdict that would result in death or you cannot.

21 If you can't, that is fine, but please
22 -- they can't deal with a maybe or I think so,
23 that type of thing. They must have yes or no
24 answers to that question.

25 All right. Are there any other questions

1 now?

2 All right. I am going to ask that
3 Ms. Penrice come up and have this chair, please,
4 and Ms. Petty, Ms. Compton, and Ms. Whiteford,
5 go to the jury room, please.

6 (There was a discussion before the
7 bench.)

8 THE COURT: All right. Pursuant to a
9 request by the State for a shuffle in this matter,
10 I am going to allow Mr. Moen to choose the order
11 in picking.

12 Ms. Penrice, we have reshuffled, and Ms.
13 Petty will be the first juror to be examined, so
14 bring out Ms. Petty, please.

15 The order is: Ana Petty, Constance
16 Whiteford, Rosalyn Penrice, and Jewel Compton.

17 Just to explain what happened, we had
18 a request to have the panel reshuffled, and so we
19 redrew the names and you came out first.

20 MS. PETTY: Okay.

21 THE COURT: Just have a seat and relax
22 and visit with us a little bit.
23
24
25

1 ANA PETTY,
2 was called as a prospective juror and responded to
3 questions propounded as follows:
4

5 EXAMINATION
6

7 QUESTIONS BY MR. MOEN:

8 Q. Mrs. -- is it Miss or Mrs. Petty?

9 A. Mrs.

10 Q. Mrs. Petty, my name is Bob Moen. I am with the
11 District Attorney's Office here in Houston.

12 Seated behind me is a fellow named
13 Dick Bax, also with the District Attorney's Office,
14 and together, Mr. Bax and myself will be
15 representing the family of J. D. Harris in a case
16 styled the State of Texas versus Ricardo Aldape
17 Guerra.

18 As the Court told you, he is charged
19 with having killed a Houston Police officer back on
20 July 13th in Houston, Texas. The offense is
21 alleged to have taken place at Edgewood and Walker
22 streets, not far from the center of town, not more
23 than five or six miles. It is east as you leave
24 the downtown area.

25 The main thoroughfare, as you leave this

1 intersection, is Harrisburg and Dumble.

2 It is also alleged that out of this
3 occurrence, another man who was with his two-year-
4 old daughter and ten-year-old son was about seventy
5 feet from the scene when Officer Harris was shot,
6 and that the suspect shot him in the head and
7 killed him a few seconds after killing Officer
8 Harris, and then about an hour and a half, I guess,
9 or so later, when the police were looking for the
10 suspects, another suspect shot an officer five
11 times and was subsequently shot to death by the
12 officer. He shot first.

13 Is there anything about my general
14 description of that case which rings a bell in
15 your mind about anything you may have heard?

16 A. I remember hearing about it.

17 Q. Newspaper or on television or maybe both?

18 A. Television or reading.

19 Q. Okay. As the judge said, and it is true, there is
20 nothing wrong with having read or heard about a
21 case. The only reason we ask in the first place
22 is to see if the jurors have formed opinions or
23 conclusions based on what they have read or heard.

24 A. Uh-huh.

25 Q. I take it from your response to the judge you

1 haven't formed an opinion one way or another about
2 whether this man is innocent?

3 A. I haven't read enough to form an opinion.

4 Q. I need to ask you questions for the next twenty
5 or thirty minutes or so, and I guess I should
6 explain to you why.

7 In a capital murder case like this where
8 the only possible punishments a man can receive
9 are a life sentence or the death penalty, we need
10 to make sure how the jurors feel about some of the
11 things we have to ask about, some of the aspects
12 of the law we have to ask about.

13 There are no right or wrong answers.

14 A. Okay.

15 Q. Because you feel one way or another about the
16 death penalty or any aspect of the law we are
17 going to talk about this morning doesn't mean Ms.
18 Petty is any more or less a citizen than anyone
19 else who finds herself or himself in the chair you
20 are seated in this morning.

21 Do you follow me on that?

22 A. Yes.

23 Q. If you become a juror in this case, it will be
24 because you can do what is expected of you without
25 violating any of your personal beliefs, religious

1 convictions, et cetera.

2 We don't make people serve as jurors on
3 a capital murder case. No one is required to do
4 that as a citizen, but the only way we know if
5 people can be jurors on a capital murder case
6 is if they tell us how they feel.

7 Some people tell us, "Mr. Moen, I am
8 opposed to the death penalty, by either my religious
9 beliefs or personal beliefs, and I could probably
10 be a good juror on any other case, but I couldn't
11 be a juror and return a verdict that would result
12 in someone being put to death. I could not do that
13 myself. My personal beliefs or religious beliefs
14 would not let me do that."

15 Other jurors say, "Mr. Moen, I have
16 believed in the death penalty all my life, and I
17 can give the death penalty." That is fine for
18 someone to be either opposed or for the death
19 penalty. That is fine. We are not here to change
20 your mind or debate with you or try to talk you
21 into something, because you are the person who
22 will have to make a choice.

23 Only if Ms. Petty can do it, and not
24 because anyone will demand it of you.

25 Do you follow me on that?

1 A Yes.

2 Q The only thing we ask you is that you give the
3 most honest and frank responses to the questions
4 we ask so we know exactly how you do feel.

5 Now, keeping that in mind, can you tell
6 me what your personal beliefs and opinions are
7 concerning the death penalty? Would they allow
8 Ms. Petty to be a juror on a capital murder case
9 and to return a verdict that would result in
10 someone being put to death, or would your personal
11 beliefs and convictions not allow you to be a
12 juror on such a case?

13 A I think it is not used enough. I think a lot of
14 people go free that shouldn't go free. They get
15 life and they shouldn't get life. They should be
16 put to death.

17 Q I take it from what you are telling me, you are in
18 favor of the death penalty for people who commit
19 certain crimes?

20 A Yes.

21 Q Is that pretty much the way you have felt all your
22 life?

23 A Definitely.

24 Q Is that the result of either your -- well, the
25 things that you have read or discussions you have

1 had with friends or things you might have heard
2 on television, or is that pretty much the way your
3 mother and father felt when they raised you as
4 well?

5 A. I think my only personal opinion over the years
6 has been reading about different crimes committed
7 and sentences they got, and I didn't think some
8 were fair. Some were not right.

9 Q. Do you feel like some of these people who committed
10 some of these crimes where they take another's
11 life, it is fair they be put to death themselves?

12 A. I don't think anyone has the right to take anyone's
13 life.

14 Q. Let me explain to you what type of crimes in our
15 state a person can be punished by the death penalty
16 for. Okay?

17 Our legislature has said that if a man
18 or woman takes a person's life while they are
19 breaking into their home --

20 A. Uh-huh.

21 Q. -- to break in and steal from another man's home,
22 to burglarize -- that is what that offense is --
23 to break into a man's home, while you are doing
24 that, if you take anything from a person's house
25 while murdering, that is capital murder.

1 For a rapist to abduct a woman, to rape
2 her and take her life; for the kidnapper to kill
3 a kidnap victim; for a robber to kill his robbery
4 victim; for an arsonist to put someone to death,
5 those are capital murders, murders that take place
6 during the course of those crimes.

7 The legislature has also said if someone
8 has killed for money --

9 A. Uh-huh.

10 Q. -- or if a police officer or fireman is killed,
11 someone sets a fire and the fireman arrives to put
12 the fire out and his idea of having a good time
13 is to wait in the bushes and shoot one of the
14 firemen, kill one of the firemen, that is his idea
15 of fun for whatever reason, that is capital murder;
16 and also, if a convict, someone who is confined
17 in one of our penal institutions, Texas Department
18 of Corrections, if he kills an employee of the
19 penal institution, someone we ask to work there,
20 whether it be medical personnel, a librarian, let's
21 say, or a guard, anyone we ask to work at the
22 penal institution to keep things running for us,
23 if a convict kills one of those individuals, that
24 is capital murder, or if a convict kills anyone
25 during the course of an escape, either attempting

1 to escape or after he escapes if he causes a death,
2 that is capital murder as well.

3 Do those strike you, Ms. Petty, as being
4 the type of crimes where the death penalty would
5 be the proper type of punishment for someone who
6 did one of those murders?

7 A. Yes. Uh-huh.

8 Q. All other murders fall within the other range of
9 punishment.

10 For someone just to take another person's
11 life -- if I were to walk up to Cindy Layne, our
12 court reporter, and for no reason whatsoever, with
13 a loaded pistol, empty my pistol into her body
14 until she is dead, horrible example, that is an
15 example of murder, but it is not capital murder.

16 If I were to couple that murder with
17 attempting to rob her, stealing her purse, or say,
18 "Cindy, give me your purse," and I go and take my
19 pistol and kill her, that would be capital murder,
20 but just to intentionally take another person's
21 life is not capital murder. It is murder, and for
22 the offense of murder, the range of punishment is
23 five to ninety-nine years or life.

24 Do you follow me on the difference
25 between murder and capital murder?

1 A Yes.

2 Q Okay. Now, the way that someone receives the
3 death penalty or the life sentence, which are the
4 only two possible punishments you can get when you
5 are convicted of capital murder, is by the jury
6 answering these two questions that appear over here
7 to my left.

8 A Uh-huh.

9 Q If the jury answers both questions yes, the man
10 on trial receives the death penalty.

11 If the jury answers one of the questions
12 no, the man on trial receives a life sentence
13 rather than the death penalty.

14 Two yes answers, he receives the death
15 penalty; one no answer and he receives the life
16 sentence rather than the death penalty.

17 Do you follow me on the difference, what
18 happens if the questions are answered either yes
19 or no?

20 A Yes. Uh-huh.

21 Q Before the jurors can answer any question yes,
22 all twelve jurors have to unanimously agree that
23 is what their answer should be, so twelve jurors
24 have to agree to answer a question yes, but only
25 ten jurors have to agree to answer either one of

1 the questions no. There is a slight distinction
2 there: ten jurors in agreement for a no answer
3 and twelve jurors in agreement for a yes answer.

4 Do you follow me on that difference?

5 A. Yes, sir.

6 Q. If you have any questions at any time, I am going
7 to be doing most of the talking for the next twenty-
8 five or thirty minutes, and if you have any
9 questions at all, though, don't hesitate to stop
10 me and ask me. Okay?

11 A. Uh-huh.

12 Q. So we can clear up any questions you might have.

13 After you get selected on the jury, if
14 you do, we can't talk to you again. The law
15 forbids us to talk. They would say, "She struck
16 up a friendship with Bob Moen, one of the lawyers
17 on the case," so we can't answer any questions
18 later. So if you have any now, don't hesitate to
19 ask.

20 A. I have one question. When you gave an example of
21 shooting her, what is the difference? She is dead
22 either way, whether it is capital murder or murder.

23 Q. You are right, but, you see, capital murder is
24 either to kill under one of the circumstances I
25 have mentioned, as a convict, or to kill a police

1 officer or fireman, or capital murder is to take
2 a life during the course of one of those five
3 crimes we have talked about.

4 A. More of a deliberate crime?

5 Q. Well, it's actually -- capital murder is made up
6 of two elements, a murder taking place during the
7 course of the commission of another crime.

8 A. I see. I understand.

9 Q. If someone just takes another human being's life,
10 it is murder but not capital murder. If someone
11 takes another human being's life and takes that
12 life during the course of committing a robbery or
13 a burglary or a rape, say a man goes into a
14 convenience store and he tells the lady, "Give me
15 all the money," the lady who is working as the
16 cashier, and she does, she is frightened as anyone
17 would be, and turns the money over to him, and
18 after he gets the money, he kills her, thinks she's
19 the only witness, so he fires twice into her body
20 and she dies and unbeknownst to him the police are
21 waiting outside because she had stepped on some
22 type of an alarm and they catch him, that is
23 murder that takes place during the course of a
24 robbery. Therefore, it is not murder but
25 capital murder.

1 A Okay. I understand the difference now.

2 Q Just to commit murder, that is a separate offense
3 all by itself.

4 A Okay.

5 Q Now, the way that -- of course, the difference is
6 if you commit the offense of murder, the punishment
7 range is five years to ninety-nine years or a
8 life sentence, the possibility of a life sentence
9 in the Texas Department of Corrections, but if you
10 are found guilty of capital murder, you can only
11 receive a life sentence or the death penalty. Those
12 are the only two possible punishments a man can
13 receive for having killed someone in a capital
14 murder case.

15 Now, the way those punishments are
16 assessed is not by the jury going back and saying
17 should we give this man we found guilty of capital
18 murder a life sentence or the death penalty and
19 then discussing it among themselves.

20 Instead, what the jury does is they
21 listen to all the evidence and they decide what
22 their answers to these two questions should be,
23 and then by their answers to these questions, the
24 Defendant will either receive the life sentence
25 or the death penalty.

1 Do you follow me on how that works?

2 A. Yes.

3 Q. At the very first stage of the trial, the jurors
4 come out and they get in their chairs and all
5 they hear is evidence about whether or not the man
6 is guilty or not guilty. That is the first phase
7 of the trial. You will hear evidence about whether
8 or not he did what he is accused of, and then you
9 will go back, and along with the other jurors, you
10 will make the first decision you have to make in
11 the case: Was the man guilty or not guilty.

12 If you decide, along with the other
13 jurors, that the man on trial was guilty, you will
14 tell the judge that and then we will start into
15 the second phase of the trial.

16 Now, in the second phase of the trial,
17 in addition to all the evidence you have already
18 heard, you can hear additional evidence to help
19 you decide what your answers to these questions
20 should be.

21 You see, at the second phase of the
22 trial, you can learn about the man on trial. Has
23 he been convicted of any crimes in his past; has
24 he committed any other crimes of violence?

25 You see, only at the second phase of

1 the trial can you learn about that type of
2 information. Then you take everything that you
3 have heard and you go back to the jury room and
4 you decide what your answers to these questions
5 should be.

6 A. I see.

7 Q. And then, of course, as I mentioned earlier, if
8 the questions are answered yes, the man will
9 receive the death penalty. If either one of the
10 questions is answered no, he will receive the
11 life sentence rather than the death penalty.

12 Okay. Have you had a chance to go over
13 these questions, you know, to read them to
14 yourself?

15 A. Yes.

16 Q. Okay. Let me direct your attention to this
17 first question here, and I want to go over this
18 first question with you.

19 The first question asks you to make a
20 determination about the conduct of the man on
21 trial that you, as a juror, would have found guilty
22 of capital murder.

23 You see, these questions only come into
24 play if the jury finds someone guilty. Then they
25 will come out and take their chairs and decide

1 what his punishment ought to be, but only after
2 a guilty verdict is returned, the jury decides
3 about the conduct of a man on trial: Was the
4 conduct of the man on trial that caused the death
5 of the deceased, was it deliberately done -- it is
6 a two-part question -- and was it done with a
7 reasonable expectation the deceased would die?

8 Let me give you a common sense example
9 of how that question applies in a hypothetical
10 case, in a make-believe case.

11 We have already talked about the
12 situation where the man goes into the convenience
13 store and confronts the cashier, takes the money
14 and kills her and then he is caught by the police
15 as he runs outside. That man has committed murder
16 during the course of a robbery. Therefore, he has
17 committed, not just murder and robbery, but he
18 has committed capital murder.

19 After the jury finds the man guilty,
20 they would then have to decide what their answers
21 to these questions should be.

22 Now, the first question would ask them:
23 Was the conduct of that man that caused the death
24 of the cashier, the firing of the bullets from his
25 gun into her body, was that deliberate conduct, and

1 is it reasonable to expect that when you fire a
2 loaded gun into someone's chest and head area,
3 that that person is going to die from being shot
4 with a bullet in the head or chest? Is that
5 reasonable to expect that someone, a human being,
6 will die from being shot in the head with a loaded
7 gun?

8 A. Yes.

9 Q. Do you see how that question is a kind of common
10 sense question based on what you have heard during
11 the course of the trial?

12 You make a determination about what did
13 the man do; were his actions that caused the death
14 of the deceased, were they deliberate, on purpose,
15 if you would. Did he mean it; was it intentional?

16 A. Uh-huh.

17 Q. And were they done with the reasonable expectation
18 the deceased would die?

19 Do you see how this question is pretty
20 much a common sense question based on what you
21 have heard surrounding the facts of the case? Do
22 you feel it is the type of question you could
23 answer either yes or no depending upon the evidence
24 you would hear?

A. I think so.

1 Q Okay. Do you have any questions of me about
2 Question 1? Is there anything in there confusing
3 to you at all that we can talk to you about or
4 clear up now?

5 A. No.

6 Q Question 2, let me get out of your way so you can
7 take a look at that question. That is a little
8 different. Question 2 would ask you to make a
9 determination about the person on trial.

10 Question 2 asks you about his conduct.
11 was his conduct deliberate.

12 A. Uh-huh.

13 Q Question 2 asks you what kind of person is it. Is
14 he the type of person where there is a probability
15 that he would commit criminal acts of violence that
16 would constitute a continuing threat to society?
17 Is there a probability he would commit those types
18 of acts, criminal acts of violence, and would
19 those acts constitute a threat to society, you and
20 me and other people in society.

21 That is what society means. You will have
22 to use your own definition for the word probability
23 and for the word society. Okay?

24 The legislature drew these questions up,
25 and they didn't give us definitions we can give to

1 you. I want to point that out to you now.

2 Later on, if you were deliberating on
3 these questions and were to ask the judge, "Judge,
4 can you tell us what probability means, or what
5 society means," the judge would just have to tell
6 you he couldn't answer the question, because you
7 will have to use, along with the other jurors,
8 your definitions of those words. Okay?

9 A. All right.

10 Q. But the second question asks you to make a
11 determination about the person on trial based on
12 everything you have heard about him, any other
13 crimes he may have committed, the part that he
14 played in the death of the human being in this
15 case he has been found guilty of. What does that
16 tell you about the type of person he is? Is there
17 a probability he would commit criminal acts of
18 violence that would constitute a continuing threat
19 to society?

20 Before you could answer the second
21 question yes, you don't have to believe there is
22 a certainty the Defendant would do anything, and
23 I think you realize why. No person, or the only
24 person, I should say, I know of in the entire
25 world that can tell us what any person will

1 certainly do in the future is God Almighty himself,
2 and he won't be called as a witness on this case,
3 and you, as a juror, aren't required to put
4 yourself in the position of playing God.

5 You are asked to make the best judgment
6 decision you can about what kind of person that
7 you have found guilty of the offense of capital
8 murder, what kind of person is he?

9 Criminal acts of violence is a phrase
10 that includes all the criminal acts of violence,
11 whatever they may be, whether they be damage to
12 property, breaking into someone's home, rapes,
13 robberies, kidnappings, murders, assaults, or any
14 type of criminal act of violence, theft of a
15 person, anything we can think of. Is there a
16 probability he, the Defendant, would engage in
17 those types of acts and would those acts
18 constitute a continuing threat to society.

19 I hope I have managed to explain both
20 questions to you, but do you have any question
21 of me about either Question No. 1 or Question
22 No. 2?

23 A. No, I don't think so.

24 Q. Okay. Do you feel like those are -- or Question
25 No. 2 is a question you could answer, depending

1 upon the evidence you would hear in the case?

2 A. I could answer that.

3 Q. Not whether your answer would be yes or no; that
4 is for you to decide after you have heard the
5 evidence, but do you feel like that is the type
6 of question Ms. Petty would be able to answer,
7 whether her answer would be yes or no, depending
8 upon the evidence you would hear at the trial?

9 A. Yes, I do.

10 Q. The only thing the judge will tell you now when
11 you are deliberating on those questions is that
12 you are not to consider how long the Defendant
13 would have to serve in the penitentiary if the
14 punishment assessed by the jury was the life
15 sentence rather than the death penalty.

16 The judge will tell you that how long
17 the man would have to serve is within the
18 exclusive jurisdiction of the Board of Pardons and
19 Paroles, and jurors are not to discuss that.

20 Do you follow me on that?

21 A. Yes, sir.

22 Q. Let me talk to you about some of the obligations
23 that you have as a juror on a case like this. The
24 judge touched on them briefly, but I want to go
25 over them again with you.

1 I guess I should ask you: Have you been
2 a juror on a criminal case before?

3 A. No.

4 Q. Let me spend more time than I would with someone
5 whose just gotten off of jury service a few months
6 ago.

7 We have the presumption of innocence.
8 The Defendant is presumed to be innocent in this
9 case. Now, that is a legal presumption, and I
10 think you realize from your own common sense, that
11 doesn't mean the Defendant is not guilty. I think
12 you realize someone caught committing a crime is
13 just as guilty the day he is caught as he is the
14 day he is called to answer to a jury for having
15 done this crime, but all the law says is, "Ms.
16 Petty, you don't know what happened on July 13th;
17 you weren't there, and were not a witness -- if
18 you were, you couldn't be on the jury anyway --
19 but you were not there; you don't know what
20 happened; and you should base your decision on
21 what you hear from the witness stand and don't go
22 into the proceedings believing the person is guilty
23 of the crime, but wait until you hear the
24 evidence and you decide what happened on July
25 13th."

1 Do you feel you are the type of person
2 who could do that?

3 A. I think so.

4 Q. Now, the judge will tell you in the event the
5 Defendant doesn't testify -- now, I anticipate
6 the Defendant will testify in this trial. I
7 anticipate he is going to deny he did this crime,
8 but I am talking in hypothetical terms.

9 In the event the Defendant does not
10 testify, the judge will charge you that where a
11 Defendant does not testify at his criminal trial,
12 the jurors are not to consider a Defendant's
13 failure to testify as any evidence of his guilt.
14 In other words, jurors don't base their verdict
15 on silence. They base it on what they have heard
16 from the witness stand.

17 Now, you, as a juror, might want to hear
18 from the Defendant. That is a natural enough
19 reaction.

20 I see you are a mother and you have a
21 child, and I am sure when your child comes home
22 and tells you, "Mommy, Johnny jumped on me," you
23 are the type of person who wants to get both
24 sides of the story, and whether you are involved
25 in business or family life, you would want to get

1 as much input as you can.

2 But, unfortunately, in a criminal trial,
3 the Defendant doesn't have to testify unless he
4 wants to. He can, but he can also remain silent,
5 and if he is silent, the judge will say, "Base
6 your verdict on what you have heard and don't base
7 your verdict on whether you didn't hear from him."

8 Do you feel you can base your verdict
9 on what the witnesses tell you rather than what
10 you hear from the Defendant?

11 Now, there is nothing wrong with wanting
12 to hear from him, nothing wrong with wanting to
13 know why he didn't testify, but you are not to
14 find someone guilty or innocent because of their
15 silence. You should base your verdict on what
16 you have heard if you feel you could do that.

17 Do you feel you are the type of person
18 who could do that?

19 A. I think I could if I had enough facts.

20 Q. That is up to the Defendant. He could get on the
21 stand if he wants. That is up to him. He doesn't
22 have to. That is up to him, too. If he decides
23 at a trial, even where he is accused of a serious
24 crime like capital murder, or whether it be any
25 crime, rape or kidnapping or any serious crime we

1 can think of, that is strictly up to the Defendant.
2 If he wants to get on the stand and tell the jury
3 why they should find him not guilty, he can, but
4 if he prefers to remain silent rather than get
5 on the stand during a trial, he can do that. That
6 is up to him.

7 Now, the judge will tell you that the
8 Grand Jury indictment -- and I don't know whether
9 you know what an indictment is or not -- it is not
10 necessary that you do, but it is just a piece of
11 paper that allows us to start this trial, and he
12 will tell you you are not to consider that piece
13 of paper as evidence of anything. You will not have
14 a chance to look at it. That is the way we get
15 started.

16 He will tell you not to consider the
17 Grand Jury indictment as evidence of anything.

18 Do you feel like you could do that?

19 A. Yes, I do.

20 Q. Now, in a criminal case, the burden of proof --
21 and that means -- see, in any criminal trial --
22 I guess before you could start any type of --
23 whether it be a football game or baseball game,
24 someone else has got to kick the baseball (sic)
25 first. Someone else has got to pitch.

1 The same thing applies in a criminal
2 trial. One side has to go first. One side has
3 the burden of getting started and proving what is
4 alleged, and that burden is with Mr. Bax and myself.

5 We have the burden of proving to you and
6 to the jury that this man is guilty of the facts,
7 allegedly killing a police officer on July 13th of
8 this year. We have that burden.

9 So you don't think a trial is a closed
10 proceeding, I will tell you the Defense can call
11 whatever witnesses they want. It doesn't cost them
12 money. They just go to that lady, the clerk in
13 our court, and tell her they want a witness, make
14 a written request for the witness, and she will
15 forward that request to the Sheriff's Department
16 and they will mail that person a subpoena, and if
17 that person doesn't come, the Sheriff will go and
18 pick him up and bring him down. A trial is a wide-
19 open proceeding. Both sides have the opportunity
20 to prove or disprove what they want.

21 But only one side has the burden of
22 proof, the burden of doing it, and that is Mr.
23 Bax and myself. Before you could say by your
24 verdict in this case or any other case that the
25 man was guilty of the crime charged, you would

1 have to believe Mr. Bax and I had proven it to you
2 beyond a reasonable doubt. That is the legal
3 test. There is no definition for that phrase,
4 but that is what the phrase is, beyond a reasonable
5 doubt.

6 So, before you could say guilty, you
7 would have to believe beyond a reasonable doubt
8 that it has been proven to you by the evidence, and
9 before you could answer either one of the questions
10 yes, you would have to believe beyond a reasonable
11 doubt Mr. Bax and I have proven that to you as
12 well. Okay?

13 Do you follow me on how that works?

14 A. Yes.

15 Q. So oftentimes we hear the phrase on the lawyer
16 shows, we hear "beyond all doubt," or "shadow of
17 a doubt." I know when I grew up as a kid, my
18 parents hardly missed an episode of Perry Mason,
19 and I wish I had a nickel for every time Mr.
20 Burger said Mr. Mason had not proved his case
21 beyond a doubt or beyond any doubt, and it worked
22 perfect for Perry. It was a perfect phrase on
23 television.

24 But here in our courts, we don't ask
25 them to believe beyond all doubt or a shadow of

1 a doubt. We don't ask people who have based their
2 opinion, based it on what they have heard or read
3 about a crime to be jurors. We don't ask people
4 to believe beyond all doubt. We don't ask witnesses
5 who become jurors to believe beyond any doubt or
6 a shadow of a doubt.

7 We ask people to listen to what happened,
8 listen to witnesses who saw it take place, listen
9 as they tell you what happened, and if you believe
10 them, you have to believe it beyond a reasonable
11 doubt, not any doubt or all doubt, and that applies
12 to those Questions 1 and 2 as well.

13 Do you have any questions so far on
14 anything?

15 A. No.

16 Q. Have I managed to confuse you on anything?

17 A. Not so far.

18 Q. Give me a few more minutes.

19 That is what you do as a juror in a
20 criminal case. You have the ability to sit here
21 as a juror and listen to people who will sit in
22 the same chair you are in now if you are a juror
23 on the case. Witnesses will sit in the same seat
24 you are in, take an oath like you did this morning
25 to answer all the questions truthfully. Witnesses

1 will basically take the same oath, that they will
2 swear to God to tell the truth before they testify.

3 Jurors decide, however, in any criminal
4 case how much of a witness' testimony they are
5 going to believe, how much of a witness' testimony
6 they are going to disbelieve, if any, even though
7 the witness is under oath and has sworn to God
8 to tell the truth.

9 It kind of sounds crazy, doesn't it,
10 that you are going to disbelieve something a person
11 might have told you even though he was under oath
12 and had sworn to tell the truth?

13 I think Ms. Petty knows from her common
14 sense, like all of us do, we don't live in a
15 perfect world. We don't live in a world where
16 we can believe everything everyone tells us.

17 Not all people who live in this world
18 are, unfortunately, people who can tell the truth,
19 even though they have sworn to God they will do
20 that.

21 That is why jurors have to decide at
22 a criminal trial how much of a witness' testimony
23 they are going to believe, how much they are going
24 to disbelieve, and they reach a decision.

25 You can ask yourselves questions like

1 what bias, motive, or prejudice does that witness
2 have for testifying the way he is or she is? What
3 do they have to gain for testifying they way they
4 are?

5 Those are the questions you can run over
6 in your mind when listening to a witness testify
7 to decide how much of a witness' testimony you are
8 going to believe or disbelieve, and one of the jobs
9 or important jobs of jurors is to resolve conflicts
10 in testimony, conflicts such as where one person
11 is saying someone did something and another person
12 is saying they did not, the Defendant denying he
13 committed the crime and witnesses saying that is
14 the person who did it or perhaps a family member
15 saying he couldn't have. He was over at our family
16 barbecue, alibi defense.

17 Those are the type of decisions jurors
18 make every day on cases down here at the court-
19 house. They listen to both sides of any story and
20 decide who they are going to believe or disbelieve
21 and reach their decision based on their feelings
22 about the testimony. Okay?

23 Now, the only thing the judge will
24 tell you in that regard is that you are not to
25 give a witness more belief or less belief just

1 because of a witness' job.

2 You see, someone who is a police officer
3 or a fireman or a lawyer or a doctor or the
4 favorite priest or minister at our church that we
5 might attend, just because of a person's job, they
6 are not entitled to any more or less belief than
7 anyone else is solely because of their job.

8 Now, that is before a person testifies.
9 You see, if I were to tell you, "Ms. Petty, we
10 are going to have four witnesses testify in this
11 case, two doctors, a lawyer, and a homemaker,"
12 the law would tell you in that regard that before
13 you hear any witness' testimony, you are not to
14 give a witness any more or less belief just because
15 of a witness' job. You wait until you hear the
16 witness testify and if their job enters into their
17 testimony, then it is perfectly all right for you
18 to consider their job, like a doctor testifying
19 about medical injuries, a police officer with
20 twenty-two years of experience testifying about
21 what his investigation told him. Then it would be
22 nuts for you not to consider their job, but that
23 is when a witness testifies. I am talking about
24 before they testify.

25 Do you follow me on what the judge

1 tells you in that regard?

2 A. Yes, sir.

3 Q. I want to talk to you about one final aspect of
4 the law, and that is a term called -- well, rather
5 than tell you what the term is, it wouldn't make
6 any sense anyway, we talked about the range of
7 punishment for murder.

8 The only reason I mention that in the
9 first place is murder is a portion of the offense
10 of capital murder.

11 You see, someone could be charged with
12 the offense of capital murder and yet the jury
13 could find the person not guilty of capital murder
14 but guilty of the offense of murder instead, and
15 let me give you an example of how that would
16 occur in a hypothetical, make-believe case.

17 Take the case we have already talked
18 about with a cashier shot by a robber at the
19 convenience store, and let's change the facts
20 around a little bit. Let's say there were a
21 couple of witnesses in the convenience store rather
22 than just the robber and cashier. Let's say there
23 were a couple of witnesses present and these
24 witnesses thought that the man robbed the cashier.

25 Now, they never saw her hand any money

1 to him, but they just thought, "Why would that man
2 come into a convenience store and kill a cashier
3 if he wasn't stealing her money?" They thought it
4 was a robbery case, robbery-murder, and he got
5 indicted for capital murder.

6 Let's say the jury heard what really
7 happened, it wasn't a robbery; yes, he killed her,
8 but the reason he did it was not to steal money,
9 but because he had been living with her a couple
10 of years and had been having a violent argument
11 about her leaving him to go with another fellow,
12 and for the last two weeks, they had been really
13 arguing, and he has a violent temper, and let's
14 say they were arguing and he followed her to work
15 and started the argument again and she told him
16 to leave, get out of my life, and being the jealous,
17 angry person he is, he brought the pistol out and
18 shot her. That is not capital murder, but it
19 certainly is murder.

20 You see, the jury in that case should
21 probably say by their verdict that it is not
22 capital murder, that is, a murder that took place
23 during the course of a robbery, but he is guilty
24 of murder.

A. Yes.

1 Q You see where in a case where the Defendant might
2 be charged with capital murder, the verdict might
3 be murder? That depends on the evidence the jury
4 hears.

5 The range of punishment for murder is
6 all the way from five years as a minimum to ninety-
7 nine years or life as a maximum.

8 A I have a question.

9 Q Sure.

10 A In the case, you said the woman was just murdered.
11 Do these two questions apply at all?

12 Q They do not. They go back then and discuss among
13 themselves what term of years the man receives.
14 They decide if he should receive anywhere from five
15 years all the way up to ninety-nine years or life.

16 The only time these two questions come
17 into play is on a capital murder case.

18 A All right.

19 Q So, if the jury finds someone guilty of murder,
20 they go back and the judge will tell them the range
21 for murder is five to ninety-nine years or life.
22 The death penalty does not apply, and, ladies
23 and gentlemen of the jury, decide among yourselves
24 what is the punishment for this man you find guilty
25 of murder. It is five to ninety-nine years or

1 life.

2 A I see.

3 Q Now, in addition, I want to hit you with one more
4 thing.

5 Have you ever heard the phrase "probation"?
6 Have you ever read it in the paper or talked about
7 it with your friends at the courthouse, that
8 somebody got probation, or read something in the
9 paper? Are you a little familiar with that term?

10 A Yes.

11 Q Let me tell you how it applies in a felony case.
12 You see, anyone convicted of a crime, if he can
13 prove he has never before been convicted of a
14 felony in the state of Texas or any other state
15 of the United States or a federal court of the
16 United States, and if he can prove he has never
17 been given probation for any type of felony in
18 Texas, or any state of the United States, or any
19 federal court of the United States, then he can
20 ask a jury to give him probation, no matter how
21 bad the crime is he may have committed. He can
22 ask a jury for probation.

23 The jury can laugh in his face and tell
24 him, "No, we are not going to give it to you," or
25 the jury can discuss among themselves and decide

1 if it is a proper case for probation, but here is
2 how probation comes into play. Before the jury
3 can ever consider giving someone probation, they
4 have to, first of all, all twelve jurors have to
5 unanimously agree that the proper punishment for
6 the crime they found this man guilty of, whatever
7 it was, he should receive no more than ten years
8 in the penitentiary. They have to unanimously agree,
9 the jurors do, that the range of punishment should
10 be ten years or less.

11 You see, if the jurors hear a case where
12 a man has committed a particularly horrible crime
13 and they decide he deserved to spend thirty or
14 forty years in the penitentiary, well, the question
15 of probation never arises.

16 If the jury feels a man should go to the
17 penitentiary for only ten years, they can consider
18 probation. It is only where the jury feels it
19 is a proper case for ten years or less; then the
20 jury can discuss and consider among themselves
21 whether or not they are going to recommend that
22 the man receive probation.

23 You will ask yourselves: Is this a
24 proper case for probation, and discuss it with
25 the other jurors. Is this the type of case for

1 what happened in the case where the man deserves
2 probation.

3 Say a seventeen-year-old joyrider takes
4 a car, parks it at his buddy's, takes it without
5 permission. He would have a right to ask for
6 probation. Anyone who is a first offender and
7 can prove he is a first offender has the right to
8 ask for probation, and a jury decides is this a
9 right case or not where we can consider recommending
10 probation.

11 Of course, if the jury recommends it,
12 he doesn't go to the penitentiary. He is released
13 by the Court, but he is released under conditions
14 imposed by the Court.

15 He's got to report to his probation
16 officer down the street once a month; work
17 faithfully at suitable employment; support his
18 dependents; remain at a specific address in
19 Harris County, Texas; if you move, tell your
20 probation officer so he will know where you are
21 going to; if you are working someplace, let your
22 probation officer know so he can keep tabs on it;
23 avoid places and persons of harmful character;
24 avoid injurious and vicious habits such as the
25 use of narcotics or habit-forming drugs, and things

1 like that.

2 Those are the conditions of probation.

3 Now, even if the crime is a murder case,
4 the Defendant has a right to ask the jury for
5 probation. The jury doesn't have to give it,
6 but the Defendant can ask, and if the jury decides
7 that even though they have found the man guilty of
8 murder, that it is a proper case for probation,
9 the jury can recommend it, even though the crime
10 is a murder case.

11 Now, the reason I took so long to
12 explain that to you is I want to ask you this:
13 In a proper case, if you were a juror, speaking
14 of make-believe now, and had found someone guilty
15 of the offense of murder and you felt like it was
16 a proper case for probation, would you be able to
17 recommend probation or consider recommending
18 probation even though you had found someone
19 guilty of the offense of murder?

20 A. I think it would depend on the case.

21 Q. I was going to give you examples of cases where
22 you might consider probation even though someone
23 committed murder. That is all we ask a juror to
24 do, to keep an open mind to that, and you hear the
25 evidence and decide whether it is a proper case.

1 If you believe it is, don't be ashamed
2 to say it is. If not, don't be ashamed to say it
3 is not.

4 A. Uh-huh.

5 Q. Any questions so far?

6 A. No.

7 Q. I anticipate that the evidence in the case will
8 show that the Defendant is, in fact, an illegal
9 alien, that he is not lawfully here in this
10 country.

11 The only thing I ask you to do in that
12 regard, if you can -- if you can't, I understand.
13 That is fine, too.

14 The only thing I ask you to do in that
15 regard, you should not find him guilty or not
16 guilty because he is an illegal alien.

17 Do you feel like you could do that?

18 A. I think so.

19 Q. Base your verdict on the facts and don't find him
20 guilty or not guilty just because he is an illegal
21 alien?

22 A. Yes.

23 Q. Okay. Let me ask you some personal questions here
24 about your information sheet. Okay?

25 You worked for four years at the County

1 Clerk's Office here?

2 A Yes, sir.

3 Q You are a little bit familiar with how the criminal
4 justice system works?

5 A A little bit.

6 Q Criminal or civil side?

7 A No, I worked here in this building when the County
8 Clerk's Office was here.

9 Q Okay. I see here that you have a little bit
10 of a problem with diabetes, but let me explain,
11 and you tell me how that might affect your jury
12 service.

13 Let me tell you how we usually work.
14 We generally start at 9:00 o'clock in the morning,
15 and work until around 5:00, and break for an hour
16 to an hour and a half for lunch, 12:00 to generally
17 1:30. It depends upon what the judge decides to
18 do. He may decide 12:00 to 1:00 is better than
19 12:00 to 1:30, but usually it is 12:00 to 1:30,
20 and we start back and work until 5:00 and not much
21 after that. Generally, it is not much after 6:00
22 unless there is some special need for it, and then
23 we adjourn until 9:00 or 9:30 the next morning.

24 Do you feel that is the type of schedule
25 you could get along with?

1 A. Something that dragged on from 8:00 until late at
2 night, I couldn't do it.

3 Q. You will be given an opportunity, if the jury has
4 to be kept together for a reason, they will go
5 together at the county's expense. The jury (sic)
6 will take you to get something to eat, get Cokes,
7 et cetera.

8 A. I wouldn't have a problem with that.

9 Q. Let me ask you about your aunt. She was robbed
10 twice, both in 1970 and 1980?

11 A. Yes, sir.

12 Q. Where was she when she got robbed?

13 A. In her apartment when she got robbed.

14 Q. In her apartment?

15 That is a burglary.

16 A. I am sorry.

17 Q. There is no reason to be sorry.

18 Her house got broken into a couple of
19 times. Did they ever find the people who did
20 that?

21 A. No.

22 Q. Did she ever manage to get her property back?

23 A. No.

24 Q. Let me ask you about your cousin. How was he
25 killed in '73?

1 A Stabbed.

2 Q Where did that take place?

3 A In a bar somewhere here in town.

4 Q Do you know anything about the facts?

5 A Just a little I heard. All I know, they got in
6 a fight, and supposedly, it was self-defense.

7 Q What happened to the man who killed your cousin?

8 A He was apprehended.

9 Q Was there a jury trial?

10 A Yes.

11 Q Do you remember the lawyer who represented him?

12 A No.

13 Q Was this a close cousin of yours, or kind of a
14 distant cousin?

15 A No, a close cousin. He lived with us five years
16 after his mother died.

17 Q Did you ever come and watch any of the trial?

18 A No. His mother was dead at the time.

19 Q Did you come and watch the trial at the time?

20 A No.

21 Q Did the police ever come and talk to you about
22 it or the District Attorney's Office talk to you
23 about it or anything?

24 A No, because at the time we weren't in touch with him
25 very much, so we really didn't have anything to do

1 with him, just the fact that they had called and
2 said that happened.

3 Q Was that here in Harris County that that happened?

4 A Here in Houston.

5 Q Who was the lawyer for the District Attorney's
6 Office, you know, that handled your cousin's case?

7 A I couldn't tell you. I don't know.

8 Q Your thirteen-year-old daughter: Where does she
9 go to school?

10 A Paul Revere Elementary School.

11 Q Paul Revere?

12 A Yes.

13 Q How long were you in Havana, Cuba, before you
14 came to the United States?

15 A I was born there. I lived there for thirteen
16 years.

17 Q I guess you got out pretty much sometime around the
18 Bay of Pigs?

19 A Well, it was 1961.

20 Q A little before the Bay of Pigs?

21 A It was a little after.

22 Q Right after.

23 What did your father do during the course
24 of his lifetime, if he is not still alive? What
25 was his job or type of occupation?

1 A He worked in a hospital.

2 Q What type of hospital job did he have? Do you
3 remember?

4 A Medical technician.

5 Q How about your mom? If she's ever worked outside
6 the home, what type of job did she have?

7 A She is a seamstress.

8 Q Do you have brothers and sisters?

9 A I have a sister.

10 Q Is she younger or older than yourself?

11 A She is younger.

12 Q What does she do for a living?

13 A I really don't know what she does. She works
14 for a construction company as sort of a planning
15 assistant, I guess you would call her.

16 Q Does your mom and sister live here in Harris
17 County?

18 A Oh, yes, sir.

19 Q Do you have any questions of me about anything
20 we have talked about?

21 A No.

22 Q Is there anything we have talked about that makes
23 you feel you couldn't be fair to either side on
24 this case?

25 A No.

1 Q Thank you, Ms. Petty.

2 I asked you that out of an abundance
3 of caution.

4 For once, I can say I haven't any more
5 questions. I can't ask you more.

6 If you are selected to serve, I look
7 forward to serving with you.

8 I will pass you to the Defense.

9
10 EXAMINATION

11
12 QUESTIONS BY MR. ELIZONDO:

13 Q Ms. Petty, how are you doing?

14 A. Fine.

15 Q You are number ninety-one. We have interviewed
16 ninety people in the last six weeks. We've got
17 eleven jurors. We need another juror.

18 In a capital murder case, each side
19 gets fifteen strikes to strike for whatever
20 reason you want. I am sure you are familiar with
21 that, having worked in the Clerk's Office, and
22 after you use up your fifteen strikes, you can't
23 use any more, so the next person we interview will
24 be on the jury panel, of course.

25 Of course, you also have challenges for

1 cause where the prospective jurors have already
2 formed an opinion about the Defendant, et cetera.

3 In a capital murder case in the state
4 of Texas, the prosecutors have to prove to twelve
5 jurors beyond a reasonable doubt that this man
6 committed the offense, have to prove to twelve
7 jurors until they are satisfied beyond a reasonable
8 doubt that on a particular day in Harris County,
9 Texas, this man shot and killed a police officer
10 who was in the lawful discharge of an official
11 duty knowing at the time he was a police officer.

12 The term reasonable doubt will not be
13 defined for you. It is a legal word. There is
14 no legal definition for that term. The Court
15 won't give you one, the prosecutor can't give you
16 one, and I can't give you one.

17 All I can do is give you a comparison
18 or analogy.

19 Across the street in the civil courthouse
20 where they try lawsuits for millions of dollars
21 over property damages, over personal injuries,
22 over contract disputes, the burden of proof over
23 there is proof by a preponderance of the evidence,
24 the greater weight of the credible evidence.

25 In the criminal courthouse, the

1 legislature says we are going to put the State of
2 Texas to a higher burden of proof than
3 preponderance of the evidence. We are going to
4 put them to a burden of proof of beyond a reasonable
5 doubt, a higher burden, and rightfully so, I
6 believe, because before anybody can be found guilty
7 of capital murder and before somebody can be
8 killed for it, they'd better have the right person.

9 Do you agree with that or disagree with
10 that?

11 A. Oh, definitely. I agree with it.

12 Q. The way they go about their burden of proof is
13 to go ahead and call witnesses to the witness
14 stand, have them take the same chair where you are
15 sitting, and they give their version of the facts.

16 After they get through presenting
17 witnesses and evidence, they will rest their case.
18 That means, "That is all we have."

19 At that point in time, the Defendant
20 can, if he chooses, he can call witnesses. He
21 doesn't have to. He can go ahead and just rest
22 his case also.

23 Now, let's assume for a minute that you
24 were on this jury and you have heard the State's
25 evidence and the State has rested its case and we

1 go ahead and rest our case, too, don't put on one
2 bit of evidence, not one iota of evidence, and you
3 go to the jury deliberation room and you are saying
4 to yourself, "I think he did it. Maybe he did it.
5 The Grand Jury indicted him. He didn't testify,
6 but it hasn't been proven to me beyond a reasonable
7 doubt."

8 What would your verdict be in that
9 situation?

10 A. I would say not guilty if there was a reasonable
11 doubt.

12 Q. You see where you might get put in a switch if
13 you were to say to yourself, "Maybe he did it. I
14 think he did it, but it hasn't been proven to me
15 beyond a reasonable doubt"?

16 Do you see where you might get put in
17 a switch?

18 A. Yes. I see it.

19 Q. And you could still come back and tell everybody
20 that the State didn't prove this case to me, and,
21 therefore, I am going to find him not guilty?

22 A. Yes, if they didn't prove to me he is guilty. He
23 would have to be not guilty.

24 Q. The reason I'm asking you these questions, your
25 first remark was, "A lot of people go free who

1 shouldn't go free, and that worried me a little
2 bit. You may be in that jury box, and that scared
3 me.

4 A. What I mean is, you see, someone committing
5 a real violent crime, and three or four days later,
6 you see them going free, and you think, "He
7 shouldn't go free to do something to somebody else."

8 Q. You are talking about after they have been convicted
9 of a crime?

10 A. Yes.

11 Q. Another thing that got my attention was about
12 your cousin. I am sorry about that, but you said
13 the Defendant in that case also got free. It was
14 self-defense.

15 How did you feel about that?

16 A. I was angry, because I didn't think he should have
17 gone free.

18 Q. Okay.

19 A. But then there was an emotional reason in the thing.
20 He was my cousin, so you can understand, I didn't
21 want him to go free, even if he was innocent or
22 it was self-defense. I didn't want him to go
23 free. I was emotionally involved in the case.

24 Q. I suspect this case will be a very emotional case.

25 A. I am not myself involved in the case, and I don't

1 know either one of them. I don't know the officers
2 or the criminal.

3 Q. The judge gave you a brief rendition of the facts.
4 A police officer got shot three times in the head
5 and a bystander was shot and later died. Another
6 police officer got five bullets into him and he
7 lived. He was able to kill one of the suspects
8 in the case.

9 A. They are not personally related to me, so I don't
10 feel that emotionally involved. I can understand
11 and feel sorry for their families and everything,
12 but I am not emotionally involved in it.

13 Q. I suspect that the widow will testify in this case,
14 and I imagine that will get pretty emotional.

15 A. Yes, but it still doesn't affect me emotionally.
16 They are not kin to me.

17 Q. That wouldn't influence you at all in any shape,
18 form, or fashion?

19 A. Everybody that dies has a family. There would
20 always be somebody emotionally involved in it.
21 It wouldn't affect me.

22 Q. Anyway, you can promise me anyway that the
23 emotional aspect of this case will not influence
24 your decision in the guilt-or-innocence stage?

25 A. I couldn't promise one hundred percent. I don't

1 know what they will bring before me or say, but
2 I don't believe so.

3 Q As a juror, you've got to take an oath -- not the
4 oath you took earlier this morning, but another
5 oath, that you would base your verdict on the
6 evidence and the law in this case, so help you God.

7 A Uh-huh.

8 Q And only that.

9 And you can't let your emotions --

10 A I don't think that --

11 Q -- guide you in deciding whether he is guilty or
12 not, just the law and the facts in the case.

13 A I think that would be the only thing I would take
14 into consideration then, because emotionally, I am
15 not involved with it. I am not related to any of
16 the people, don't know them. I don't think it
17 would affect me. I can't say it won't, definitely
18 never will, but I don't think it will. I don't
19 believe it will.

20 Q You can see where the word "think" worries me a
21 little bit, too.

22 Let's assume you have a mallet in your
23 hand and I go up there and say, "Ms. Petty, if I
24 put my hand in front of you, are you going to hit
25 me with your mallet?" If you said, "I don't think

1 think I would," I would be leery of putting my
2 hand there.

3 A. I am not a violent person. I don't go around
4 hitting people with mallets.

5 Q. You see what I mean when I say this?

6 A. I would say no, I wouldn't.

7 Q. In a capital murder case, the Prosecution in this
8 case will be actively seeking the death penalty.

9 We are actively seeking a not guilty in
10 this case.

11 In a capital murder case, of course, a
12 Defendant can testify, can present evidence. I
13 suspect that he will. I don't know for sure. I've
14 got to hear the evidence first to see if he should
15 or not, but if he testifies, he can take the same
16 stand you are sitting at right now and he can be
17 impeached with the proof of any prior felony
18 convictions within the last, say, ten years, and
19 if he is impeached or discredited by proof of any
20 felony convictions within the last ten years, you
21 can weigh that and you can use that to base whether
22 or not you believe him or not.

23 Do you agree with me there or not?

24 A. What do you mean by impeach him?

25 Q. Discredit him with proof of prior felony

1 convictions.

2 A. Oh, I see.

3 Q. When he takes the stand, he can be impeached or
4 discredited --

5 A. I see.

6 Q. -- with proof of prior felony convictions.

7 A. That would be that case, and this would be this
8 case, two separate things.

9 Q. The law allows the State to discredit or impeach
10 him for that purpose alone. Do you see?

11 A. Uh-huh.

12 Q. So what would your question be with regards to
13 that?

14 A. I was --

15 Q. I was just telling you, not questioning you. Just
16 telling you.

17 A. Okay.

18 Q. The Defendant can also call witnesses up there,
19 and I suggest or submit to you that if he does,
20 there will be two stories, two diametrically opposed
21 versions of the facts.

22 A. Uh-huh.

23 Q. And it will be your job, as a juror, to resolve
24 the conflicting testimony, and I believe you can
25 do that.

1 A Well, I think so.

2 Q As Mr. Moen was telling you, in a capital murder
3 case, there is a lesser included offense of murder.

4 A Uh-huh.

5 Q Murder is when you intentionally and knowingly
6 take the life of somebody. It is not a lesser
7 offense in my eyes, but it is a lesser offense,
8 because the penalty range is less.

9 You cannot be put to death for murder,
10 only for capital murder. As I was saying, the
11 penitentiary range is anywhere from no less than
12 five to up to ninety-nine years or life, and a fine
13 of up to ten thousand dollars can also be imposed,
14 and a murder is when you intentionally and
15 knowingly take the life of somebody.

16 Now, I want you to just think about it,
17 and can you consider probation as a proper
18 punishment in a proper case in your own mind for
19 somebody's intentionally and knowingly taking the
20 life of somebody?

21 A It would depend on the person and the situation,
22 the motive. I think it would depend on a lot of
23 things.

24 Q Sure.

25 So you can consider probation?

1 A. Yes, I could.

2 Q. Well, Mr. Moen was asking you a little while ago
3 about the Defendant's failure to testify or the
4 Defendant's right not to testify.

5 If he doesn't testify, would you want
6 to know why he doesn't?

7 A. I think -- I would naturally be curious.

8 Q. Sure. Sure. We all grew up, and when we would
9 hear arguments, we would always want to hear two
10 sides of the story and see what the other person
11 was going to say before we could make decisions.

12 Do you agree with that or not?

13 A. I think so, yes.

14 Q. He's got a right not to testify, got that
15 privilege, and should he not testify, would you hold
16 that against him in any way?

17 A. No, but I would still wonder why he didn't.

18 Q. There is nothing wrong with wondering.

19 A. But I wouldn't hold it against him.

20 Q. Would that be a strike against him?

21 A. No. Some people can't express themselves as well
22 as others, and he may feel instead of helping
23 himself, he is hindering himself, and that is why
24 he wouldn't want to speak. That would be one
25 reason he wouldn't testify.

You wouldn't hold that against him at all?

No.

(The evidence, as Mr. Moen said, will probably show he is an illegal alien, in this country unlawfully, and as a result of that, would you hold that against him in any way?

Not really.

When you say "not really" --

Well, I feel that he should have tried to come in legally, but just because he did come illegally, it is not that much of a crime to me or not a crime at all. It is just a -- how can I put it? He is not really right in coming in illegally. I just think it would have been better if he had come in legally like everybody else has, like myself. I came in legally.

When you talked to Mr. Moen, you said you think or you thought you could be fair to him.

Uh-huh.

Even though you might find out later he is an illegal alien?

I try to take a person for what they have done or what their background is. I try to make an opinion according to the person.

(you have an opinion about illegal aliens?

1 A. No, I don't really have an opinion about them.
2 Either way, they are people like everybody else,
3 whether they are legal or not. It doesn't affect
4 me.

5 Q. You could judge him as a citizen?

6 A. As a person.

7 Q. As a person.

8 And accord him, under the law, the same
9 rights as a citizen of this country is accorded in
10 a trial of this nature?

11 A. Yes.

12 Q. Do you speak Spanish?

13 A. Yes, sir. I have forgotten a lot of it.

14 Q. Let me ask you -- back to that first answer you gave
15 Mr. Moen. It just kind of worried me a little
16 bit.

17 Are you in favor of the death penalty?
18 Would you say you are moderately in favor of it,
19 reluctantly in favor of it, or strongly in favor
20 of the death penalty?

21 A. I think if a person is guilty, I am strongly in
22 favor of it.

23 Q. Now, in a capital murder case, of course, if you
24 found a person guilty of intentionally and
25 knowingly killing a police officer, then you have

1 found him guilty of capital murder, and then we
2 go to the second part of the trial, the punishment
3 phase.

4 A. Uh-huh.

5 Q. At the punishment phase, there are only two
6 possible punishments, life or death.

7 A. Uh-huh.

8 Q. And, of course, that is determined by how you
9 answer those two questions.

10 The first question is asking you whether
11 or not the conduct of the Defendant that caused the
12 death of the deceased was committed deliberately
13 and with a reasonable expectation that the death
14 of the deceased would result.

15 The word deliberately in that first
16 question is underlined. There is no legal
17 definition of the word deliberately. The judge
18 won't give you one. I can't give you one.

19 I want to ask you what you think the
20 word deliberately means.

21 A. I think deliberately means something you have
22 planned ahead.

23 Q. Premeditated?

24 A. Not so much premeditated, but like, you know, you
25 are taking all the possibilities of things that

1 might happen in mind and you come prepared for
2 them. I would call that deliberate.

3 Q Okay. Would you mean ponder and think about?

4 A Well, if you thought about it or you came prepared
5 with a gun and everything, I think that would be
6 deliberate.

7 Q Okay. Like for example you will go to the jury
8 deliberation room in the guilt-or-innocence stage
9 and you will think about or ponder about whether
10 the State has met its burden of proof in proving
11 the case beyond a reasonable doubt.

12 Would you agree with that?

13 A Yes. I would agree with it.

14 Q Well, now, let's assume we are in the punishment
15 phase and you have found him guilty of intentionally
16 and knowingly killing a police officer.

17 A Uh-huh.

18 Q And then we go to Question No. 1.

19 Would you answer Question No. 1
20 automatically solely because you have found him
21 guilty of intentionally and knowingly taking the
22 life of a police officer?

23 A No, not necessarily.

24 Q So, you would --

25 A It would depend on how he came about being guilty.

1 Q The second question is asking you to determine
2 whether there is a probability that the Defendant
3 would continue to commit criminal acts of violence
4 that would constitute a continuing threat to society.

5 A I think that would depend on the kind of person
6 you could prove to me this Defendant is.

7 Q That question is more or less asking you to foretell
8 or forecast the future.

9 Would you agree with that?

10 A In a way, yes.

11 Q What do you think the word probability means?

12 A Oh, I would say chances, whether you have a ninety-
13 nine percent chance someone is going to do something
14 or not do something. No one is one hundred percent
15 sure.

16 Q Some people say anything is possible.

17 A That is true.

18 Q Do you think that anything is probable?

19 A It is possible but not probable.

20 Q Before you could answer those two questions yes,
21 the State would have to prove to you beyond a
22 reasonable doubt that they should be answered yes,
23 and if you don't believe beyond a reasonable doubt
24 they should be answered yes, you would have to
25 answer them no.

1 Do you agree with that or disagree with
2 that?
3 A. I agree with that.
4 Q. Let me ask you now if you have a preference.
5 A. A preference to what?
6 Q. In punishment, just a general preference: life or
7 death?
8 A. No.
9 Q. You don't?
10 Did you go to the U. of H.?
11 A. Yes.
12 Q. And studied geology?
13 A. Yes.
14 Q. How many hours do you have in geology?
15 A. About, I think it is sixteen.
16 Q. Sixteen?
17 A. Uh-huh.
18 Q. Over here, you answered question number thirty-
19 three that you have some interest in some criminal
20 cases, and I assume that was the Eva Lott case,
21 that child abuse case?
22 A. The one with the four-year-old. Yes, I read a
23 little bit about that.
24 Q. Did you ever read about the Hinckley case?
25 A. The one who shot the President?

1 Q Uh-huh.

2 A Yes.

3 Q What did you think about the jury coming back with
4 not guilty by reason of insanity?

5 A I thought that was a little insane, just -- well,
6 first of all, I think he should have been shut up
7 somewhere.

8 Q Should have been shut up?

9 A They should have locked him up.

10 Q You weren't one of the jurors and you really didn't
11 hear the evidence, I guess.

12 A Really, that is just a personal opinion. I
13 couldn't tell you whether that is right or not.

14 Q This is going to be a pretty emotional case, and I
15 guess the jurors in the Hinckley case were probably
16 overwhelmed by the publicity and all the news
17 accounts, et cetera, and they came back with a pretty
18 controversial verdict of not guilty by reason of
19 insanity.

20 You can see what kind of pressure they
21 were under.

22 Do you think you could come back with a
23 not guilty in this case if they haven't proven
24 their case beyond a reasonable doubt, keeping in
25 mind this is an emotional case, another police

1 officer got killed, another officer got five
2 bullets, and a bystander got killed?

3 A. If they can't prove it, I would have to say not
4 guilty.

5 Q. Let's assume for a moment you are the Defendant
6 in this case and we were talking to a juror with
7 your frame of mind right now.

8 A. Uh-huh.

9 Q. Would you want -- you as a Defendant -- would you
10 want that person to be on your jury?

11 A. I don't really know. I have never been in that
12 position.

13 Q. Considering how strongly you feel about certain
14 things?

15 A. Well, I feel strongly about certain things, but
16 I also think I am a fair person. Show me the facts
17 and things, and I am willing to change my mind or
18 make up my mind one way or the other. I am not
19 going to go into something with my mind set on
20 an idea, that this is the way it is going to be
21 and nobody is going to change my mind.

22 I am a fair person where I can take both
23 sides of the question and weigh them and decide
24 in my mind which side is right and which is wrong,
25 but I do feel strongly about things, but that

1 doesn't mean my mind can't be changed.

2 Q Were you assigned to a court when you were in the
3 Harris County Clerk's Office?

4 A No. I just worked in records.

5 Q On the fifth floor?

6 A Second floor.

7 Q You were in the County Clerk's Office?

8 A Uh-huh.

9 Q I was thinking of the District Clerk's Office.

10 A No, in the County Clerk's Office.

11 MR. ELIZONDO: Your Honor, before we pass
12 her, could we discuss the juror for a minute?

13 THE COURT: Ms. Petty, if you would,
14 please step into the jury room for just a
15 second.

16 (Ms. Petty retired to the jury room, and
17 out of her presence and hearing, the following
18 proceedings were had.)

19 MR. ELIZONDO: Do you want to agree?

20 MR. MOEN: That she be number twelve,
21 sure.

22 MR. ELIZONDO: Your Honor, in view of the
23 fact we are out of peremptory challenges, and after
24 talking to Ms. Petty, we find her totally
25 unacceptable and ask the Court for additional

1 challenges.

2 THE COURT: Simply show in the record
3 that the request is overruled.

4 MR. ELIZONDO: Thank you, Your Honor.
5 That is all we have.

6 THE COURT: Bring her back.

7 (At this time Ms. Petty returned to the
8 courtroom.)

9 THE COURT: Ms. Petty, you will be a
10 juror on this case and if you would, please stand
11 and raise your right hand and be sworn as a juror.

12 (Whereupon Ms. Petty was sworn as a
13 juror.)

14 THE COURT: Please be seated. I need
15 to give you a few brief instructions.

16 I anticipate we will be starting the
17 evidence Monday in this case. We do have -- we
18 are going to select an alternate juror to consider
19 the case in case something should happen to one
20 of the jurors, so we do have that one more to
21 select.

22 I will have someone notify you as to
23 exactly when to come down. It probably will be
24 Monday, but it may be Tuesday before we are ready
25 to get started, so you need to inform your

1 employer and what have you that you will be on
2 this case, and it will take somewhere in the
3 neighborhood of four or five days to try the case,
4 and it may take as long as a day or so longer.
5 It could be a day shorter, but that is the best
6 guess I can give you right now.

7 THE JUROR: All week?

8 THE COURT: I would say all week. Yes,
9 ma'am.

10 There may be a time in that process
11 that you may have to be held downtown in a hotel
12 overnight, so you may need to be thinking about
13 that also.

14 I don't anticipate much, if any,
15 publicity about this case between now and the time
16 we will actually begin the trial.

17 I do anticipate that there will be
18 coverage in all three forms of the media after
19 we begin the actual trial of the case.

20 I will strongly admonish you now and
21 later, should you see anything in the media, whether
22 it be television, newspaper, or on the radio, you
23 are not to read, watch, or listen to anything about
24 this case other than what you heard in this
25 courtroom. It would be unfair for you to make your

1 decision on anything except what you hear from
2 witnesses under oath.

3 I think you understand that, but I wanted
4 to give you that admonition.

5 So, do you have any questions of me at
6 this point?

7 THE JUROR: No. I don't think so.

8 Would someone let me know before Monday?

9 THE COURT: Oh, yes, ma'am. We will let
10 you know as to exactly when.

11 You will report back to this courtroom,
12 and when you do, I will have someone call you and
13 tell you when to come.

14 You are now excused until such time.

15 (The juror was excused from the
16 courtroom.)

17 THE COURT: I have an appointment at
18 noon.

19 Are there any objections to recessing
20 until 1:30?

21 MR. MOEN: No objections.

22 MR. ELIZONDO: No objections.

23 THE COURT: We will recess until 1:30.

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

1 CONSTANCE ELAINE WHITEFORD,
2 was called as a prospective juror and responded to
3 questions propounded as follows:

4
5 EXAMINATION

6
7 QUESTIONS BY MR. MOEN:

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

9 THE COURT: Certainly.

10 Q. (By Mr. Moen) Ms. Whiteford?

11 A. Yes?

12 Q. My name is Bob Moen. I am with the District
13 Attorney's Office here in Houston, and if you are
14 selected as a juror on this case, another gentleman
15 by the name of Dick Bax will also be with me during
16 the trial of this case. He is also a member of the
17 District Attorney's Office of Harris County, and
18 Mr. Bax and myself will be representing the family
19 of Officer Harris in the prosecution of this case
20 styled the State of Texas versus Ricardo Aldape
21 Guerra.

22 Now, he is charged with back on July
23 13th of this year having killed a police officer
24 by the name of J. D. Harris while Officer Harris
25 was in the course of his official duties.

1 The judge asked earlier of all the
2 jurors if they had remembered reading or hearing
3 anything about this case.

4 Does the name of Officer Harris or any
5 of the facts that the judge described ring a bell
6 in your mind about anything you may have read or
7 heard about this case?

8 A. I remember it vaguely, you know. I don't remember
9 the names or really too much about it. It was on
10 the news.

11 Q. As the judge said, there is absolutely nothing
12 wrong whatsoever with having read or heard something
13 about a criminal case you might become a juror on.

14 The only reason we ask in the first
15 place is to see if the jurors have formed opinions
16 or conclusions based on what evidence they have
17 heard.

18 I need to ask you some questions for
19 the next twenty or thirty minutes, and I think I
20 ought to explain a little bit about the proceeding
21 before I do that.

22 In a capital murder case, the law requires
23 us to talk to the jurors individually. It generally
24 takes about an hour to talk to one prospective
25 juror and explain to them all of the various

1 aspects of the law that may come up during the
2 course of the trial, what will be expected and
3 required of the juror by his or her jury service,
4 and to see if the juror has disagreements or
5 questions that we can clear up.

6 You see, we live in the type of society
7 -- and I know you are aware of this -- but we live
8 in the type of society where no type of person is
9 required to be a juror on any type of case where
10 that jury service would violate the prospective
11 juror's personal beliefs, moral convictions,
12 scruples, et cetera. You just don't have to do
13 it.

14 About the only way we know jury service
15 on any type of case, particularly in a capital
16 case, would be an impossible task for Ms. Whiteford
17 or any other prospective juror to perform is if
18 the juror tells us.

19 We will be trying to explain things to
20 you and ask what your feelings are. We will be
21 completely honest with you as to what will be
22 required of you.

23 The only thing we ask of you is not only
24 that you be honest with us, but be honest with
25 yourself as well, and tell us exactly how you

1 feel so we can make a decision as to whether or
2 not you could be a juror on this type of case or
3 whether or not it would be best for Ms. Whiteford
4 to be excused from this type of case, although she
5 may be a perfectly wonderful juror on another type
6 of case.

7 A lot of people who find themselves
8 in the position you are in today -- and we have
9 talked to a lot of people over the past five
10 weeks. It takes a long time -- express various
11 opinions about the death penalty.

12 Some members of the jury wouldn't have
13 difficulty with it. Other's don't go along with
14 making that type of decision on being a juror in
15 a capital case. The jurors have told us, and have
16 told us over the past five weeks, "Mr. Moen or
17 Your Honor, because of my convictions or personal
18 beliefs or religious beliefs, I just can't be a
19 juror on a death penalty case. My personal beliefs
20 or religious beliefs would not let me be a juror
21 and return a verdict I know would result in someone
22 receiving the death penalty," and that is fine.

23 However you feel concerning the death
24 penalty is basically your business. We are not
25 here to debate it with you or try to change

1 your mind. That is not our purpose at all.

2 It is to find out exactly how you do
3 feel. To find out whether you could be a juror on
4 this case or you could not.

5 There are, as I said, no right or wrong
6 answers, only how you feel.

7 With that in mind, can you tell me exactly
8 how you feel about the death penalty? Could your
9 feelings and opinions allow you to be a juror on
10 this case, a capital murder case, or do you feel
11 you could not be?

12 A. I think in certain circumstances the death penalty
13 -- I could do along with it. It would depend on
14 the circumstances. I have no moral convictions
15 against it.

16 Q. Okay. Okay. Well, good.

17 I wanted to explain to you and try to
18 make you feel at ease, if I could, how you do feel
19 about that topic.

20 Although we tell jurors when they come
21 up to go ahead and relax, that this is an informal
22 experience, that is easy to say, but when you are
23 sitting in the chair you are in with a group of
24 perfect strangers in the courtroom, it is easy
25 to tell you to relax and speak your mind, but I

1 hope we can make you relax and do that.

2 Not all murders that take place in our
3 community are classified as capital murders. Only
4 those murders that take place in the course of
5 committing certain crimes become capital murders.

6 Let me give you an example of what our
7 legislature has said. If a man kills during the
8 course of a burglary, breaking into someone else's
9 home, and a man, woman, or child gets up to see
10 what the noise is all about and the burglar takes
11 their life; robbery-murder is capital murder; for
12 the rapist to kill his rape victim is capital murder;
13 for the kidnapper to kill his kidnap victim; for
14 the arsonist to kill anyone during the course of
15 setting a fire, those are the types of murders,
16 because of the type of crime for which the man
17 commits the murder, they become capital murders,
18 and they are punished either by the man committing
19 that crime receiving a life sentence or the death
20 penalty, if the jury were to find the person
21 guilty.

22 The legislature has said there are five
23 other instances in which the person commits the
24 crime of capital murder, and that is if he murders
25 a fireman or police officer in the course of his

1 or her official duties; if he murders for money,
2 if anyone kills for money or hires another person
3 to kill for money, that is capital murder; and the
4 last two examples confine themselves to the convict
5 situation.

6 If a person is confined in our prison
7 system and he kills one of the employees at the
8 prison system, that is capital murder, or if a
9 convict is attempting to escape or actually does
10 escape and during the course of the escape, takes
11 anyone's life, that is capital murder.

12 Now, all other murders that take place
13 have a completely different range of punishment.

14 For someone to commit the crime of murder
15 as opposed to capital murder, the range of
16 punishment is from five years to ninety-nine years
17 or life.

18 Do you follow me on that distinction
19 so far? Do those strike you as being the type of
20 crimes Ms. Whiteford feels the death penalty could
21 be an appropriate punishment for, those type of
22 criminal offenses?

23 A. Yes.

24 Q. Okay. How long have you been of the frame of mind
25 that you described to us here this afternoon

1 concerning the death penalty? How long have you
2 felt that way? Has it been the majority of your
3 adult life, or have you ever felt different at any
4 time and because of some event or conversation or
5 articles you may have read, changed your position
6 to what it is today, or have you pretty much felt
7 the same way?

8 A. I think I have pretty much felt the same way.
9 I would not enter into it lightly.

10 Q. Certainly.

11 A. I mean, it is someone's life, and it is pretty
12 important.

13 However, like I said, in certain
14 circumstances, I would feel that that would be just.

15 Q. Okay. I could -- you know, I think probably your
16 response puts you somewhere in the ninety-nine
17 percentile of the people we talk to concerning the
18 death penalty. That is the way we feel.

19 I don't mean to make it light by my
20 conversation. I don't mean to, if I have not
21 implied it would be a very weighty decision for
22 every single member of the jury panel. It almost
23 certainly would, and probably would be one of the
24 most important decisions for yourself and all the
25 parties concerned, not only the family of Officer.

1 Harris, but the Defendant as well.

2 Whatever decision you would make, it
3 would certainly be a weighty and important one.
4 I think you realize that.

5 Now, the way punishments are assessed
6 in a capital murder case is by the jurors answering
7 these two questions that appear here on the easel.
8 If both of these are answered yes by the jury, the
9 Defendant receives the death penalty.

10 If either one of the questions is answered
11 no, the Defendant receives a life sentence rather
12 than the death penalty.

13 Now, these questions are answered by the
14 jury based on the evidence that they hear surrounding
15 the facts that led them to the conclusion that the
16 man was, in fact, guilty of the offense of capital
17 murder. The jury answers these questions from the
18 evidence, regardless of their personal feelings
19 about what type of punishment they would like to
20 see the man on trial receive.

21 You see, back -- it used to be back in
22 1967 when our death penalty -- the Supreme Court
23 held the death penalty was unconstitutional because
24 of the way it was being applied; they said jurors
25 were being too subjective in the application of

1 the death penalty.

2 Back in those days, any felony case
3 could carry the death sentence, murder or rape.
4 That was prior to 1967.

5 What our legislature did, they tried
6 to take it and make it more of an objective case
7 as to whether the person would receive the death
8 penalty rather than a subjective one, and they
9 said jurors should really put their personal
10 feelings aside to what type of cases deserve the
11 death penalty.

12 They said let the evidence indicate to
13 them what their answers to these questions should
14 be. Even if the jury should decide this would be
15 a proper case for a life sentence, they must
16 answer the questions yes if the evidence indicates
17 it.

18 The jurors are required by their oath
19 to put their personal feelings aside as to what
20 type of punishment they would like to see the man
21 on trial receive for the crime they have found
22 him guilty of and instead answer these questions.

23 Do you follow me on how that test works?
24 It is not to hide anything from you.

25 I think I indicated that two yes answers

1 and the Defendant receives the death penalty.
2 A no answer to either one of the questions and
3 he receives a life sentence.

4 Before the jurors can answer yes, all
5 twelve have to unanimously agree that is what
6 their answers should be.

7 To answer a question no, only ten have
8 to agree.

9 We are talking about so many things here,
10 but don't worry about forgetting some of these
11 things we are talking about. The judge will put
12 these in writing to you later, and when we are
13 deliberating on these questions, hopefully what
14 we can do now at this stage of the trial is explain
15 those things, and you can have a working
16 remembrance of them, and when the actual trial is
17 over, after the evidence is presented, the judge
18 will give you these in writing and you will be able
19 to look at it and study it and be able to follow
20 the actual instructions in order to answer yes or
21 no.

22 Just by way of explaining what happens
23 first, the first thing the jury does is hear
24 evidence about the man on trial. Is he guilty or
25 not guilty, and that is all the jury does. Then

1 you will retire to the jury deliberation room and
2 make a decision based on the facts and evidence
3 you have heard from the witness stand and decide:
4 Is the Defendant guilty or not guilty.

5 If the jury decides the man is guilty,
6 they return that verdict to the Court and we
7 proceed to the second stage of the trial, and the
8 second stage is totally different from the first.

9 Jurors take their seats again and we
10 begin again at the second phase. Jurors can hear
11 additional information to answer or help them
12 answer Questions 1 and 2 and decide what those
13 answers should be.

14 For instance, at the second phase of the
15 trial, the law says crimes that the man on trial
16 has committed, even though he hasn't been convicted
17 of those crimes yet, the jury can hear that type
18 of evidence, too, as an indicator of what type of
19 person that man on trial is, and also if the man
20 has any record of past history to let the
21 authorities know about it, the jury can hear that
22 evidence, once again, to help the jury answer the
23 questions that they will have to take with them as
24 the last thing that happens in a capital murder
25 case.

1 If you haven't had a chance to read
2 these questions to yourself, let me ask you to
3 do that now, and I want to go over some of the
4 language or words, rather, that we have underlined
5 in these questions with you.

6 Will you just take a few seconds to
7 read them to yourself, and I will go over them with
8 you.

9 Okay. This first question asks you to
10 make a determination about the conduct of the man
11 on trial. You see, these questions come into play
12 after the man is found guilty of capital murder.

13 On the first question, they make a
14 decision about his conduct, and it is a two-part
15 question.

16 They will decide, first of all, was the
17 conduct of the man we found guilty of capital
18 murder, was that conduct that caused the death of
19 the deceased, was it deliberate and was it done
20 with a reasonable expectation she would die?

21 Let me give you a hypothetical, make-
22 believe case and show you how the first question
23 applies in a capital murder case.

24 Imagine a situation where a man goes
25 into a convenience store to commit robbery. It is

1 in the early morning hours. He goes in and confronts
2 the cashier working there and she is afraid, as
3 anybody would be. At gunpoint, he demands the
4 money, and he takes it.

5 He looks around and sees there are no
6 other witnesses. She is the only one who could
7 identify him, and he fires two bullets into her
8 body, one in the head and one in the chest.

9 Unbeknownst to him, she steps on some
10 type of an alarm that notifies the police and they
11 are waiting for him and he is arrested.

12 He has committed murder in the course
13 of robbery, and, therefore, he is guilty of capital
14 murder.

15 After the jury had found him guilty
16 based on those facts, they would decide was his
17 conduct that caused her death deliberately done;
18 was that deliberate on his part, and when you
19 fire bullets into a person's body with a loaded
20 gun into the chest and head, is it reasonable to
21 expect that someone would die from these wounds,
22 that someone struck in the head and chest with
23 bullets from a loaded gun would die.

24 You see where that question is a rather
25 common sense question based on the evidence the

1 jury has heard that led them to believe the
2 man was guilty of the crime? It is a rather
3 straightforward question based on the facts of
4 the crime and the part the man played in the
5 offense of murder.

6 Do you follow me on that question?

7 A. Yes.

8 Q. You will have to use your own definition for the
9 word deliberately, and you will have to use your
10 own definition for the word reasonable that
11 appears in the question, just your own common
12 sense, everyday definitions, and I think you have
13 a pretty good understanding of what those words
14 mean to you, because the legislature that drew
15 these questions up didn't give us definitions to
16 give to you. The law requires we give you
17 definitions.

18 Now, the second question, let me get
19 out of your way so you can see it while we are
20 talking about it.

21 The second question is different. It
22 asks you to make a determination about the kind
23 of person they have found guilty of capital murder.
24 Is the man on trial the type of person where there
25 exists the possibility he would commit criminal

1 acts of violence that would constitute a continuing
2 threat to society? Is he the type of person where
3 there is a probability he would commit such acts,
4 criminal acts of violence, that would constitute
5 a continuing threat to society.

6 That asks you to make a decision as to
7 what type of person the Defendant is.

8 Based on the evidence you have heard,
9 you make the best judgment you can about the kind
10 of person he is. You will have to use your own
11 definition for probability and for society.

12 Once again, those words were drafted
13 by the legislature and they didn't give us any
14 definitions we could pass on for you, so the law
15 is you use your own definitions for those words.

16 The only thing I ask you, before you
17 can answer yes, you only have to believe to a
18 probability the man is the kind of person that
19 could engage in those acts, not that there is a
20 certainty, and I think you can realize why.

21 The only person in the universe who can
22 predict to a certainty what anyone will do in the
23 future is God Almighty himself. Jurors are not
24 asked to put themselves in the position of playing
25 God. They are asked to make the best judgment

1 they can about the person on trial.

2 Do you think you can do that?

3 A. Yes.

4 Q. Criminal acts of violence: Before you can answer
5 the first question yes, you don't have to believe
6 the person will commit any specific act of criminal
7 violence, anything from criminal mischief, breaking
8 into someone else's home, breaking into someone
9 else's vehicle, murders, rapes, thefts, assaults,
10 any type of criminal act.

11 Is there a probability he would engage
12 in those types of acts, criminal acts, and would
13 those acts constitute a continuing threat to
14 society?

15 Once again, you use your definition for
16 society.

17 Once again, do you agree or disagree
18 with this proposition I am about to say to you?
19 Would you agree or disagree there are people who
20 work in our prison system, who take jobs in our
21 prison system, who actually are charged with the
22 running of our prison system, who have a right to
23 expect to come to their jobs on a day in, day out
24 basis without being in fear of other convicts
25 there? Do they have a right to expect their lives

1 will be protected?

2 A. Yes, sir.

3 Q And would you agree with me on the second
4 proposition, that there are even convicts in the
5 penitentiary who are serving out their debt to
6 society who have a right to expect that the other
7 members of society, ourselves, will protect them
8 from certain prisoners that might be sent to the
9 prison system?

10 A. Yes, sir.

11 Q Now that we have had a chance to go over Questions
12 1 and 2, do you have questions of me about either
13 one of those questions that I can answer for you at
14 this time?

15 A. No.

16 Q Is there any reason that you can think of that you
17 would not be able to answer Questions 1 or 2? I'm
18 not saying whether you would answer yes or no,
19 but is there any reason you can think of you
20 wouldn't be able to answer either one of those
21 questions, depending on the testimony you hear?
22 Do you feel you could answer, based on the
23 evidence?

24 A. Yes, I could.

25 Q The only thing the judge will tell you about

1 Questions 1 and 2 before you answer them is this:
2 He will tell you when you answer them or are
3 discussing with the jurors what your answers should
4 be, the jurors must not deliberate among themselves
5 as to how long the Defendant would have to serve
6 in the penitentiary were he to receive the life
7 sentence rather than the death penalty. The judge
8 will tell you that is within the exclusive
9 jurisdiction of our Board of Pardons and Paroles.
10 They decide that, and jurors just cannot enter
11 into that type of discussion, and it is a very
12 definite admonition by the judge.

13 If any juror starts to do that, you will
14 tell him not to do that, to keep his mouth shut,
15 because the judge told him not to do it.

16 Do you follow me on that?

17 A. Okay.

18 Q. Okay. There are several things the judge will
19 put in his charge to the jury, several instructions,
20 if you would, as to what you must do during the
21 trial if you are deliberating.

22 Let me cover those with you.

23 Earlier, the judge talked about the
24 presumption of innocence, and basically what the
25 judge said was it is presumed the Defendant is

1 innocent.

2 I think, not to insult your intelligence,
3 but I think you realize the man is just as guilty
4 the day he is arrested in the act of committing
5 it as the day he comes to the courtroom to answer
6 to a jury for committing that crime. Nothing
7 changes just because he's been caught, but the law
8 says people who don't know anything about a crime
9 -- because witnesses can't be jurors in a criminal
10 case nor can people who have formed an opinion
11 based on their knowledge and conclusions; it is only
12 people who don't know anything about a criminal
13 case who can serve as jurors.

14 We ask them, "Clear your minds about
15 anything you may have heard and anybody you may have
16 talked to about the case, and base your opinions
17 on the evidence in the courtroom. Get your
18 information down here in the courtroom from the
19 witnesses and reach your decision based on what
20 these people tell you."

21 Do you follow me on how that presumption
22 of innocence works?

23 A. Yes, sir.

24 Q. You don't presume the Defendant is guilty because
25 he has been indicted by a Grand Jury or finds

1 himself having to answer a serious allegation
2 here in the courtroom while represented by a
3 couple of lawyers. Let the evidence tell you what
4 to do rather than the surroundings, until you are
5 able to form opinions or conclusions in your own
6 mind.

7 Do you follow me on that?

8 A. Yes, sir.

9 Q. The judge will tell you, and has already told you,
10 and I want to cover it again out of an abundance
11 of caution, that the Defendant has a right not to
12 testify at his trial.

13 Any Defendant charged with any crime
14 has a right to remain silent at his or her trial
15 and not to say anything.

16 Now, that sounds crazy, I guess. Our
17 natural reaction, obviously, whether we are jurors
18 or just ordinary, everyday people, we like to get
19 as much of a fact situation as we can to reach a
20 decision. We like to get input from both sides,
21 if we can, before we make a decision in our life,
22 whether it is one affecting our personal or family
23 life or a business decision, we like to get as
24 much input as we can.

25 But in a criminal case, the Defendant

1 doesn't have to put on witnesses and doesn't have
2 to testify himself if he doesn't want to. He can
3 remain totally silent and not call anybody in his
4 behalf, so the jury might reach a decision based
5 on just what's been presented to them.

6 Do you follow me on how that works?

7 A. Yes.

8 Q. The Defendant may not testify. He may feel it's
9 the best strategy not to, for whatever reason.

10 If he doesn't, the judge will tell you:
11 Don't let his silence be an indicator of anything
12 to you. Let what you heard decide what your verdict
13 ought to be based on what the witnesses have told
14 you and not what you have not heard from the
15 Defendant.

16 The judge will also charge you that the
17 burden of proof in a criminal case always rests
18 with lawyers just like myself. I've got the
19 burden of proving to you and the other jurors that
20 the Defendant has, in fact, committed this crime
21 and that your answers to those questions should,
22 in fact, be yes.

23 So you don't get the wrong idea, a
24 trial is a wide-open proceeding. Both sides have
25 an opportunity to call whatever witnesses they

1 would like at no expense to anyone except the
2 taxpayers.

3 I can go and issue a subpoena to the
4 clerk, and she would forward that subpoena to the
5 Sheriff's Office and he will personally serve, if
6 I ask it, every single witness I want to come and
7 testify at this trial, and the same thing will be
8 done for the Defense attorneys at no expense to
9 themselves except the taxpayers again. They
10 can just make a request to the clerk and she takes
11 it to the Sheriff's Office and the Sheriff's
12 Office will serve those people, and if they don't
13 come to the courthouse after being personally
14 served, they will go and get them a ride.

15 Only one side has the obligation to call
16 witnesses, and that is myself. The Defendant and
17 his lawyers, for whatever reason, if they feel it
18 would be the best strategy, they can remain
19 completely silent and not even cross-examine any
20 witnesses that I call to the stand, but I can
21 assure you in this case, that will not be the case.
22 I will assure you that they will subject the
23 witnesses I call to a very vigorous cross-
24 examination, and probably will call witnesses on
25 their own behalf as well, but I am giving you the

1 most hypothetical example of that burden of proof
2 the judge will charge you on, and he will tell you
3 before you can find someone guilty, before you
4 can answer either one of these questions yes, you
5 have to believe beyond a reasonable doubt that is
6 what your answer and verdict should be. That is
7 the test.

8 A juror -- before a juror can answer
9 that someone is, in fact, guilty of a crime, and
10 before a juror can answer either one of these
11 questions, the jury has to believe it's been proven
12 beyond a reasonable doubt, not beyond all doubt,
13 any doubt, or a shadow of a doubt as we see on
14 television lawyer shows, only has it been proved
15 to me that this man has done what he's been alleged
16 to have done, and has it been proved beyond a
17 reasonable doubt, not beyond any, all, or a shadow
18 of a doubt.

19 You see, I think the law recognizes,
20 as you do, that to be convinced beyond any, all,
21 or a shadow of a doubt, you would have to be
22 present yourself when the crime took place to have
23 all doubt removed from your mind.

24 For perfect strangers to learn about
25 an offense from perfect strangers to them, I think

1 you can see there would always be doubt in your
2 mind or another's mind, so the test is not to
3 remove all doubt, any doubt, or a shadow of a doubt,
4 but beyond a reasonable doubt.

5 Do you follow me on that burden of
6 proof?

7 A. Yes.

8 Q. When you judge the credibility of the witnesses,
9 the judge will tell you: Don't give any witnesses
10 any more or less belief -- this is before a
11 witness testifies -- don't give any witness any
12 more or less belief just because of a witness'
13 job.

14 You see, whatever a person does for
15 a living doesn't mean they are any more believable
16 than anybody else just because a person has chosen
17 a different job.

18 After a person has testified, has sat
19 on the witness stand, after they have testified,
20 if their job enters into their testimony, you can
21 consider their job, such as a doctor testifying
22 about medical injuries or a police officer with
23 fifteen or twenty years of investigative
24 experience telling the jurors, "Here is what my
25 investigation in this crime indicated to me."

1 I think you can see how foolish it would
2 be for them not to consider their job. I am only
3 talking about before a witness gets on the stand,
4 no witness is considered to be more believable than
5 any other man or woman because of his or her job.
6 It is common sense, but I like to tell the jurors
7 that anyway. That is basically what the judge will
8 put in writing.

9 I am tired. We have been at this for
10 five weeks. It is difficult for me this afternoon
11 to keep my train of thought.

12 Do you have any questions about anything
13 we have talked about so far?

14 A. No.

15 Q. Let me talk to you about one final thing, and I
16 want to ask you questions about your personal
17 information sheet.

18 We talked about the range of punishment
19 for murder, and the only reason I spent any time
20 talking about it is this: Murder is the lesser
21 included offense of the crime of capital murder.

22 What does that mean? Well, as we
23 mentioned, to commit the crime of capital murder,
24 you have to have the aggravating circumstance that
25 goes along with the murder because just a murder

1 case -- that sounds bad, doesn't it? Just a
2 murder case. Just a case of murder has a different
3 range of punishment than capital murder, but a
4 murder that takes place under those aggravating
5 circumstances, a policeman or fireman or person
6 employed in a penal institution or one of those
7 felonies, that is what elevates that murder up to
8 a capital murder.

9 If someone just takes another person's
10 life, he has committed murder. Now, he could
11 receive a life sentence, but he couldn't receive
12 the death penalty for the crime of murder.

13 So, murder is a lesser included offense
14 of the crime of murder (sic).

15 The way that might be significant to a
16 juror is as follows: Imagine -- or let's go back
17 to the hypothetical I have already talked about
18 where the man goes into the convenience store and
19 he shoots the cashier at the store and he is caught
20 as he goes out.

21 Let's add a couple of things to our
22 hypothetical.

23 Imagine there were a couple of other
24 witnesses present, and they thought this man killed
25 the cashier during the course of a robbery. They

1 didn't see any money exchange hands, but they
2 assumed in their minds why else would a man kill
3 a cashier that early in the morning except to rob
4 her. They drew the conclusion under those
5 circumstances, exciting event, it was a robbery
6 case, but the jury hears, and let's say the man
7 gets charged for capital murder, robbery-murder
8 and the jury learns the man had known the cashier
9 for two years; they had been living together for
10 two years, and for the last couple of months, had
11 some violent arguments over another man she was
12 seeing, and she had told him she was moving out
13 and out of the picture as far as her life was
14 concerned. He was extremely jealous and angry
15 it.

16 Say, he had followed her to the store
17 and started the argument again and she told him
18 to leave, get out of my life, et cetera. He is
19 angry, a very jealous man, and he took the pistol
20 and shot her to death.

21 If that were, in fact, the case, rather
22 than it being a robbery-murder, the jurors' pro
23 verdict in that case would be to say not guilty
24 of capital murder but guilty of murder, because
25 if the murder doesn't take place in the course

1 one of these aggravating circumstances or
2 situations, the man's not excused for what he has
3 done, but he is guilty of murder rather than
4 capital murder.

5 I hope that explains what I mean when
6 I say murder is a lesser included offense of
7 capital murder.

8 Now, the range of punishment is different
9 for murder. It is five to ninety-nine years or
10 life, and the jury can consider giving someone
11 probation even though the jury has found someone
12 guilty of the offense of murder. They can consider
13 recommending probation to the judge.

14 Have you ever heard the phrase probation
15 as it is used down here at the courthouse? Have
16 you maybe heard of someone getting probation in
17 the papers? Are you familiar with that phrase
18 at all?

19 A. Yes.

20 Q. Let me tell you technically how probation works.
21 The jury can only consider probation where the
22 jury does -- well, two things. The jury has to
23 first of all be in unanimous agreement after they
24 have found the man guilty that his punishment
25 should be ten years in the penitentiary or less.

1 If the jury deems the man or woman who has committed
2 the crime, whatever the crime might be, deserves
3 to spend a greater period of time in the
4 penitentiary than ten years, they don't even
5 consider probation.

6 Probation only comes into play where
7 the jury, in unanimous agreement, all twelve jurors
8 agree this is the type of case where the person on
9 trial, given all the facts of the crime, given the
10 reason for the killing or the reason for it taking
11 place, any type of mitigating evidence we might
12 have heard, they say, "We feel this person should
13 not have to spend any more than ten years in the
14 penitentiary. In fact, we feel like six years or
15 seven years is the proper punishment for this
16 person." Then the jury can discuss and consider
17 among themselves whether they feel like it is also
18 a proper case for probation.

19 Do you follow me on how probation comes
20 into play?

21 A. Yes, I do.

22 Q. And then, of course, the jury also has to
23 unanimously agree probation is the proper
24 recommendation if they recommend it. If the jury
25 unanimously agrees it is and they recommend it to

1 the judge, he must go along with the jurors'
2 recommendation when the person is placed on
3 probation rather than go to the penitentiary, and
4 that means they will have certain conditions imposed
5 by the Court to live up to.

6 Those conditions are to report to a
7 probation officer once a month; work at suitable
8 employment; avoid persons or places of harmful
9 or disreputable character; avoid the use of
10 narcotics -- I think it says narcotics or habit-
11 forming drugs -- remain at one address; don't move
12 until you tell your probation officer where you are
13 moving to and get their permission; don't go out
14 of the county until you tell your probation
15 officer and get a pass; don't commit any -- don't
16 break any laws or you will get your probation
17 revoked.

18 That is generally how probation works,
19 and I wanted to explain that to you.

20 The reason I explained it to you, if you
21 were a juror on a case and had found someone guilty
22 of a felony offense, even the crime of murder, can
23 you in your own mind think of facts and
24 circumstances where you would feel or be able to,
25 rather, consider the question of probation as a

1 possible range of punishment even though I may have
found someone guilty even of the crime of murder?
3 Can you think of facts and circumstances even in
4 that type of case, a murder case, where you would
be able to consider the question of probation?

A. I believe so.

7 Q. Well, some jurors have a difficult time considering
facts and circumstances, and we give them
hypotheticals, but I wanted to see if in your own
10 mind you can think of some, and I think you can.

Any questions so far?

A. No.

12 Q. Okay. Let me ask you some personal questions here.

You have a twenty-two-year-old college
student. Where does he attend college at?

16 A. Bethany Nazarene College in Oklahoma City.

Q. Where does your nineteen-year-old work? What
store?

19 A. He works at a pawnshop in Pasadena.

Q. And your eighteen-year-old, where does he go to
school?

22 A. He is out of school right now.

Q. Working or living --

4 A. He is a part-time student. Actually, he is a very
troubled boy. He is not working at the moment,

and he is not attending school at the moment.

Q Is he living with you in your --

A He is living with his father.

Q And your fifteen-year-old and fourteen-year-old, where do they go to school?

A They go to Nimitz High School.

Q Nimitz?

A Nimitz.

Q Where is Seminar? Where is that?

A By Greenspoint Mall.

Okay. What type of occupation did your father engage in when you were growing up, if he is not still actively employed, and if he is not deceased, what is his occupation?

A He is deceased, but he was a welder.

Q And your mom, did she ever work outside the home?

A No.

Q Any brothers and sisters in your family?

A I have two brothers and three sisters.

Well, generally, when people have only a couple of family relatives, I ask what they all do, but I will save you that.

What type of reading do you like to do?

A Fiction, historical fiction?

A Biographies.

1 Q Let me ask you to put yourself in some categories
2 for me, if you could.

3 If you can, could you list your feelings
4 for me concerning the death penalty as a proper
5 punishment, generally speaking, as a proper
6 punishment for the commission of the crimes we
7 mentioned, certain crimes? It obviously doesn't
8 apply to all murder cases, but I just want you to
9 list your feelings in a general sense.

10 Can you tell me if your feelings would
11 fall into being reluctantly in favor of the death
12 penalty, moderately in favor of it, strongly in
13 favor of it? Can you place yourself in one of those
14 categories? If you can't, do the best you can.

15 A. I would say moderate.

16 Q. Politically speaking, tell me about your political
17 philosophies. Can you tell me if you are moderate,
18 conservative, or liberal?

19 A. I think I would tend to be conservative.

20 Q. Okay. You know, Ms. Whiteford, I have been asking
21 you a number of questions.

22 Have you any questions involving the
23 procedures we have talked about already, or anything
24 that has come up in your mind about anything we
25 have talked about so far?

1 A No, sir.

2 Q Is there any reason you feel you could not be
3 fair and impartial to either side in this case
4 if you were selected to serve?

5 A No, I don't.

6 Q One final thing, and that is this: I think the
7 evidence will show the Defendant in this case is,
8 in fact, an illegal alien. I think you will be
9 aware of that fact if you are asked to serve on
10 a jury panel at the conclusion of all the testimony,
11 and the only thing I ask you is this: If you feel
12 you can't do this, that is fine.

13 The way I perceive this is this: A man
14 should not be found guilty or not guilty of any
15 crime, particularly a serious one, because he is
16 an illegal alien. The evidence should determine
17 whether he is guilty or not guilty.

18 Do you agree?

19 A Yes, I do.

20 Q Of course, the fact that a person is in someone
21 else's country unlawfully or has come into a
22 country illegally could be evidence the jury could
23 consider about what type of person the man is.

24 MR. ELIZONDO: Objection, Your Honor.
25 That is a misstatement of the law.

1 THE COURT: Overruled.

2 Q (By Mr. Moen) I am not talking about guilt or
3 innocence. No man should be found guilty or not
4 guilty because a man is an illegal alien.

5 I think you agree with me, do you not?

6 A. Yes, I do.

7 Q. I am going to ask you one thing. If you agree to
8 serve on the jury panel, I expect you to say by
9 your verdict not guilty if I don't prove my case,
10 and can you do that?

11 A. Yes.

12 Q. And if I do prove my case to you beyond a reasonable
13 doubt, I will expect you to follow your oath as a
14 juror and to say by your verdict guilty. Can you
15 do that?

16 A. Yes, sir.

17 Q. These two questions to my left, I mentioned this
18 earlier and I am going to go and explain it a little
19 bit more.

20 The jurors don't automatically answer
21 these questions yes because they have found someone
22 guilty of capital murder.

23 In fact, the jury could find someone
24 guilty of capital murder and answer the first
25 question no because of the part that individual

1 played in the commission of the capital murder.

2 You see, sometimes crimes are committed
3 by more than one individual. Sometimes parties
4 act together. That is what we used to call
5 accomplices and accessories to a crime. That is
6 what we now call parties, two or more individuals
7 getting together to commit a crime and sometimes
8 the death of an individual during the course of
9 one of those crimes results from the actions of
10 only one person rather than all two or three
11 together, so you see that basically Question 1 is
12 a question answered about an individual found
13 guilty; what part did he play; what part did his
14 actions contribute to the death of the deceased,
15 if any at all, and I think you could probably
16 perceive in your own mind of some situations
17 where people act together to commit a crime.

18 One person might be extremely responsible
19 for the death of an individual, and the other
20 person might be unaware at the time the death is
21 taking place, although he was involved in the
22 crime. It is not a question automatically answered
23 yes just because the jurors have found someone
24 guilty. They answer it from the evidence, and
25 what does the evidence tell them about the part

1 the individual played in the commission of capital
2 murder.

3 Do you follow me on that?

4 A. Yes, I do.

5 Q. Thank you for letting me visit with you, and I
6 appreciate your kind attention and bearing with us
7 all day.

8 I will pass you to the Defense and they
9 will have questions.

10
11 EXAMINATION

12
13 QUESTIONS BY MR. ELIZONDO:

14 Q. Good morning, Ms. Whiteford. How are you?

15 A. Fine.

16 Q. It's been a long five weeks, and I think we will
17 soon be through.

18 We've already got twelve jurors and you
19 will be number thirteen or the alternate if you are
20 chosen.

21 I want to talk to you a little about a
22 capital murder case.

23 In all criminal trials in Texas, they
24 all have two parts. The first part is the guilt-
or-innocence stage. The second part is the

1 punishment phase.

2 I am going to talk to you a little bit
3 about the guilt-or-innocence phase.

4 The prosecutors talked to you in great
5 detail, as they always do in a capital murder
6 case, on the punishment phase.

7 I want to talk to you about the guilt-or-
8 innocence phase, if I may.

9 In all trials, the State has the burden
10 of proving its case to you beyond a reasonable
11 doubt. It has to prove to you beyond a reasonable
12 doubt that on a particular day in Harris County,
13 Texas, this Defendant shot and killed a police
14 officer in the lawful discharge of an official
15 duty knowing at the time he was a police officer.
16 They must prove that to you beyond a reasonable
17 doubt.

18 The term reasonable doubt will not be
19 defined for you because there is no legal
20 definition for the word or the term reasonable
21 doubt. About all I can do is give you a
22 comparison.

23 Across the street in the civil courthouse
24 at 301 Fannin where they try lawsuits over
25 property, over money, over contract disputes, over

1 personal injuries, the burden of proof over there
2 is by a preponderance of the evidence, the greater
3 weight of the credible evidence, and that side
4 wins.

5 On this side of the criminal courthouse
6 -- on this side of the street in the criminal
7 courthouse, the legislature said that the State
8 of Texas will have a heavier burden than in civil
9 lawsuits, and that burden will be proof beyond a
10 reasonable doubt.

11 Now, you can see it is a heavier burden.

12 Do you agree with that or disagree with
13 that?

14 A. Yes, I do.

15 Q. You do agree with that?

16 A. Yes, I do.

17 Q. You can see -- and that is probably right -- before
18 a person can be found guilty of capital murder and
19 subject themselves to one of two possible
20 punishments, life or death, before the State of
21 Texas can ask somebody to kill somebody, they'd
22 better have the right man.

23 Do you agree with that?

24 A. Yes, I do.

25 Q. How strongly do you agree with that?

A. Extremely.

The way they go about and prove their case to you or to the twelve jurors' satisfaction beyond a reasonable doubt is by calling witnesses. They come by and take the same stand where you are sitting, the same chair you are sitting in, and they ask questions of them and they give their version of the facts, the evidence, et cetera.

After they get through with the witnesses giving their version of the facts, they will then rest their case. That means, "That is all we have."

The Defendant can, if he chooses, he can also rest his case and not put on one bit of evidence, because the State has brought the charges. Now they've got to prove them beyond a reasonable doubt.

So, the Defense does not have to put on any evidence whatsoever for any reason.

Do you agree with that or disagree?

A. Yes, I do.

Q. Let's assume for a minute that the State has rested its case and we, for whatever reason, have decided not to put on evidence. You go in the jury deliberation room and you are thinking to

1 yourself and you are saying, "You know, in my
2 mind, I think he did it. Maybe he did it. He
3 could have done it, but they haven't proven this
4 case to me to my satisfaction beyond a reasonable
5 doubt."

6 In that situation, what would your
7 verdict be?

8 A. It would have to be not guilty.

9 Q. Okay. Can you see where you might get put in a
10 switch or in a position where you might say to
11 yourself: It is a pretty bad crime. An innocent
12 police officer got killed. Another innocent
13 bystander got killed, and another police officer
14 got five bullets pumped into him, and you are
15 sitting back there saying, "He could have done it.
16 Maybe he did it, but they haven't proven this case
17 to me beyond a reasonable doubt."

18 Can you come back and say, "Mr. Bax and
19 Mr. Moen, you did a good job, but you haven't proven
20 it beyond a reasonable doubt, and I find him not
21 guilty"?

22 Can you do that?

23 A. Yes, I could.

24 Q. I guess the Defendant -- probably the Defendant
25 will testify, and if he does testify, he can be

1 impeached or discredited with prior felony
2 convictions that have occurred within the last
3 ten years, let's say. You can use that if it is
4 proven to you that he has been convicted of any
5 prior felony convictions. You can use that to judge
6 his credibility or anybody else's credibility.

7 The Defendant can call witnesses. If
8 he calls a witness, I will suggest to you or submit
9 to you there will be two diametrically opposed
10 stories, two versions of the facts: He did it
11 and no, he didn't.

12 It will be your job then as a juror under
13 your oath to resolve those conflicts.

14 Do you think you could do that?

15 A. Yes, I do.

16 Q. It will be your job as a juror to be the judge
17 of the facts. There will be twelve judges of the
18 facts and one judge of the law. Judge Oncken will
19 decide on the admissibility of inadmissibility of
20 the exhibits and on the questions of law.

21 You, as a juror, will determine or
22 resolve the conflicts of testimony and be the
23 judge of the facts.

24 This is a pretty emotional case. A
25 police officer, like I say, was killed in action.

1 An innocent bystander got killed, and another
2 police officer got five bullets put into him.
3 It is pretty emotional.

4 I would speculate that the officer's
5 widow will testify, and maybe his children. I
6 don't know, and it might get pretty emotional.

7 Under your oath as a juror, it will be
8 your job to hear the evidence and base your verdict
9 upon the law and the evidence so help you God,
10 not emotions.

11 Will you be able to separate emotions
12 from the facts?

13 A. Yes.

14 Q. If the Defendant is found guilty of capital murder,
15 then there is only two possible punishments, life
16 or death, and, of course, that is determined by
17 how you answer those two questions.

18 In the first question, the word
19 deliberately is underlined, and that is because
20 there is no legal definition for the word
21 deliberately, and it is underlined to draw
22 attention to it for you anyway. It is not
23 underlined in the jury charge.

24 It is underlined right now, and I want
25 to ask you: What do you think the word

1 deliberately means?

2 A. With a purpose.

3 Q. With a purpose.

4 Again, there is no legal definition of
5 the word deliberately. About all I can do is give
6 you some comparisons, because we know there is a
7 definition of the word deliberately, but no legal
8 definition for the word deliberately.

9 I will give you an example.

10 For example, you will go into the jury
11 deliberation room and you will deliberate on that
12 man's guilt or innocence, and that to me would
13 indicate that you would think about or ponder
14 about with measurable consideration.

15 Do you have the same meaning for the
16 word, or do you have a different meaning for the
17 word?

18 A. No. That is what the word means.

19 Q. The second question is asking you to more or less
20 foretell or forecast the future.

21 Do you agree with that?

22 A. Yes.

23 Q. The word probability there is underlined. Some
24 people say the word probability means chances are,
25 more likely than not.

1 What do you think it means?

2 A. That is about what it means.

3 Q. Do you think that a person can change his mode
4 of operations, mode of behavior, mode of conduct?

5 A. I would hope so.

6 Q. It's probable, isn't it?

7 A. Yes.

8 Q. In Questions 1 and 2, both questions, the State must
9 prove to you beyond a reasonable doubt that the
10 answer to those questions should be yes, and if
11 they don't prove to you beyond a reasonable doubt
12 that the answers to those two questions should be
13 yes, then it is your duty, under your oath, to
14 answer them no.

15 Do you agree with that?

16 A. Yes, I do.

17 Q. Question No. 2 is asking you to predict the future
18 as to whether or not the Defendant will commit
19 criminal acts of violence, more than one act,
20 that would constitute a continuing threat to
21 society.

22 Do you think the penitentiary is a
23 society?

24 A. Yes, I do.

25 Q. Would you make the State prove to you that there

1 is a probability that this Defendant, is he is
2 found guilty, would commit criminal acts of
3 violence, more than one act, that would constitute
4 a continuing threat to society?

5 A. Yes.

6 Q. Okay. Of course, a lesser included offense of
7 capital murder is murder, and not because it is
8 lesser in my eyes, but because the penalty range
9 is lesser, the penalty range being no less than
10 five years nor more than ninety-nine years or
11 life, and a fine of up to ten thousand dollars
12 can be imposed.

13 The legislature, when they drew that
14 penalty range, realized there are many, many
15 different ways that murder can be committed, and
16 that is why there is a wide range of punishment,
17 and I want to get it here in my mind.

18 Can you, in the proper case in your
19 own mind, consider probation, as little as five
20 years' probation, for a murder case?

21 A. It would depend on the circumstances.

22 Q. Sure, but you can consider it?

23 A. I can consider it, yes.

24 Q. In the proper case in your own mind, whatever
25 you thought was proper?

1 A Yes.

2 Q The Defendant, it may come to your knowledge,
3 is an illegal alien.

4 I forgot when it happened. It may have
5 happened three months ago or six months ago, but
6 it happened, I guess, about six months ago, I guess,
7 that the Supreme Court came down with the decision
8 that the children of illegal aliens had a right
9 to a free education.

10 Remember that?

11 A Yes, I do.

12 Q What was your first reaction when you heard that?

13 A I feel the children should have an education if
14 they are going to be in this country. They are
15 not responsible for what their parents do.

16 Q I guess you feel everybody should have an education?

17 A I don't think they should be punished because of
18 the parents.

19 Q Well, it may come to your knowledge that he is
20 an illegal alien, this Defendant in this case,
21 Ricardo Aldape Guerra.

22 Can you give him a fair and impartial
23 trial in this case?

24 A Yes, sir.

25 Q Knowing he is an illegal alien?

1 A. Yes, sir.

2 Q. You know, I was brought up to always believe
3 police officers, to always obey them, and now when
4 we get into a court of law, I've got to ask you
5 certain questions regarding police officers.

6 Would you automatically give a police
7 officer more credibility prior to his testimony
8 in court solely because he is a police officer?

9 A. No, sir.

10 Q. So then I guess you believe like everybody else,
11 that police officers are human and that they also
12 can make mistakes?

13 A. That is right.

14 Q. They have the same human frailties that you and
15 I do?

16 A. That is right.

17 Q. Let me see -- I've forgotten what it is now.

18 Yes. I just remembered.

19 What do you think about eyewitness
20 testimony? Do you believe or do you think that
21 a person can be mistaken about a particular
22 identification of somebody?

23 A. Yes, I do.

24 Q. Have you ever gone up to somebody and said, "Hi,
25 Joe," or, "Hi, Mary," and Mary or Joe turns around,

1 and you turn all shades of red because it is not
2 Joe or Mary?

3 A It has happened.

4 Q I know it has happened to me before. Has it happened
5 to you before?

6 A Yes, it has.

7 Q Ms. Whiteford, it's been a pleasure talking to
8 you, and I look forward to seeing you on the jury
9 panel.

10 MR. ELIZONDO: That is all we have,
11 Judge. We pass.

12 MR. MOEN: We will accept Ms. Whiteford.

13 MR. ELIZONDO: We would gladly accept
14 her also.

15 THE COURT: Ms. Whiteford, you will be
16 the thirteenth or alternate juror in this case.
17 In the event that one of the other twelve becomes
18 disabled to serve for any reason, you will be
19 stepping in in that place. We do that because it
20 has taken us five weeks to pick a jury, and we
21 don't want anything to happen and go through five
22 more weeks to do that.

23 THE JUROR: Right.

24 THE COURT: We will begin the testimony
25 in this case on Monday, and I anticipate that we

1 will begin about 10:00 o'clock on that day, so I
2 would ask that you be back at 10:00 o'clock on
3 Monday morning, and in the meantime, if there is
4 any publicity about the case in any form of the
5 media, newspaper or television, I would admonish
6 you to studiously avoid listening to or reading
7 anything about this case.

8 That is true now and after we begin the
9 testimony, and certainly after the testimony begins,
10 I am confident there will be media coverage in
11 all three of those media, and I would strongly
12 urge the jury at that time to avoid reading,
13 watching, or listening to anything if anything
14 comes on the newspapers, radio, or television.
15 They are to turn it off immediately and not read
16 it, watch it, or listen to it.

17 If you would, stand and raise your right
18 hand to be sworn as a juror.

19 (Ms. Whiteford was sworn as a juror.)

20 THE COURT: Do you have any questions
21 to ask me about?

22 THE JUROR: Just as an alternate, does
23 that mean I will be back here or where?

24 THE COURT: I would anticipate you
25 would be out here listening to everything that

1 goes on.

2 We will see you on Monday morning. I
3 would expect you to make arrangements to spend at
4 least a week with us. There may be one or two
5 nights you will have to stay with us in a hotel,
6 but I can't tell you whether that is true. It
7 might be possible. You might want to make
8 arrangements.

9 THE JUROR: I need some sort of slip for
10 work.

11 THE COURT: The bailiff will provide that
12 for you.

13 Thank you so much.

14 (Ms. Penrice and Ms. Compton were brought
15 into the courtroom, whereupon the following
16 proceedings were had.)

17 THE COURT: Ms. Penrice and Ms. Compton,
18 we have now completed the selection of this jury.
19 I guess that is good news and bad news. You have
20 been down with us all day, and I appreciate your
21 patience.

22 I know you don't fully understand why
23 you had to sit in the courtroom all day long.
24 It would probably take me the rest of the
25 afternoon to try to explain it to you.

Picking a jury in a capital case is the most exasperating thing you can go through. It takes your time and takes the juror's time, and whether you believe it, you have served a very vital purpose here, and we appreciate your willingness to come and serve on the jury here.

Thank you very much.

(At this time the prospective jurors left the courtroom.)

MR. ELIZONDO: Judge, for the record, prior to trial, we filed a motion to wait to exercise our challenges to the jury until the entire venire had been examined and selected, and we objected to the constitutionality of 35.13 of Vernon's Annotated Code of Criminal Procedure, and now, after we've seen the entire venire, we could see we would have made different selections in our jurors. We would have struck Larry Douthitt, Stephen Busby, Ana Petty, and would have taken Charles Krezinski, Wanda Oliver, and Charles Gougenheim, and for that reason, we are again objecting to having had to make our strikes pursuant to 35.13.

THE COURT: Well, your objection is overruled.

MR. ELIZONDO: Note our exception.

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