

Aldape: Trial Transcript
(982) (voir dire) (v. 14)

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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 XVII
STATEMENT OF FACTS
VOIR DIRE EXAMINATION
CONTINUED
SEPTEMBER 29, 1982

FILED

RAY HARDY
District Clerk

JUL 11 1983

Harris County, Texas

By: *[Signature]*

Deputy

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I N D E X

VOLUME XVII

September 29, 1982

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NEW JURY PANEL EXAMINED BY THE COURT

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1 (At this time a jury panel of six was
2 brought into the courtroom, and in their presence
3 and hearing, the following proceedings were had.)

4 THE COURT: All right. Good morning,
5 ladies and gentlemen.

6 My name is Henry Oncken. I am the
7 judge of the 248th District Court where you now
8 find yourselves seated, and we are here this
9 morning to select a jury -- to continue the
10 process of selecting a jury to try a capital
11 murder case.

12 The Defendant in this case is the
13 man seated at the end of the table, Ricardo
14 Aldape Guerra, and seated next to him and speaking
15 with him is Linda Hernandez. She is an
16 interpreter, and is telling him everything in
17 English -- or in Spanish, rather, that is said
18 in the courtroom.

19 Mr. Guerra does not speak English, and
20 it is necessary for him to have an interpreter
21 with him.

22 Mr. Guerra is represented by two
23 attorneys, Mr. Candelario Elizondo and Mr. Joe
24 Hernandez, and Mr. Hernandez and Ms. Hernandez
25 are not kin to each other. They just happen

1 to have the same name.

2 The Prosecution is represented by Mr.
3 Bob Moen and Mr. Dick Bax.

4 The lady seated in front of you there
5 is Cindy Layne. She is the court reporter, and
6 she is taking down everything said in this
7 courtroom in this case, and that is the normal
8 procedure in every criminal case, is to have a
9 court reporter take it down.

10 Now we have brought over six persons to
11 interview in this case, and I'm sure most of you
12 are aware, but for those of you who are not
13 aware, a jury in a case where the State is seeking
14 the death penalty, or a capital case, the jury
15 is talked to individually.

16 Each prospective juror is brought into
17 the courtroom and talked to individually, and
18 when it comes your turn to do that, I ask that
19 you simply relax and visit with us a minute.

20 It will take about an hour to get
21 through the interview, but during this period of
22 time, please bear in mind no one in this
23 courtroom is trying to embarrass you or do
24 anything sinister to you at all. It is just the
25 law in a capital case you interview the jurors

1 individually because of the serious nature of the
2 proceedings.

3 In a normal criminal case, we bring over
4 a panel of either thirty-six or forty jurors and
5 they sit in the seats and we talk to them at one
6 time, and it takes maybe an hour, two hours,
7 sometimes three to complete the selection of a
8 jury.

9 We have actually been in this case now,
10 in jury selection, we have completed fifteen days
11 of it, but it has covered about a five-week
12 period of time to do that.

13 We have nine jurors, and it is just
14 a painstaking, slow, tedious process.

15 We ask your indulgence and patience
16 with us.

17 We are going to make this day as
18 profitable for us, as well as you, too. We
19 zealously guard our time as well as your time,
20 and it takes time to do these things.

21 I am going to discuss with you a few
22 general things true in all cases, and the lawyers
23 when they visit with you will go into more
24 detail about how this case is tried and how a
25 capital case is tried.

1 First of all, after the close of the
2 evidence in the case when both sides say they
3 rest, I will prepare what is called legally
4 a charge.

5 What that means, all the law applicable
6 to this particular fact situation will be given
7 to the jury in writing, and you will have that
8 to take back into the jury room and read and
9 study, and you will apply the facts to that law,
10 and part of that charge is true in every criminal
11 case, and I want to get those preliminary and
12 general things out of the way so the lawyers
13 don't have to talk about those.

14 First of all, any Defendant charged
15 with a criminal offense is presumed under the
16 law to be innocent until his guilt is established
17 by legal evidence beyond a reasonable doubt.

18 As Mr. Guerra sits here today, he is
19 charged with the offense of killing a police
20 officer, but he is presumed under the law to be
21 innocent until such time as the State brings
22 sufficient evidence to you to convince you beyond
23 a reasonable doubt that he did it.

24 If they fail to meet that burden of
25 proof, it will be the jurors' duty to find the

1 Defendant not guilty.

2 Incidentally -- not incidentally --
3 I forgot to mention or tell you a brief overlay
4 of the facts here to see if you know anything
5 about this particular case. There is nothing
6 wrong for you to have read something or heard
7 something about this case; however, if you have
8 made up your minds as to the guilt or innocence
9 of this individual at this time based on what
10 you have read or heard, that would be wrong --
11 wouldn't be wrong, but at least you could not
12 serve on the jury.

13 Officer James D. Harris, on July 13th,
14 1982, was shot and killed as he stopped at a car
15 out on Edgewood and Walker streets. That is out
16 in the vicinity of Dumble and Harrisburg in the
17 east end of town, fairly close to downtown.

18 But he was shot and killed. Shot
19 three times in the face, and about a minute or
20 so later, a citizen who had two children in the
21 car with him was also shot and killed at that
22 same place.

23 About an hour after that, the Houston
24 Police Department was in the process of attempting
25 to make some arrests in the case based upon

1 some information they received, and another
2 police officer was shot five times. He returned
3 the fire of the individual who shot him and
4 managed to kill that individual.

5 Now with that brief rendition of the
6 facts, is there anyone who knows anything about
7 this case?

8 Okay. As I say, there is nothing wrong
9 to know anything about it, but if you have
10 already decided the facts, it would be improper.

11 Okay. Now, I mentioned when I told
12 you that the presumption of innocence applies to
13 this Defendant, that the State had the burden of
14 proving his guilt beyond a reasonable doubt.
15 There will be many terms defined for you in the
16 law that I give you, but the term beyond a
17 reasonable doubt will not be defined for you
18 because I can only define for a jury what the
19 legislature defines for me and they have not
20 defined the term reasonable doubt, so you will
21 find nothing in the charge that tells you what
22 that means. To me, it simply means you use your
23 common sense. You listen to the evidence and
24 if you are convinced, after you have heard all
25 the evidence, if you are convinced he did do it,

1 you are to find him guilty.

2 If you are convinced he did not, you
3 will find him not guilty.

4 To me, it is that simple. To others,
5 it may mean something else.

6 The first thing that the jury will hear
7 in the case is I will tell the State to present
8 the indictment to the jury.

9 The indictment is a legal term. It is
10 a piece of paper upon which certain words are
11 typed, and those words bring to this courtroom,
12 to this trial, a formal charge against this
13 individual. It is the same thing as if you
14 filed a lawsuit in the courthouse across the
15 street over there, if you were not involved in
16 an automobile accident. You would file a lawsuit
17 stating certain things and you would have to go
18 over there and prove those things.

19 That piece of paper is not evidence
20 nor is the indictment evidence in this case.

21 I will tell the jury in the charge
22 the fact that any Defendant has been arrested
23 for, charged with, and perhaps confined for an
24 offense is absolutely no evidence of his guilt.
25 That evidence must come from this witness chair

1 that is right between you and I, and that is
2 the only place you will get any information
3 concerning the guilt or innocence of this
4 individual.

5 The Defendant in this and every other
6 criminal case has the right to remain silent.
7 He does not have to testify. His lawyers do not
8 even have to ask questions of the witnesses who
9 testify. That is a right given to any Defendant
10 by the Constitution of the United States, the
11 Constitution of this state, and the laws of this
12 state, and you are not to consider, as I will
13 tell you in that charge, you are not to
14 consider failure to testify as evidence of guilt.
15 He does not have to prove his innocence. The
16 burden is on the State to prove his guilt.

17 Because the State has the burden of
18 proof, they always go first. They will talk to
19 the jurors first. After the jury is selected,
20 they will put on evidence first. They have the
21 right to open and close the summation or arguments,
22 as we call them. They get to go first because
23 they have that burden of proof.

24 In any criminal case, the felony
25 grade -- and this certainly is a felony-grade

1 case -- there are thirteen judges in the
2 courtroom.

3 I will be the judge of the law in the
4 case. I will give you the law, rule on
5 objections, rule upon the admissibility of
6 certain evidence, but I have no function in the
7 decision concerning the facts of the case. That
8 will be up to twelve citizens to decide after
9 they hear the evidence.

10 You and I will serve on an equal
11 basis, but we have separate functions, also. You
12 are fact-finders under the law. Okay?

13 Now, in a murder case, for example, the
14 jury --

15 First of all, let me back up just a
16 minute.

17 A criminal case is divided into two
18 parts. It is called a bifurcated trial. If you
19 hear the lawyers use that term, it simply means
20 divided into two parts.

21 The first stage of a criminal case is
22 to hear facts about an event which occurred, and,
23 obviously, someone is charged with that offense,
24 and it is up to the jury to decide whether or
25 not the individual charged caused that event

1 to occur, and if the jury finds that Defendant
2 guilty of having caused that event to have
3 occurred, there is a second stage to the trial,
4 and that stage is to decide what you are going
5 to do with that Defendant.

6 In a murder case, for example, the
7 full range of punishment is by commitment in the
8 Texas Department of Corrections for any period of
9 years not less than five nor more than ninety-
10 nine, or the Defendant can be sentenced to life,
11 and in addition to any of that range of
12 punishment, the Defendant can be assessed a fine
13 of up to ten thousand dollars.

14 In this case and in all capital cases
15 where the State is seeking the death penalty,
16 the jury goes back and they answer two questions.

17 The jury in a murder case can go back
18 there, after hearing evidence, and they can go
19 back there and decide on any period of years
20 within that range I have told you about.

21 However, in a capital case, they simply
22 go back and answer those two questions over there
23 on the board, and I will ask you to take just a
24 minute to glance at those, please.

25 (The prospective jurors complied.)

1 THE COURT: All right. When the jury
2 goes back on the second stage of the trial, and
3 that is assuming, for our purposes here, that the
4 jury has found the Defendant guilty, they go back
5 and consider the evidence they have heard to answer
6 those two questions. If the jury answers those
7 two questions, both of them yes, then it becomes
8 my duty under the law to assess the punishment
9 of this Defendant at death.

10 If the jury answers one of those
11 questions yes and one of those questions no, it
12 becomes my duty under the law to assess his
13 punishment at life in the penitentiary. There are
14 only two possible punishments in a capital case
15 if the jury finds the Defendant guilty of capital
16 murder, and that is death or life in the
17 penitentiary.

18 The jury does not go back and say, "We
19 think he ought to get death," or "We think he
20 ought to get life." They simply answer those
21 questions, and the law takes care of the rest
22 of it.

23 In any criminal case, a jury is not
24 allowed to ask questions. You may sit over
25 there and hear witnesses testify and you may

1 wish to ask a question or cross-examine a witness
2 or whatever, but I cannot do that either, and
3 a jury cannot do that. I ask you to remember that.
4 A lot of times, jurors try to ask questions,
5 but they cannot do that.

6 All right. I need for you to begin
7 now, if you haven't already begun the process,
8 to think about your feelings concerning death as
9 a punishment for a criminal case.

10 When these lawyers are questioning you,
11 please bear in mind they are not going to try to
12 change your views about anything. They simply
13 are entitled to know and need to know how you
14 feel about certain issues and certainly whether
15 or not you could participate on a jury where the
16 State is seeking the death penalty.

17 If you do not approve of the death
18 penalty, don't agree with it, that is certainly
19 your prerogative, and I am not going to argue
20 with your views about it.

21 Any other questions they ask you
22 that you consider to be personal, please don't
23 take them to be personal. They are here to
24 select a jury that will be fair and impartial to
25 both sides, and impartially decide the facts

1 of this case and the punishment, if any, to be
2 assessed.

3 So please understand we are not trying
4 to be personal with you and pry into your personal
5 affairs.

6 If you are chosen on this jury today,
7 you will not be required to stay down here,
8 obviously, until we have completed the selection
9 of the jury. You will be allowed to go home and
10 go about your normal duties until such time as
11 we begin evidence.

12 Our target date is Monday next, the
13 4th. We may or may not make it. We may miss it
14 by a day or two. That is when we plan to start
15 the evidence, and certainly if you are chosen,
16 you will be allowed to go about your normal
17 activities during that period, the interim
18 period.

19 Likewise, you might be, if you are
20 selected on the jury, at some period in the trial,
21 which I anticipate once the evidence begins
22 will last four, five, or six days, somewhere in
23 that range, at some period in that time span,
24 you may be required to stay down here one or
25 two nights with us. We will put you in a hotel,

1 not lock you in a jury room. You will have a
2 place to sleep, meals, and that sort of thing.
3 We need you to be thinking about that.

4 Our normal experience has been that
5 we can get through three jurors in the morning
6 and three in the afternoon, so I am going to ask
7 Ms. Matthews, Mr. Bridges, and Mr. Horbelt --

8 MR. ELIZONDO: May I approach the
9 bench?

10 THE COURT: Yes, sir.

11 MR. ELIZONDO: May it please the
12 Court, I would ask the Court to shuffle the jury
13 panel.

14 THE COURT: We are going to shuffle
15 your names around. Stand by.

16 All right. Do you want to come and
17 draw them? I will let you draw them.

18 (Mr. Elizondo did so.)

19 THE COURT: Mr. Busby will be number
20 one. Mr. Horbelt will be number two, and Mr.
21 Lee will be number three.

22 Ms. Southern, Mr. Bridges, and Ms.
23 Matthews, I don't see any point in having you
24 wait down here with us, so I will excuse the
25 three of you now until 1:30. You can go anyplace

1 you want to go during that period. You can stay
2 down here with us if you want to, but I will tell
3 you that you will be seated and nothing will
4 happen until this afternoon, because it will take
5 the full morning to get through the other three.

6 Those three may be excused until 1:30.

7 Please report back here in this
8 courtroom at that time, and the other three, Mr.
9 Busby, Mr. Horbelt, and Mr. Lee, if you would,
10 remain with us.

11 Mr. Busby, you will be the first one.
12 If you would, come right around and have this
13 chair here, and, Mr. Horbelt and Mr. Lee, if you
14 would like, you can go down and get a cup of
15 coffee in the basement or have a seat in the
16 jury room. It is your choice.

17 Are you ready?

18 MR. MOEN: Sure.

19 THE COURT: You may proceed.
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1 STEPHEN C. BUSBY,
2 was called as a prospective juror and responded to
3 questions propounded as follows:
4

5 EXAMINATION
6

7 QUESTIONS BY MR. MOEN:

8 Q Mr. Busby, my name is Bob Moen. I am with the
9 District Attorney's Office. The fellow who walked
10 out just a second ago is Mr. Dick Bax, also with
11 the District Attorney's Office, and Mr. Bax and
12 myself will be representing the family of J. D.
13 Harris in the prosecution of this case that the
14 judge has talked about.

15 I take it from your silence when the
16 judge was giving a description of the facts that
17 you don't remember having heard or read anything
18 about the case at all?

19 A No.

20 Q There is nothing wrong with it. The only reason
21 we ask is to see if the juror has formed an opinion
22 or conclusion based on what they have seen or
23 heard.

24 A Okay.

25 Q I need to ask you questions in the next few

1 minutes or so about your feelings or opinions
2 and explain some things you can expect to come
3 up during the course of the trial from a legal
4 standpoint, and what you need to do by your
5 jury service, if we can.

6 If you have questions, I ask you to ask
7 them so we can clear them up now. If you have
8 disagreements, go ahead and state those, too.

9 The judge mentioned, and I second,
10 that there are no right or wrong answers. The
11 reason we talk to jurors like yourself is to find
12 out how you feel.

13 A Yes, sir.

14 Q We live in a type of country where no one has
15 to be on a jury panel where that jury service
16 would violate their feelings, opinions, or
17 convictions. The only thing is that the jury
18 tells us about them. We don't want anyone on
19 the jury panel who is afraid to speak out and
20 tell us how they really feel when a week from
21 now we are standing before the jury asking them
22 to reach a verdict based on the evidence, and
23 they find they cannot serve on a jury concerning
24 the death penalty or capital punishment or
25 anything else.

1 We are entitled to know how you feel,
2 and please let us know so we can make a decision
3 as to whether or not you would be qualified to
4 serve on this jury.

5 A Okay.

6 Q Keeping that in mind, can you tell me what your
7 feelings are concerning capital punishment, the
8 death penalty? Would they allow you to serve on
9 a jury? Would they allow you to return a verdict
10 knowing it would result in the death penalty or
11 not?

12 A I could give capital punishment.

13 Q I take it at least your feelings concerning the
14 death penalty would allow you to serve on a jury
15 and return a verdict.

16 How long have you felt that way? Is
17 that pretty much the way you have felt all your
18 life, or have you ever felt differently?

19 A No.

20 Q I want to ask you to think about it and put your-
21 self in that category as far as the death penalty,
22 your feelings concerning the death penalty.

23 Would you say you are strongly,
24 moderately, or reluctantly in favor of the death
25 penalty, if you can put yourself in one of those

1 three?

2 A I don't think strongly. I would say it is
3 moderately.

4 Q I am going to ask you to categorize yourself
5 politically. Would you be liberally inclined,
6 conservative, moderate, or some other description?

7 A Conservative.

8 Q Let me explain to you a little bit about the
9 death penalty procedure in our state.

10 Not all murders that take place are
11 punished as capital murders. Our legislature,
12 back in 1974, when they enacted and passed our
13 death penalty, current death penalty statute,
14 they said that people that commit certain types
15 of murders are going to stand before a jury and
16 the jury is going to decide whether those
17 individuals who commit those crimes should receive
18 the life sentence or the death penalty, and they
19 said for someone to murder during the course of
20 a burglary, break into someone's home and kill
21 someone; during the course of a robbery, robbery-
22 murder, rape-murder, kidnap-murder, and arson-
23 murder are all examples of murders that, because
24 they take place during the commission of one
25 of those crimes, they become capital murders.

1 The legislature has said there are
2 five other instances as well in addition to those
3 five, where if someone takes a life, they also
4 will stand before the jury for capital murder,
5 and that is murder for hire, such as the assassi-
6 nation of Judge Wood, which seems to be in the
7 paper now, the federal judge, that is a capital
8 case, even though he is a judge in federal court.
9 That falls within the definition of capital
10 murder.

11 Murder of a policeman or fireman during
12 the course of their official duties, murder by
13 a convict during the course of escaping or
14 attempting to escape from a penal institution,
15 and murder by a convict of anyone who is employed
16 by us -- I say by us or the State -- in the
17 running or involved in the running of our penal
18 institutions for us and for the rest of society,
19 whoever they might be: guards, librarians,
20 medical personnel, et cetera.

21 People involved in the running of our
22 penal institution and employed in that capacity,
23 if they are killed by a convict for any reason,
24 obviously, other than self-defense reasons, is
25 guilty of the crime of capital murder.

1 If they return a guilty verdict, they
2 come and take their seats in the jury box, and
3 we proceed to the second phase, the punishment
4 phase. At that portion of the trial, each side
5 has an opportunity to offer evidence to the jury,
6 in addition to what the jury has already heard,
7 to help them answer the two questions that appear
8 to your left, because depending upon the jurors'
9 answers to those questions, the Defendant will
10 receive either the life sentence or the death
11 penalty.

12 No one is trying to hide anything from
13 you. If both those answers are yes, you know
14 what the results of your answers will be. The
15 Defendant will receive the death penalty.

16 A no answer to either one of those,
17 he will receive a life sentence rather than the
18 death penalty.

19 For all to be yes, all twelve have to
20 unanimously agree. To answer a question no,
21 only ten have to be in unanimous agreement.
22 Slight difference. Twelve to answer yes, ten
23 to answer no.

24 Now, I want to talk about these
25 questions here for just a second, and some of

1 the wording we have underlined in some of the
2 questions.

3 What I would like you to do is read
4 them to yourself, if you haven't already done
5 that, and I want to go over some of the words.

6 A Okay.

7 Q Okay. This first question, let me direct your
8 attention to it. It's a question that asks you
9 to make a determination about the conduct of the
10 man on trial that you have found guilty --
11 speaking hypothetically -- that you have found
12 guilty.

13 Was the conduct of that man, was that
14 conduct deliberately done?

15 It's a two-part question. And was it
16 done with a reasonable expectation that the
17 deceased would die.

18 Let me give you a hypothetical case.
19 Imagine a situation where a man goes into a
20 convenience store, confronts the cashier, demands
21 the money, she is scared to death, and turns
22 the money over to him. He gets the money and
23 looks around the store and anticipates, or at
24 least believes she is the only witness to the
25 crime. He takes a pistol and fires two bullets

1 into her body, one in the head and one in the
2 chest, and she dies.

3 Unbeknownst to him, she alerts the
4 police with an alarm, and they are waiting
5 outside.

6 At that stage, the jury would decide
7 is he guilty or not guilty of robbery-murder,
8 which is a capital murder.

9 If the jury found him guilty, they
10 would then decide: Was the conduct of this man,
11 was it deliberately done and was it done with the
12 reasonable expectation she would die? In other
13 words, the pointing of the pistol, the firing
14 of the bullets into her body, was that conduct
15 deliberate and done with a reasonable expectation
16 that that person would die as a result of those
17 wounds?

18 Do you see how that question is
19 basically a question of the conduct of the
20 individual who has been found guilty of capital
21 murder, and it is a question that directs itself
22 to a focus?

23 A Both have to be answered?

24 Q Yes. It is a two-part question: Was it
25 deliberate, and was it done with a reasonable

1 expectation the deceased would die.

2 Then the jury passes to the second
3 question, and the second question asks you to
4 make a determination about the type of person you
5 find yourself in the courtroom with. Is the man
6 on trial the type of person where there is a
7 probability he would commit criminal acts of
8 violence that would constitute a continuing
9 threat to society?

10 The second question asks you to make
11 a decision about the person. The first question
12 is about the conduct of the man or the individual.

13 You will have to -- let me go back.
14 You will have to use your own definitions for
15 deliberate and use your own definitions for
16 reasonable expectation that the deceased would
17 die. Why is that?

18 The legislature that drew these up
19 for capital murder cases didn't give us
20 instructions. The basic law is that you and the
21 other jurors will have to use your common sense
22 definitions for these and the other things.

23 The same thing applies to Number 2,
24 probability and criminal acts of violence and
25 society. You will have to use your own

1 definitions for those words and phrases as well.

2 I want to point out some things in
3 regards to Question 2.

4 First of all, you have to believe the
5 man on trial is the type of person where there
6 is a probability he would engage in these types
7 of acts, and that those acts would constitute
8 a continuing threat to society.

9 The first word is probability, not
10 certainty, and I want to point out to you, and
11 I think you realize why, if you are a juror on
12 this case, if you are selected to serve, there is
13 no way anyone can prove to you anything to a
14 certainty. I think you realize why. The only
15 person in the universe who can tell you anything
16 to a certainty is God Almighty himself, and he
17 will not be a witness in this case, and you are
18 not to put yourself in the position of playing
19 God.

20 You are to make the best judgment you
21 can based on all the evidence presented to you
22 about what kind of person is on trial to decide
23 is there a probability he would commit these
24 kinds of acts, criminal acts of violence.

25 Before you could answer the question

1 yes, you don't have to believe the person would
2 commit certain things, murders, or assaults or
3 robberies, or rapes, or criminal mischief or
4 any other act of criminal violence we can think
5 of.

6 Again, is there a probability he is
7 the type of person that would commit those acts
8 which would be a continuing threat to society,
9 and you will have to use your own definition for
10 the word society.

11 The only thing I would like to point
12 out to you, I think you will realize from your
13 own common sense, once a man is convicted of
14 capital murder, the only society he will find
15 himself in is the prison society, and the only
16 thing I want to know is: Do you disagree or
17 agree with me? Do you feel there are people
18 in our prison system, that we ask to work in our
19 prison system for us, who run the prison system,
20 who deserve our protection from the convicts
21 confined there?

22 A Yes.

23 Q And do you agree or disagree there are convicts
24 in the prison system serving out their debt to
25 society who deserve protection from other

1 convicts sent to the penitentiary?

2 A Yes.

3 Q Now that I have had a chance to go over Questions
4 1 and 2, do you have questions about 1 and 2,
5 the way they are worded, anything we can clear
6 up for you right now?

7 A Comes down to the definitions. That's the only
8 thing. I guess that would be up to me.

9 Q Do you feel that Question 1 and 2 are the type
10 of questions you could answer depending on what
11 the evidence you would hear would be, yes or no,
12 depending on the evidence?

13 A Yes.

14 Q Let me point out a certain thing: In a proper
15 case, the law says just the facts of the crime
16 itself can be enough evidence for you to answer
17 both questions yes. That is for you and the other
18 jurors to talk about.

19 We talk about the punishment phase of
20 the trial. At the punishment phase of the trial,
21 you can hear other evidence. You don't have to,
22 but you can. Just the facts from the first stage
23 can be enough for you to answer yes. That will
24 be a call judgment for you and the other jurors
25 to decide, whether based on the facts of the

1 case, is it enough to answer yes? Do the facts
2 itself tell you enough about the conduct of the
3 man and what kind of person he is to be able
4 to answer both questions yes?

5 At the punishment stage, however, the
6 law does allow other evidence, if there is any
7 to be presented to the jury, to help them decide
8 their answers.

9 For instance, crimes a man may have
10 committed that have not been tried, too -- that
11 is a specific question -- that type can be
12 submitted to the jury; whatever crimes are known
13 to authorities, any prior convictions that are
14 known to the authorities can again be presented
15 to the jury.

16 Any type of information that is known
17 about the man on trial can be presented, good or
18 bad, to help the jury decide what their answers
19 to the questions can be.

20 But there is no requirement that type
21 of evidence be presented to the jury before the
22 questions can be answered yes. The opportunity
23 is there.

24 Do you follow me so far, to a general
25 extent?

1 Obviously, if you are selected, you
2 will get a firsthand view of how it works, but
3 speaking strictly in hypothetical terms, have you
4 got a little bit of a feel of what's going on so
5 far?

6 A I guess so, yes.

7 Q The only thing a judge will tell you, in answering
8 those questions here, he will tell you you are not
9 to discuss with other jurors how long a man would
10 have to serve in the penitentiary on a sentence
11 if that were the sentence.

12 A Repeat that.

13 Q The judge will tell you you are not to discuss
14 among yourselves as jurors how long a man would
15 have to serve in the penitentiary on a life
16 sentence. The judge will not tell you that.

17 The judge will tell you however long
18 he will serve is within the exclusive
19 jurisdiction of the Board of Pardons and Paroles.
20 The reason we emphasize -- and it is so important
21 -- if jurors were to discuss that, it would be
22 grounds for having to do this case all over from
23 the start, and the judge will give you that in
24 writing, and I ask you to remember that. I want
25 you to know how important --

1 MR. ELIZONDO: Objection to his
2 stressing the laws of parole, Your Honor.

3 THE COURT: Overruled.

4 Q (By Mr. Moen) Do you have any questions about
5 these two questions before we pass to something
6 else?

7 A No.

8 Q Okay. The judge will tell you -- I want to talk
9 to you about other aspects of the law -- but
10 first, what would be required in your jury service,
11 there are six or seven things the judge will tell
12 you in his charge.

13 The charge is nothing more than a piece
14 of paper. The way a jury arrives at a verdict
15 in a murder case or capital case, they take the
16 law in writing from the judge and they take the
17 facts and apply it to those legal definitions
18 given them by the judge to see if the crime
19 actually took place. Is the man guilty or not
20 guilty based on what the judge has told us
21 capital murder is? And they reach their verdict
22 and the charge consists of definitions,
23 definitions of capital murder and admonitions
24 the jurors must follow in reaching their
25 decision in the case.

1 What the judge will tell you first
2 off, they can go in different order than this,
3 but first off, if the Defendant doesn't testify,
4 you are not to consider the Defendant's failure
5 to testify as evidence of his guilt.

6 In other words, jurors should arrive
7 at their verdict based on what they have heard
8 in the courtroom and seen inside the courtroom
9 on the witness stand, not on the fact they have
10 not heard from the Defendant.

11 That does not mean as a juror you do
12 not desire or do not want to hear both sides of
13 the story. That is a natural reaction, or you
14 may have wished to have heard from the Defendant.
15 That is, once again, a human reaction, but if
16 the Defendant doesn't testify, you are not to
17 consider his failure to testify as evidence of
18 guilt.

19 I anticipate the Defendant will
20 testify in this trial, but I wanted to give you
21 that admonition in the event he does not. Okay?

22 Presumption of innocence, the judge
23 will tell you -- and that will be in writing --
24 you are to presume the Defendant innocent. You
25 are to reach your decision on the evidence in

1 the case, not on the fact the Defendant finds
2 himself in the courtroom represented by a couple
3 of lawyers and charged with a serious crime, but
4 you should reach your verdict on the evidence
5 presented from the witness stand and not find
6 him guilty because an indictment has been
7 returned, he has two lawyers who represent him,
8 and he is here in the courtroom. He has the
9 presumption of innocence.

10 Do you follow me on that?

11 A Yes.

12 Q The analogy I draw for prospective jurors on the
13 indictment is kind of like a starter's pistol
14 in a footrace. Until the starter's pistol goes
15 off, we can't begin the race, and without the
16 indictment, we can't begin the trial. If you
17 give it any significance, that is the only
18 significance you should give it. You will never
19 have a chance to look at it on a case, and it is
20 not evidence of anything. All right?

21 A Uh-huh.

22 Q The judge will tell you that the burden of proof
23 in any trial, in any case, whether a traffic
24 ticket or criminal case, the burden of proof
25 always rests with the District Attorney's Office

1 to prove to the jurors, before they can say by
2 their verdict that someone is guilty of any
3 crime, and that burden is to prove beyond a
4 reasonable doubt.

5 Now, the burden never shifts to the
6 Defense, but before you think that the trial is
7 strictly a one-sided affair, it is not.

8 At a trial, any criminal trial, the
9 Defense has an opportunity to call any witnesses
10 they want at no expense to them. They can go
11 over to the clerk and issue a subpoena arrest,
12 forward it to the Sheriff's Department, and the
13 individual they want to testify can be subpoenaed,
14 and if that individual won't come voluntarily,
15 they can be picked up and brought to the
16 courtroom.

17 Either side can prove or disprove
18 whatever they hope to prove or disprove, and only
19 one side has the burden of doing that, and that
20 is Mr. Bax and myself.

21 Follow me on that?

22 A Yes.

23 Q If he feels the best strategy is to remain
24 silent, not to put the Defendant on the stand
25 and not cross-examine any witnesses Mr. Bax and

1 I call, they have that opportunity. They can
2 remain silent if they like. I don't think they
3 are going to do that, but I am just trying to give
4 you the most hypothetical farfetched idea that I
5 can think of to explain that burden of proof to
6 you.

7 Now, that burden is to prove to you
8 beyond a reasonable doubt, not beyond all doubt,
9 any doubt, or a shadow of a doubt, as we see
10 often here on the lawyer shows on television, but
11 to prove beyond a reasonable doubt, and that
12 applies to these questions as well.

13 Before you could answer either one of
14 the questions yes, you would have to believe
15 from the evidence presented by Mr. Bax and
16 myself that is what you believe your answers
17 should be beyond a reasonable doubt.

18 We don't have the obligation to remove
19 all doubts from your mind. You may have some
20 doubts in your mind. The proof is beyond a
21 reasonable doubt, not all doubt.

22 I think you realize why. I think you
23 will always have doubts as to Question 2 before
24 you answer it. I don't care how damaging the
25 facts may be to any person on trial.

1 The jury may have questions, but the
2 fact is whether that question has been proven
3 to them beyond a reasonable doubt, not all doubt,
4 the removal of a shadow of a doubt, or anything
5 else.

6 Any questions about anything so far?

7 A No.

8 Q And finally, the judge will tell you as a juror
9 you have the right to judge the credibility of
10 the witnesses. That sounds almost insulting to
11 your intelligence at first blush, but what I
12 want to point out to you is this: The jury has
13 a right to believe everything a witness has
14 told them under oath or disbelieve everything,
15 even though the witness has taken an oath to
16 tell the truth.

17 I wish I could report to you, Mr.
18 Busby, we lived in a world where no human being,
19 after they had taken an oath to God to tell the
20 truth, would ever say anything that was not
21 the truth.

22 But I think you realize from your
23 common sense we don't live in that type of
24 society, so the burden falls on jurors to
25 decide how much of a witness' testimony they are

1 going to believe. Does that witness' testimony
2 make sense in logic and fact? Should I reject
3 it or accept it, and which portions should I
4 believe? Should I accept all of it, reject all
5 of it?

6 That is a decision you will make with
7 the other jurors, to judge the credibility of
8 the witnesses.

9 The only thing the judge will tell you
10 regarding that is when you are doing that, don't
11 give a witness more or less belief because of
12 a witness' job. In the eyes of the law, no
13 witness is automatically more believable or
14 disbelievable just because of a witness' job.
15 A police officer, fireman, even our favorite
16 minister at the church we attend, if we lined
17 them up together right here in front of the jury
18 rail, our favorite minister is going to testify,
19 favorite doctor, favorite lawyer, dentist,
20 et cetera, in the eyes of the law; none of those
21 men are more believable or disbelievable
22 than anyone else.

23 After they testify, it is perfectly
24 all right for jurors to consider their
25 occupations. I am only talking about before

1 they get on the stand.

2 Do you follow me on that charge of the
3 Court?

4 A Yes.

5 Q That pretty much covers judging the testimony.

6 I told you I would include the lesser
7 included offense of murder and capital murder.
8 Here is how it applies.

9 Okay. A person could pretty well be
10 charged with the offense of capital murder, but
11 you find by the evidence he is only guilty of
12 murder.

13 Now, how does that come up?

14 Remember, we talked about for capital
15 murder to be that offense, those circumstances
16 have exist. In other words, the crime has to
17 be committed during the course of committing one
18 of those crimes we mentioned.

19 Imagine the hypothetical we have used
20 to explain Question 1, where the man goes into
21 a convenience store and confronts the teller.

22 Let's say there were witnesses present
23 and change it and they thought it was a robbery-
24 murder and he had committed capital murder, and
25 the jury was selected, but during the course of

1 the trial, the jury heard evidence and found out
2 that really it wasn't a robbery-murder.

3 What had happened was that he, the
4 Defendant who killed the cashier, had been living
5 with her off and on for the last couple of years,
6 that earlier in the day, for the last couple of
7 weeks, they had been having violent arguments
8 about her leaving him, and he had followed her
9 to work and the argument had continued there at
10 work, and finally, he lost his temper and
11 produced a pistol he had brought to her job and
12 he shot her to death.

13 You see, the proper verdict in that
14 case would be not guilty of capital murder, but
15 guilty first of murder, because it was not a
16 robbery-murder, but yet a murder that took place.

17 That is how, just by way of explanation,
18 the lesser included offense of murder can arise,
19 even though an individual has been charged with
20 the offense of capital murder which brings up
21 the range of punishment for murder, which, as I
22 mentioned earlier, is five to ninety-nine years
23 or life, and in addition, even though a person
24 has been found guilty of the offense of murder,
25 a Defendant has the right to ask the jury to

1 consider giving him probation.

2 Are you familiar with that term,
3 probation? Have you heard that before at the
4 courthouse?

5 A Yes.

6 Q I am sure in general terms in the newspapers or
7 whatever, maybe in discussions with your friends,
8 but probation means release by the Court. The
9 Defendant doesn't have to go to the penitentiary.
10 He is released by the judge under the terms and
11 conditions set by the judge; to support his
12 dependents; work at suitable employment; avoid
13 places and persons of disreputable or harmful
14 character; remain at one place in the county,
15 and if you are going to move, tell your probation
16 officer so that he can keep count of you; don't
17 go out of town without a pass from your probation
18 officer; and I think you are supposed to avoid
19 the use of habit-forming drugs and other forms
20 of probation, but basically, live your life like
21 other human beings and abide by the law with
22 a few other admonitions; report once a month
23 so he can keep an eye on you, but he has the
24 right to consider giving the man probation.

25 The jury can throw it out the window

1 as ridiculous for the crime committed, or could
2 feel it was the proper case for recommending
3 probation, and if they do recommend probation,
4 the jury can only recommend probation where the
5 jury has unanimously agreed that the range of
6 punishment for the man they find guilty, no matter
7 what it is, the range of punishment should be
8 ten years or less.

9 If the jury decides it should be ten
10 to ninety-nine years, probation doesn't apply;
11 only the type of case where the jury is first
12 of all in unanimous agreement that the man's
13 punishment should be under ten years for the
14 crime they found him guilty of, and secondly,
15 where the jury unanimously agrees probation is
16 proper.

17 You see, even though the jury assesses
18 a term of years less than ten, they can find
19 probation in a proper case. They could recommend
20 it to the judge even for someone they had found
21 guilty of the offense of murder.

22 Let me give you a hypothetical and
23 try to tie in all these things we have talked
24 about: capital murder, lesser included offenses
25 of murder, punishment range in the very low

1 range for murder, and probation being granted
2 by the jury.

3 Let me try to give you a hypothetical
4 that ties those things in.

5 Imagine a situation where a man and
6 woman find themselves at a hospital, and he is
7 dying from an incurable disease, whatever it
8 might be. His life is being sustained by life-
9 support equipment. His prognosis is anywhere
10 from two to six months of life left.

11 His wife -- and they have had the type
12 of relationship, they are both in their seventies,
13 have been together forty or fifty years -- they
14 have the type of relationship where she is down
15 almost every night spending the night.

16 They have a discussion, a rational
17 discussion between the two. He has no hope of
18 recovery whatever. The only thing that is
19 happening, their finances and reserves are being
20 exhausted by his stay at the hospital. The
21 longer he stays alive, and longer he is kept
22 alive, the poorer he will be when he passes, and
23 the more dependent she will be on social
24 security, et cetera.

25 They decide the best thing is to let

1 him pass, and she agrees and assists in the ending
2 of his life. She unplugs the life-support
3 equipment, maybe takes an IV out of his arm, and
4 he passes during the night and dies. She
5 commits the offense of murder. She has
6 intentionally and knowingly taken his life.
7 Technically, she is guilty of murder.

8 Let's say some of the relatives are
9 bitter about his passing. She admits it. She
10 is not trying to lie. After he dies, she freely
11 admits to the family and anyone who wants to
12 listen to her how he died, and they are extremely
13 bitter about their relative passing, and they
14 manage to convince the jury in this hypothetical
15 case the only reason she did that, they both
16 owned a half-acre retirement lot that was being
17 developed by the developer and he needed this
18 last parcel he was going to develop to build a
19 resort community on, and she stands to gain
20 lots of money, but they convince the Grand Jury
21 that this was murder for money, and because of
22 his guilt, she will now deliberately benefit
23 in a pecuniary fashion by his passing.

24 The jury hears all the facts and
25 they think, "That is the most preposterous bunch

1 of malarkey," but they follow their oaths as
2 jurors and find her guilty of murder, and they
3 retire and deliberate on what her punishment
4 ought to be, and they decide society would not
5 benefit by her spending any term in the
6 penitentiary whatsoever and they return a verdict
7 of five years' probation.

8 You see, by that hypothetical, it
9 ties together all the things: capital murder,
10 the lesser included offense of murder, and even,
11 in fact, the range of probation, the range of
12 punishment being probation for someone the jury
13 has found guilty of the offense of murder.

14 Now, ultimately by that explanation,
15 I wanted to ask Mr. Busby this: In a case where
16 you were a juror and had returned a verdict and,
17 in fact, found someone guilty of murder, could
18 you, in a proper case, consider the question of
19 probation even though you had returned a verdict
20 finding someone guilty of the offense of
21 murder?

22 A Yes.

23 Q Okay. If you felt it was a proper case? That
24 is the test, really, for jurors.

25 A Yes.

1 Q If they felt like it was a proper case.

2 I believe the evidence in the case
3 will show that the Defendant is, in fact, an
4 illegal alien. He is not lawfully here in the
5 United States.

6 The only reason I point that out to you
7 in that regard is that I ask you, unless you
8 feel you cannot put that out of your mind, do
9 not consider that as evidence whatsoever. The
10 Defendant should not be found guilty or not guilty
11 merely because he is an illegal alien.

12 Can you abide by that?

13 A Yes.

14 Q That can be evidence you want to consider for
15 whatever weight you want to give it in answering
16 these questions as to what type of person he is,
17 but I am talking about guilt or innocence. He
18 cannot be found guilty or innocent because he is
19 illegally in this country.

20 Do you follow me on that?

21 A Yes.

22 Q Tell me a little bit about your parents'
23 occupations.

24 Did your mom ever work outside the
25 home?

1 Q What type of jobs did she have?

2 A Mainly secretarial. She is in the fast-food

3 business.

4 Q Did your dad ever -- or I say -- did your dad

5 ever -- if your dad is still actively employed,

6 what is he employed in? If he is deceased, what

7 was his occupation?

8 A He is deceased. He was a salesman for a cement

9 firm.

10 Q Do you have any brothers and sisters?

11 A One brother.

12 Q What is his occupation?

13 A He is a student.

14 Q Where does he attend school?

15 A U. of H.

16 Q Your occupation is a food service manager? Does

17 that limit you to one store or do your duties

18 include other areas?

19 A Uh-huh. It's two or three stores, but mainly

20 one store.

21 Q Are you an owner of that store?

22 A No.

23 Q A franchise owner?

24 A No.

25 Q Has anyone at the store ever been the victim of

1 a robbery at all at the store you work at or
2 any other crimes of violence that come to mind?

3 A No.

4 Q What type of hunting do you like to do?

5 A Dove. No big game.

6 Q Now, Mr. Hernandez indicated earlier, at least
7 he remembered you.

8 Where do you know Joe Hernandez from?

9 A I couldn't place him. It was in Austin with
10 a transportation company I was with.

11 Q Is there anything about your jury service, if you
12 are selected to serve, that would cause you any
13 difficulty because of that relationship in the
14 past with Mr. Hernandez?

15 A I don't believe so.

16 Q I take it, as far as returning your verdict, you
17 would do that based on the evidence and wouldn't
18 feel -- the only thing I ask you to do, Mr. Busby,
19 is realize your jury service is not a personal
20 thing. I think you realize that. It is a decision
21 that should be based on the evidence, and the
22 only thing I ask you is not to have hard feelings
23 one way or the other based on personal feelings
24 or relationships.

25 I take it you would be able to do that?

1 A No, I don't hate him.

2 Q I don't mean that. I just ask you to be fair
3 regardless of your relationship with Joe.

4 It seems like there is something I
5 want to talk to you about, but I can't remember.

6 Let me check with Mr. Bax and see if
7 he has questions to ask you before I pass you to
8 the Defense.

9 (Consultation between attorneys.)

10 Q (By Mr. Moen) Mr. Busby, thank you for your
11 attention and your frank responses. I will pass
12 you over, and they will have questions.

13
14 EXAMINATION

15
16 QUESTIONS BY MR. HERNANDEZ:

17 Q Good morning, Steve. How is Kathy doing?

18 A Good morning.

19 Q I guess you know the nature of this case is
20 pretty serious.

21 A Uh-huh.

22 Q The State is going to get up there and ask you --
23 or ask for the death penalty. We are going to
24 get up there and, of course, we are going to ask
25 for a not guilty verdict.

1 Mr. Moen has talked to you about the
2 punishment stage, and I will probably talk to
3 you about the guilt-or-innocence stage, which is
4 very important.

5 He went over with you the three
6 concepts of the criminal judicial system, which
7 is presumption of innocence, the burden of proof,
8 and proof beyond a reasonable doubt.

9 A Uh-huh.

10 Q Let me go through them more specifically.

11 As my client sits here today indicted
12 by a Grand Jury in Harris County, a Harris
13 County Grand Jury, for causing the death of a
14 police officer, charged with that crime, he is
15 presumed to be innocent.

16 Do you disagree or agree in any way
17 with this concept?

18 A I agree that he is innocent until proven guilty.

19 Q And that will be throughout the whole trial?

20 A Right.

21 Q All right. Now, you understand that the law
22 does not place the burden upon us, the Defense,
23 to present any evidence whatsoever or to present
24 any witnesses to you? In other words, the burden
25 will stay with the State throughout the whole

1 trial. It will never shift in any way.

2 Will you agree with that?

3 A Yes. I agree.

4 Q Would you require the State to prove their case
5 to you?

6 A Uh-huh.

7 Q Would you require us to prove this man's
8 innocence to you?

9 A No.

10 Q Okay. Now, the burden that they must meet is
11 a burden beyond a reasonable doubt, and, of
12 course, there is no interpretation or no
13 definition, legal definition we may give you as
14 to what Mr. Moen was telling you, but it is not
15 beyond all doubt, and it is not a shadow of a
16 doubt, and it is not some doubt. It is beyond
17 a reasonable doubt. The burden is much, much
18 heavier than on the civil side.

19 On the civil side, it is preponderance
20 of the evidence; say, the scale of justice,
21 whatever slight movement there is, then that side
22 wins. Okay?

23 A Uh-huh.

24 Q Not so in a criminal case. The burden is much
25 heavier, much heavier where the burden is beyond

1 a reasonable doubt. It must tilt all the way.

2 Do you agree with me?

3 A Yes.

4 Q So we can agree then that as far as my client's
5 sitting here today and throughout the whole trial,
6 you will give him that benefit of the doubt, that
7 presumption of innocence?

8 A Yes.

9 Q And you can place the burden upon the State and
10 say, "You brought the charges. Prove it to me"?

11 A Yes.

12 Q And you wouldn't require us and my client to prove
13 his innocence to you, would you?

14 A No.

15 Q Now, Mr. Moen was telling you that Mr. Guerra is
16 an illegal alien.

17 You worked for T.I. in Dallas? You
18 went to Dallas, did you not, and worked for T.I.?

19 A T.I.

20 Q Did they hire illegal aliens when you were up
21 there?

22 A Not that I know of.

23 Q Have you come in contact with illegal aliens?

24 A You mean have I hired any or --

25 Q Right.

1 A Not that I know of.

2 Q Well, let me ask you this: As a class, do you
3 have anything against illegal aliens?

4 A No.

5 Q So the fact he is an illegal alien will not affect
6 your judgment in any way?

7 A As long as everybody will work, that is fine with
8 me.

9 Q All right. Now, the State, of course, will tell
10 you that it will be a case where a police officer
11 was killed and they will try to prove to you
12 that this man did it. Okay?

13 A Uh-huh.

14 Q Now, there will be police officers coming and
15 testifying. They will be coming in and out.

16 Do you believe that police officers
17 make mistakes?

18 A Yes.

19 Q Would you agree that they are human and subject
20 to human frailties just as much as you or I or
21 anybody else?

22 A Yes.

23 Q So you wouldn't place a police officer -- you
24 wouldn't give them more credibility simply because
25 of the mere fact, without even testifying, they

1 are police officers, would you?

2 A Hard question. I believe they are human, but
3 as far as being a police officer, I would give
4 them some sort of credibility.

5 Q Before they testify?

6 A Oh, no; not before they testify. As they are
7 testifying.

8 Q So the mere fact if we have several witnesses
9 or the State has several witnesses and we have
10 several witnesses, you are not saying to me that
11 before a police officer testifies that the mere
12 fact that he is a police officer, you would
13 give him more credibility?

14 A No.

15 Q So, let's put it this way: Would you give him
16 more credibility than any witness simply because
17 he is a police officer, while he is testifying?

18 A While he is testifying? Not so much more, but
19 I would give him some credibility.

20 Q How is that?

21 A Well, it's -- I can't say him versus some other
22 officer of the court. I don't see why he would
23 have more credibility. He would have more
24 compared to, I guess, the normal citizen getting
25 up there, to me.

1 Q Irregardless of the facts?

2 A Irregardless of the facts. I would have to give
3 it some credibility, because to me a police
4 officer is trained to spot things, you know, and
5 to look at things. I mean, he is more -- he is
6 trained to do a job. In other words, the average
7 citizen, being out someplace, might not be
8 recognized like people, say, if you are talking
9 about --

10 Q You are talking about if he presents to you a
11 scientific test or the fact that he noted something
12 at an intersection or whatever, a description
13 of an intersection?

14 A Yes. I mean, he would be more -- he would be
15 able to do that better than I would say the
16 average citizen would.

17 Q But you wouldn't automatically give him more
18 benefit simply because he is a police officer,
19 would you?

20 A You mean as a human being?

21 Q Prior to testifying.

22 A Oh, no, no. Expert witness, I guess, is more
23 --

24 Q Let me ask you this: Say, for example, if an
25 illegal alien, which they will be here to

1 testify as to the facts, and a police officer
2 gets up there and testifies to the facts, you
3 are not saying you would give a police officer
4 more credibility simply because he is a police
5 officer, hypothetically speaking?

6 MR. MOEN: I object to the question.
7 He is staking him out as to how he would place
8 the testimony of a police officer as opposed to
9 an illegal alien.

10 THE COURT: Sustained.

11 Q All right. Any class of citizens coming in or
12 any citizen that would testify, be it a doctor,
13 a secretary, a manager of a pizza place, a police
14 officer, would you give that police officer more
15 credibility than any other citizen testifying
16 as to the same facts?

17 MR. MOEN: I object to the same question
18 again, as to how he would judge a police officer's
19 testimony versus other people and other occupations.

20 I think he has answered the question,
21 that he would judge the police officer's
22 credibility and training and what he is doing.
23 He has also said he would not --

24 I object to the question along those
25 lines, Judge.

1 Now, the word intentional is in there,
2 and now here you are asked to answer this
3 question and your interpretation of deliberate
4 is intentional.

5 Would you automatically answer that
6 question yes for the simple fact that you found
7 him guilty of intentionally and knowingly causing
8 the death of a police officer?

9 A. I didn't follow that too well.

10 Q. Let me see if I can explain that to you.

11 In the first stage, if you find him
12 guilty of intentionally and knowingly causing the
13 death of a police officer -- those are the
14 elements of the crime he is charged with --

15 A. Uh-huh.

16 Q. And your interpretation of deliberately is
17 intentionally, okay?

18 So you find him guilty of intentionally
19 and knowingly causing the death of a police
20 officer, and you are asked in the second stage
21 here, the punishment stage, to answer these two
22 questions. The first one here is whether the
23 conduct of the Defendant that caused the death
24 of the deceased was committed deliberately.

25 Okay. Your interpretation of

1 deliberate is intentional, is it not?

2 A Well, yes, for one word.

3 Q You wouldn't automatically answer that question
4 yes, would you, simply because you found him
5 guilty of knowingly and intentionally causing
6 the death of a police officer?

7 A No.

8 Q All right. Let's go to the second question:
9 Whether there is a probability the Defendant
10 would commit criminal acts of violence that
11 would constitute a continuing threat to society.

12 Would you want further evidence from
13 the State in order to make up your mind whether
14 there is a continuing threat to society by our
15 client, or would you automatically answer that
16 question yes?

17 MR. MOEN: I object to the form of the
18 question unless it includes, "Would he
19 automatically answer it yes regardless of the
20 evidence that he heard just because he had
21 returned a verdict of guilty in the case."

22 MR. HERNANDEZ: Okay.

23 Q (By Mr. Hernandez) Regardless of the evidence
24 you have heard?

25 A Pardon?

1 Q Okay. The simple fact that you have found him
2 guilty of intentionally and knowingly causing
3 the death of a police officer in the first stage,
4 that is, the guilt-or-innocence stage --

5 A All right.

6 Q Irregardless of the evidence which you have heard,
7 would you automatically answer Question 2 yes?

8 A Irregardless?

9 Q Yes, or regardless.

10 A Well, I am confused on the definition. Not
11 regarding that stuff, that I could make it?

12 Q Uh-huh.

13 A I am not sure about the question.

14 Q Okay. Let me repeat the question.

15 You have Question No. 2 before you,
16 and you are asked to answer the question yes or
17 no?

18 A I got that part.

19 Q Okay. Would you automatically answer the question
20 yes for the simple fact that you have found him
21 guilty already, regardless of the evidence that
22 might be presented to you?

23 A You mean -- you are saying because he is guilty,
24 I would say yes to that?

25 Q Right. Right.

1 A No, I wouldn't.

2 Q Okay. Now, in the first stage, they would have
3 to prove to you beyond a reasonable doubt, and
4 the burden continues throughout the trial with
5 them.

6 Do you agree with me earlier?

7 A Yes.

8 Q That also is the case in the second stage. They
9 must prove to you these two questions beyond a
10 reasonable doubt. Would you demand that from
11 them, to prove to you, in order for you to answer
12 beyond a reasonable doubt those two questions?

13 A Yes.

14 Q Now, I see you are manager of a pizza place.
15 Would that affect your job in any way? We may
16 be here a week, five to seven days.

17 Would that affect your job in any way?

18 A It would affect all of us, but no, I could get
19 it covered.

20 Q Where is it located?

21 A Near the Astrodome between O.S.T. and Braeswood.

22 Q Now, there will be times where, of course -- you
23 know this is the death of a police officer, and
24 there will be times where witnesses or family
25 members of the deceased officer might come and

1 testify, and I can almost assure you it might be
2 an emotional phase of the trial.

3 Could you decipher or take away the
4 emotions and stick with the facts and make your
5 decision strictly on the facts of the case?

6 A Yes.

7 Q Could you do that?

8 A Uh-huh.

9 Q And could you place that burden continuously
10 throughout the whole trial on the State, to prove
11 to you beyond a reasonable doubt?

12 A Yes.

13 Q And could you keep an open mind --

14 A Yes.

15 Q -- throughout the whole trial?

16 And could you give Mr. Guerra the
17 presumption of innocence throughout the whole
18 trial until they could prove to you beyond a
19 reasonable doubt he is guilty?

20 A Yes.

21 Q All right. Let me ask you something. Say, for
22 example, if you go in the deliberation room on
23 the guilt-or-innocence stage and you think he
24 might be guilty, but the State has not proved
25 to you beyond a reasonable doubt that he is

1 guilty, how would your verdict be?

2 A Repeat it. Would you ask it again?

3 Q If you go into the deliberation room and think
4 about what transpired in the case and scratch
5 your head a little bit and say to yourself, "I
6 think he is guilty, but the State didn't prove it
7 to me beyond a reasonable doubt."

8 How would your verdict be?

9 A Not guilty.

10 Q All right. Just a moment. Let me confer with
11 Mr. Elizondo.

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

14 MR. MOEN: We will accept Mr. Busby.

15 THE COURT: What says the Defense?

16 MR. ELIZONDO: We would gladly accept
17 him.

18 THE JUROR: You accept me? Does that
19 mean I will serve?

20 THE COURT: Yes, and I need to visit
21 with you.

22 First of all, if you will, stand and
23 raise your right hand to be sworn as a juror.

24 (Mr. Busby was sworn.)

25 THE COURT: Have a seat and let me

1 give you a few instructions.

2 As I told you earlier, we anticipate
3 that we will start the evidence in the case
4 Monday. It may be Tuesday or Wednesday before
5 we get to it.

6 In the meantime, you will be allowed to
7 go about your normal activities.

8 I am going to give you an information
9 sheet, that should an emergency arise and you
10 need to leave town, or for whatever reason, you
11 can contact us. If you will, let us know that
12 so we can make appropriate arrangements in that
13 event.

14 Here are the names written in. Ask
15 for the coordinator if such an emergency arises.

16 We will try to let you know a day or
17 two ahead of that time so you can arrange your
18 schedule.

19 You will be more than likely to serve
20 five or six days, as I said. You will be away
21 from your employment during that time, and you
22 will probably need to make arrangements for that.

23 Also, in the meantime, if there is any
24 publicity, whether in the newspapers, radio, or
25 television, please studiously avoid reading

1 anything, listening to anything, watching
2 anything concerning this case, and during the
3 course of the trial, I can guarantee you there
4 will be publicity in probably all three of those
5 forms of media.

6 I will instruct you to avoid reading,
7 watching, or listening to anything during that
8 time.

9 Your service -- or decision, rather --
10 must be based upon the evidence you hear in this
11 courtroom, and not anything heard outside the
12 courtroom. Okay?

13 Do you have any questions?

14 THE JUROR: No.

15 THE COURT: Okay. We will talk to you
16 and let you know when to come, but it will be
17 sometime next week.

18 THE JUROR: If it is Monday, you will
19 contact me?

20 THE COURT: I will contact you one
21 way or the other.

22 THE JUROR: Thank you, sir.
23
24
25

1 VINCENT H. HORBELT,
2 was called as a prospective juror and responded to
3 questions propounded as follows:
4

5 EXAMINATION
6

7 QUESTIONS BY MR. BAX:

8 THE COURT: All right. Mr. Bax,
9 you may proceed.

10 MR. BAX: Thank you, Your Honor.

11 Q (By Mr. Bax) Good morning, Mr. Horbelt.

12 As the judge mentioned earlier, I am
13 Dick Bax with the District Attorney's Office.

14 There is another Assistant District
15 Attorney by the name of Bob Moen -- or he was
16 seated here earlier.

17 Together, we will be representing the
18 State of Texas and the family of James Harris
19 in the prosecution of Ricardo Aldape Guerra who
20 is seated there at the end of the table.

21 I have noticed from your information
22 form that you have filled out for us that you
23 have served on a criminal jury once before.

24 A Yes.

25 Q How long ago was that?

1 A I think about two years ago.

2 Q I am sure in that case you were brought over with
3 a group of people and the lawyers talked to you
4 as a group.

5 Was it a six-man or twelve-man jury
6 you were on?

7 A It was six, I believe.

8 Q A misdemeanor case?

9 A Yes.

10 Q And probably they were talking for thirty minutes
11 each, I guess. Both sides selected the jury and
12 started with the trial.

13 A They did have a trial, and I forget the process
14 we went through about that.

15 Q I am sure it probably only took an hour or so, but
16 this jury we are selecting now, we started
17 selecting this jury on August 30th. We are into
18 our fifth week. We've got ten jurors, and we've
19 got to get two more.

20 The reason we do it individually, number
21 one, the law requires it, and, number two, it
22 allows the jury to feel more comfortable in
23 answering some of the questions we need to talk
24 to them about.

25 As you know, should this Defendant or

1 any Defendant be found guilty of capital murder,
2 there is only one of two punishments available to
3 that man, a life sentence or the death penalty.
4 Okay?

5 And the reason we bring people
6 individually is so they are not influenced by what
7 others say. We are not trying to conduct a
8 debate or change your viewpoints or another
9 person's viewpoints. At this stage of the trial,
10 there are no right or wrong answers. What we are
11 trying to do is find out honestly how the person
12 feels about the death penalty and whether they
13 themselves could participate in such a trial.

14 There are many people in our community
15 who, for whatever reason, religious upbringings
16 or whatever, tell us, "I could not, never
17 personally, participate in a death penalty case.
18 My religion tells me no one has the right to
19 take the life of another person," and certainly
20 a person is entitled to that position.

21 What puts a person on the jury is how
22 they answer these questions, and if a person would
23 be honest and tell us honestly they couldn't
24 do it, that is fine, and if he can participate
25 in a proper case, that is fine, also, so I guess

1 the question I need to ask you is: How do you
2 feel about the death penalty? Do you feel it is
3 a proper punishment in certain cases? Would you
4 classify yourself as in favor of the death penalty
5 or opposed to the death penalty?

6 A I would say I am in favor of it, but I would find
7 -- I would find it very, very difficult to reach
8 that conclusion myself. I would prefer not to
9 make that decision if I could help it.

10 Q Okay. There is nothing -- I don't think it would
11 be an easy job for anybody.

12 A No. It would be difficult for me to reach that
13 conclusion, but I am in favor of it.

14 Q Okay. I hope that no one out there in our society
15 today believes if I find someone guilty I would
16 automatically give him the death penalty and it
17 would be easy. Hopefully, that is not the case.

18 We have had other people come through
19 basically with the same viewpoint you have given
20 us: "I believe in the death penalty, but I don't
21 know that I personally could be involved in that
22 procedure." Okay?

23 A Uh-huh.

24 Q Let me take you through the questions that would
25 be required of you to answer if you were on a

1 jury and see if you could answer those questions
2 without violating your beliefs. If you feel you
3 could never answer those questions in a manner
4 that would require the judge to assess the death
5 penalty, that is fine, and you just need to tell
6 us that. Okay?

7 A Sure.

8 Q I need to ask you these questions -- first of
9 all, let me ask you this: Let us say you listened
10 to evidence and you found a person was guilty of
11 capital murder. let's say, taking the life of
12 a police officer.

13 After you heard that evidence, assume
14 with me that you believe that the evidence showed
15 the man was guilty beyond a reasonable doubt.

16 Could you follow your oath and find him
17 guilty of capital murder, knowing by finding that
18 person guilty, you are setting him up for one of
19 two punishments, life or death?

20 Would you be able to participate in a
21 guilty verdict?

22 A I think I could, but I would rather not.

23 Q So you wouldn't -- you could find a person guilty?

24 A I think so.

25 Q I am going to get it down to a little more detailed

1 question.

2 If you find a person guilty of capital
3 murder, the two questions here on the board are
4 submitted to the jury. Okay?

5 A Yes.

6 Q Depending on how the jury answers these two
7 questions, the judge will either assess life or
8 death. If all twelve jurors answer Question No.
9 1 yes based on the evidence, and all twelve jurors
10 answer Question No. 2 yes based on the evidence,
11 then the judge must assess the death penalty. He
12 has no choice. Two yes answers, no matter what
13 the judge believes, he must assess the death
14 penalty.

15 A I understand.

16 Q If either Question 1 or 2 is answered no by the
17 jury, the judge must, by law, assess life
18 imprisonment.

19 Even though you don't go back as a
20 juror and say, "We assess the death penalty or
21 life imprisonment," you know by these two answers
22 what the judge will do. All right?

23 A Yes.

24 Q Assume you have found a person guilty of capital
25 murder and we are at the punishment stage and you

1 have heard evidence about the crime and heard
2 other evidence about the man's background to help
3 you answer these questions. You are the only
4 one who can answer the next question I am going
5 to phrase to you. Okay?

6 A Okay.

7 Q If the evidence showed beyond a reasonable doubt
8 that the answer to Question No. 1 should be yes,
9 could you answer it yes, knowing that then it
10 would take only one more yes answer for the death
11 penalty, or would you either refuse to answer it
12 or answer it no so you wouldn't be a part of the
13 death penalty?

14 A I think I could answer it yes or no with some
15 explanation of what -- the definitions -- or what
16 is meant by those two words, deliberately and
17 reasonably.

18 Q We will get into that in a few minutes. Okay?

19 A It isn't clear to me what they mean.

20 Q The reason they are underlined, you will not be
21 given a definition.

22 We will go into the contents in just a
23 minute.

24 You could answer Question 1 yes depending
25 on the evidence; is that correct?

1 A Yes.

2 Q Assume with me now that you have found a person
3 guilty and you have answered Question No. 1 yes.
4 You come to Question No. 2. Okay? And really
5 not with regard to the content of the question at
6 this time --

7 A Yes.

8 Q -- do you feel you could ever answer Question 2
9 yes knowing by answering that question yes the
10 judge will assess the death penalty, or will
11 you answer it no to avoid the death penalty and
12 assure a life sentence?

13 A Once again, if the word probability was defined,
14 I think I could. The way it is written there,
15 everyone, it would seem to me, would have to say
16 -- agree in that question that a probability exists.

17 Q That they have done something?

18 A With everybody, a probability exists they might
19 do something.

20 Q Okay.

21 A As it is put there. I don't know any other
22 answer to the question, but yes, that the
23 probability does exist.

24 Q Let's go over the questions, and I will try to
25 give you ideas of the definitions. Okay?

1 A Yes.

2 Q Number one, was the conduct deliberate in causing
3 the death, and, number two, was it done with the
4 reasonable expectation that someone would die
5 as a result of that conduct.

6 Would you agree with me that Question
7 No. 1, first of all, asks the jury to
8 reevaluate the evidence they have already heard in
9 arriving at a guilty verdict?

10 A Yes.

11 Q In other words, look back on the facts for which
12 the person's on trial.

13 A Yes.

14 Q Deliberate to me -- I don't know what it means to
15 you. You will have to use your everyday meaning
16 for that term, but to me it means on purpose or
17 willful.

18 How would you define deliberate?

19 A That is the word I am having trouble with. If
20 you define it as other than accidentally, as being
21 deliberate, I would recognize what that word
22 means.

23 Q I think you are probably pretty close. A lot of
24 times, people think of deliberately as a thought
25 process.

1 A It may not have been planned in advance. I would
2 take it to mean other than accidental. I don't
3 know whether that is good or not.

4 Q That is fine. That is good, because it is going
5 to be your definition. You are the one to
6 define it in terms of your everyday experience.

7 A I think if my conduct were deliberate in causing
8 the death of someone, it would be the same as
9 on purpose. I was defining deliberate and what
10 it means right now.

11 Q Reasonable expectation: Let me give you a couple
12 of hypotheticals. Maybe it will be easier to
13 understand at this stage. Okay?

14 In the first part of the trial, the
15 guilt-or-innocence stage -- okay?

16 A Uh-huh.

17 Q -- you have to decide from the evidence whether
18 the Defendant intentionally and knowingly took the
19 life of a police officer. Okay?

20 If you find he did intentionally take
21 the life of a police officer, as I said, before
22 we get to these questions, intentionally will be
23 defined for you. The judge will tell you what
24 intentionally means.

25 The law is that a person acts

1 intentionally if it is his conscious objective
2 or desire to engage in the conduct. Okay?

3 Let's talk more about what he was
4 thinking about. Okay?

5 Let me give you an example where a
6 person could be guilty of intentionally causing
7 the death of someone, and perhaps not have acted
8 deliberately or had the reasonable expectation
9 someone would die.

10 A I don't understand that. Say that again.

11 Q Let me give you an example where someone may act
12 intentionally in causing the death of another
13 person, and yet the jury may find he has not
14 acted deliberately or did not act with the
15 reasonable expectation someone would die. Let me
16 give you a fact situation.

17 Two people get together and decide they
18 are going to rob a bank. Okay? One man decides
19 he is going to be the actual triggerman, go in
20 and hold up the teller and demand the money.

21 The other man really is going to be the
22 getaway driver. He is going to sit out in front
23 in the getaway car and keep the car running while
24 his buddy goes inside and robs the clerk.

25 While the man is inside robbing the

1 clerk, the security guard catches on to what is
2 going on, and the man doing the robbing shoots
3 and kills the security officer. Okay? He has
4 killed somebody.

5 That could be an off-duty police
6 officer or whatever, but under our law, if two
7 people conspire together to do a robbery, if one
8 of the two commits an offense, both people are
9 guilty, even the man out front, even if he didn't
10 have the intent to cause the death of someone,
11 if he should have anticipated someone would die
12 as a result of that conspiracy, and I think you
13 will agree if two people go in with a loaded
14 gun, there may be a possibility someone may get
15 shot if something goes wrong.

16 A I hear you but don't agree with you.

17 Q Under our law, both people are guilty of capital
18 murder. The murder inside, he does the shooting,
19 but the person outside with the getaway car, he
20 is just as guilty as the man inside. Okay?

21 A I hear you, yes.

22 Q When you get to the punishment stage with the man
23 who went inside and did the shooting, you may say,
24 "Yes, he went inside and pulled the trigger and
25 had the reasonable expectation someone would die,"

1 because anytime a man goes in with a loaded
2 pistol, he should anticipate someone might die.
3 All right?

4 When the jury is asked about the man in
5 the getaway car, you should say there was no
6 deliberate conduct. He was this getaway driver.
7 He did not have the reasonable expectation someone
8 would die.

9 Do you follow me?

10 A Yes.

11 Q Do you see where this question could be answered
12 yes or no, even though you found him guilty of
13 causing the death?

14 A As to the fellow outside, I would have to say
15 no.

16 Q You could see where he could be found guilty?

17 A Maybe in the eyes of the law.

18 Q Would you be able to find someone like that guilty
19 of capital murder, the getaway driver, if it were
20 shown he knew the man was going in with a loaded
21 pistol?

22 A I don't think so. No.

23 Q You could only find someone guilty of capital
24 murder if they pulled the trigger and did the
25 shooting?

1 A Yes.

2 Q If you found the person in the case, it was the
3 person who pulled the trigger and did the shooting,
4 all right, would you automatically answer this
5 question yes, that he had to deliberately and
6 acted with a reasonable expectation that someone
7 would die?

8 A No. I would answer it yes if I felt that were the
9 case, but I don't think the two things go together
10 necessarily.

11 Q You would have to weigh it and base it on the
12 evidence?

13 A I think of someone shooting in self-defense
14 deliberately, but it may not be that you want to
15 kill the other person. You are protecting
16 yourself and not expecting them to die.

17 Q You may have a situation where someone shoots
18 somebody in the leg like the robber trying to
19 keep someone from getting the license plate
20 number.

21 A Yes.

22 Q If someone dies as a result of that act, he could
23 have acted deliberately or intentionally without
24 a reasonable expectation someone would die.

25 A Yes.

1 Q How about Question 2? Question 2 is a little
2 different.

3 It is really asking you about the man
4 on trial. What type of person is he?

5 A As I told you before, I think if you answered
6 that honestly, I would say yes about everybody.
7 The probability exists. With everybody, there is
8 a probability.

9 Q That is a psychiatric question and a tough one.

10 It is kind of asking the jury to
11 predict the future, isn't it?

12 A It is.

13 Q How would you define probability? I guess
14 everything has a probability. There is a
15 probability that the sun won't rise tomorrow, but
16 that probability might be .00001.

17 A Everything is probable. Possible, no.

18 Q You believe everything is probable, but no matter
19 who is on trial, your answer would be yes?

20 A My answer would be yes. I might do that. I don't
21 intend to do that.

22 Q Let me give you an example.

23 Let's say you were asked that question
24 by two different people. One person, all you
25 knew about him was he was a fine, upstanding

1 citizen, had raised his family, gone to school,
2 had a steady job, took care of his family, never
3 had problems with the law, and if you were asked
4 whether there was a probability that that person
5 would commit criminal acts of violence that would
6 constitute a continuing threat to society --

7 A I would have to say there was a remote
8 possibility.

9 Q And if you were asked that question of someone
10 you knew took a pistol to take things from people
11 by force, what would you think about that person's
12 probability?

13 A I would say a greater probability.

14 Q So probability in that term, I think, means
15 something more than a possibility. Okay?

16 Possibility, anything is possible.
17 Probability, to me, means chances are or more
18 likely than not. Okay? And, you can see, like
19 the first example about the person who's never
20 been in trouble before, raised a family, had a
21 good job, it is more likely than not he will not
22 commit criminal acts of violence.

23 Would you agree with me?

24 A More likely than what? Than someone who has?

25 Q He is more unlikely to commit criminal acts of

1 violence than likely.

2 A I think we may reach that conclusion, but it may
3 not be true.

4 Q It may not be true, but someone who carries a
5 pistol and steals from other people, in that case,
6 it may be more likely than not he would commit
7 criminal acts in the future.

8 I think you can see that.

9 A I think we would say yes to that.

10 Q Can you see where that question could be answered
11 yes or no depending on the evidence, Question 2?

12 A I think it would have to be answered yes. If
13 you answered yes to the other questions, if you
14 found a person guilty and said yes to the first
15 one, I think you would have to say yes to the
16 second one.

17 Q How about this question?

18 A seventeen-year-old says he is going
19 to commit a robbery for whatever reason. He
20 hasn't got any money, can't get a job, has been
21 unable to work, and he goes into a Utotem and
22 demands money from the teller. He is scared
23 nervous, upset. The teller is not responding
24 quick enough for the seventeen-year-old. He gets
25 scared and fires a shot to the side trying to

1 speed him up. Okay?

2 Unbeknownst to him, the bullet goes
3 through the wall and shoots a customer in the
4 store and kills that customer.

5 Under the law, he has committed capital
6 murder. He has intentionally caused the death
7 of someone during the course of robbery. Okay?

8 A Hum.

9 Q When you go to trial, all you hear about that
10 person is he never meant to do something wrong.
11 He didn't mean to kill the person outside and never
12 meant to kill the person outside, but can you see
13 the answer to Question 2 could be no depending on
14 the evidence?

15 A I think in that case I would answer No. 1 no
16 also, because I wouldn't consider that deliberate.

17 Q Okay.

18 A And I would answer no probably to the other one
19 also.

20 Q So you can see your answer to these questions
21 would have to be based on the evidence?

22 A I think so.

23 Q Let me go over -- I am going to go over these
24 briefly.

25 These are obligations you would have

1 as a juror, the same obligations you would have
2 had as a juror a couple of years ago on the
3 marijuana case.

4 A Uh-huh.

5 Q The Defendant is presumed to be innocent. The
6 fact he is here represented by attorneys and charged
7 by indictment is no evidence of guilt. Can you
8 at this time presume him to be innocent?

9 A Yes. Yes.

10 Q Do you recall reading or hearing anything about
11 this case, either in the newspapers or on TV?

12 A No. No.

13 Q It is fair to say --

14 A I didn't remember it when the judge described it
15 this morning.

16 Q There is so much going on --

17 MR. ELIZONDO: I object to the
18 prosecutor prejudicing the juror, Your Honor.

19 THE COURT: Sustained.

20 MR. ELIZONDO: I ask that he be
21 instructed to disregard the last comment.

22 MR. BAX: Fine. I didn't say anything.

23 Q (By Mr. Bax) You are saying you do not recall
24 anything about this particular case?

25 A No, I do not.

1 Q Is it fair to say you keep up with the newspapers
2 and what is going on?
3 A I think so.
4 Q Did the Defendant testify in the case you were
5 a juror on?
6 A No, he did not.
7 Q I am sure you were instructed by the judge in that
8 case you could not use that failure as evidence
9 of guilt.
10 A That case was more a case of whether or not the
11 material that was found on the person was or
12 wasn't marijuana, and whether he knew it was
13 or wasn't marijuana when he had it.
14 Q Okay.
15 A That was more the flavor of that case, and that
16 was really the question that was put to us.
17 Q Were you able to resolve that question?
18 A Yes. Yes.
19 Q Could you, if this Defendant chose not to testify,
20 could you put that aside and base your verdict on
21 the evidence?
22 A I think so.
23 Q My burden of proof is the same here today as it
24 was in your marijuana case. I have to prove to
25 you beyond a reasonable doubt that the Defendant,

1 number one, is guilty, and, number two, that these
2 questions should both be answered yes.

3 Because we are talking about the death
4 penalty doesn't mean my burden of proof is here.
5 It is my same burden of proof that the State had
6 to meet when it tried that marijuana case a few
7 years ago.

8 There is no way I could prove to you
9 beyond all doubt or beyond a shadow of a doubt
10 this Defendant is guilty. There will be no video
11 cameras, no video replays, and I guess the only
12 way I could prove anything to twelve people beyond
13 all doubt would be if the twelve jurors who were
14 the jurors were the witnesses in the case, and
15 if you are a witness, you are not allowed to be a
16 juror.

17 Do you understand me?

18 A I heard you.

19 Q And if you had twelve people, you would have
20 twelve versions, particularly if it were a
21 confused situation.

22 There is no way I can prove to you
23 beyond all doubt. You may have some doubt, but
24 unless it is beyond a reasonable doubt, you will
25 be required to return a verdict of guilty.

1 A I agree, and I agree there would always be a
2 doubt unless you physically saw it yourself.
3 Yes.

4 Q Would you require -- you may, you know -- I guess
5 you are the only one who could answer this. Would
6 you require me to prove it beyond a doubt or
7 would you hold me to prove it only beyond a
8 reasonable doubt?

9 A I would ask you to do it by law; whether I
10 mentally could do that, I don't know.

11 Q How do you feel about that? Do you feel because
12 we are talking about a capital murder case the
13 State should be required to prove it beyond all
14 doubt?

15 A I believe that, but I also repeat what I said in
16 the beginning. It is going to be almost
17 impossible to ever reach that conclusion that a
18 man should be put to death. It is very difficult
19 for me to reach that, yes.

20 Q I hope that is the way most people in our society
21 feel. It would be difficult.

22 Can you see how it has to be done
23 sometimes?

24 A Yes.

25 Q You cannot say, "Judge, sentence him to death or

1 sentence him to life."

2 A Yes.

3 Q But answering two questions based on the evidence
4 --

5 A You are saying the same thing, giving the judge
6 no choice, so you are saying the same thing to
7 him.

8 Q I guess the reason I am in a dilemma is on the
9 one hand, you say you can answer that question
10 yes and answer Question 2 yes, and as a matter
11 of fact, when you answered 1 yes, you would
12 automatically answer 2 yes?

13 A I think so. Yes.

14 Q And you say that on the one hand, and then say it
15 would be almost impossible for you to do that.

16 A It would have to be a very, very strong, very
17 clear case with very clear evidence before I could
18 ever reach that conclusion.

19 Q Would you automatically answer that second question
20 yes? Let's say that you found that the person
21 on trial shot another person three times in the
22 head.

23 Would that --

24 A No.

25 MR. ELIZONDO: Objection, Your Honor.

1 That is repetitious. He's already asked that
2 question.

3 THE COURT: Overruled.

4 MR. ELIZONDO: I object to confining
5 this juror to a certain set of facts.

6 THE COURT: On that particular question,
7 the way it is phrased, overrule that objection.

8 Q (By Mr. Bax) Let's say you have heard evidence
9 and you are convinced the person is guilty --

10 A Yes.

11 Q -- and you are convinced the person acted
12 deliberately and acted with the reasonable
13 expectation someone would die. All right?

14 And let's say the evidence you heard
15 was the Defendant shot someone during the course
16 of a robbery or whatever the situation was, three
17 times in the head, or four times in the head,
18 let's say, but more than once.

19 A Yes.

20 Q Under those types of facts, would you automatically
21 answer 2 yes regardless of the other question?

22 MR. ELIZONDO: Same objection, Your
23 Honor. He is trying to confine this juror to a
24 certain set of facts.

25 THE COURT: Overruled.

1 Q (By Mr. Bax) You can answer. Would you?

2 A I would probably have to say yes to the second
3 question then.

4 Q Would the fact -- let's say you were at the
5 punishment stage of the trial and you learned
6 throughout the trial, at some point of the trial,
7 the person was an illegal alien, not lawfully here
8 in our country when the crime took place. Okay?

9 Would that affect you in the way you
10 answered these questions?

11 A No.

12 Q Can you see where you could use that fact, if
13 you wanted to, the person was doing one illegal
14 act in helping you to answer that second question?

15 A No. I think --

16 Q So the fact the person is an illegal alien would
17 not affect you one way or the other?

18 A No.

19 Q Have you ever heard about probation in a murder
20 case, a person receiving probation?

21 A I have heard of it, yes. Oh, yes.

22 Q How do you feel about a person receiving
23 probation for the intentional taking of the life
24 of another person?

25 A I have never thought about it.

1 Q Can you envision a situation where you could
2 participate in a verdict which would call for
3 probation for the intentional taking of another
4 person's life?

5 A When you say "intentionally," you mean like --

6 Q Conscious objective or desire to engage in the
7 conduct. In other words, pulling out a pistol,
8 pulling the trigger, and the cause of that is
9 someone dies.

10 A Except in self-defense.

11 Q Self-defense is not murder. That is not guilty
12 if a person kills in self-defense.

13 Murder, I guess, is killing without
14 justification.

15 A I would imagine there are circumstances where I
16 could agree on probation, yes, sir. I do think
17 so.

18 Q One of your other obligations, if it were a
19 misdemeanor case, I doubt that the judge told
20 you this, but in a felony case, the jury is not
21 to consider how long a person would have to serve
22 on a life sentence in deciding what the answers
23 to these questions should be.

24 A Yes.

25 Q The judge will tell you if anyone alludes to or

1 mentions parole or how long a person is to serve,
2 the jury is to immediately tell the person to stop
3 it, and if the person continues to persist in
4 talking about parole, your obligation as a juror
5 would be to inform the judge by telling the bailiff.

6 Do you understand?

7 A I understand.

8 Q First of all, could you decide these questions
9 based on the evidence and not based on how long
10 a person would have to serve if he received a
11 life sentence?

12 A I don't understand that.

13 Q Okay.

14 A Say that again.

15 Q Okay. You are back there and trying to decide
16 what the answers to Questions 1 and 2 are.

17 A First -- evidently, the person has been found
18 guilty before we get to these questions?

19 Q Yes. Let's assume that. You have found a person
20 guilty, and we are back there trying to decide
21 whether the answers to the questions should be
22 yes, yes, or no, no, or yes, no, or what.

23 A Yes.

24 Q And the judge must tell you you are to base your
25 answers to these questions on the evidence, and

1 you cannot base it on how long a person would
2 have to serve.

3 A I understand.

4 Q A lot of people in society are concerned about
5 that.

6 MR. ELIZONDO: Objection, Your Honor,
7 to the prosecutor emphasizing the law of parole.

8 THE COURT: Overruled.

9 Q (By Mr. Bax) A lot of people, when they get back
10 there, don't decide on the evidence but say, "I
11 am not going to give him life. I know he will be
12 out in twelve years."

13 So, you can't vote on the death penalty
14 for that reason. I am sure you agree with that,
15 that your answers should be based on the evidence.

16 A I agree on that.

17 Q And not based on how long a person would have to
18 serve if he received a life sentence. The judge
19 will tell you that. Okay?

20 A Yes.

21 Q Could you follow that instruction?

22 A I think I could, yes.

23 Q And the reason I mention that to you, if the jury
24 does discuss parole, if they do go back there and
25 decide how long a person would have to serve, that

1 is automatic reversal, and we would start all
2 over again.

3 A Excuse me, but I thought there was only one
4 decision to be made, and that is life, ninety-nine
5 years or death.

6 Weren't we told that before?

7 Q If you found a person guilty of capital murder?

8 A If you do that.

9 There is no problem with probation or
10 length of time, but I can't see where that comes
11 into it.

12 Q Let me give you an example.

13 Let's say a juror heard the evidence,
14 and after hearing the evidence, found someone
15 guilty.

16 A Yes.

17 Q And there are several jurors worried about the
18 fact -- well, the State hasn't proved the answers
19 should be yes. You think the answers should be
20 no, but you think, "If we answer them no, he is
21 going to get a life sentence." Okay. And, the
22 jury says, "If we give him life, they will parole
23 him. He won't do life, but will get out in twelve
24 years."

25 MR. ELIZONDO: I object to the

1 prosecutor stressing the law of parole.

2 MR. BAX: He has asked me a question,
3 and I am giving him an explanation.

4 THE COURT: We may going farther than
5 we should.

6 Sustained.

7 Q (By Mr. Bax) All right. I am not allowed to ask
8 you anything further about it, but can you follow
9 the judge's instructions, and if someone starts
10 talking about how long the person would have to
11 serve, could you tell the judge?

12 A I could, yes.

13 MR. ELIZONDO: Same objection, Your
14 Honor.

15 A I would, if the judge instructed me to, yes.

16 Q He will instruct you on that.

17 Does your wife have -- have you ever
18 talked with your wife about the death penalty,
19 perhaps in reading about some cases in the
20 newspaper where it upset you so much you felt the
21 person should receive the death penalty for the
22 crime?

23 A Yes. I am sure we have.

24 Q Would she basically be of the same opinion, that
25 certain crimes call for the death penalty?

1 A She feels no one should be punished, particularly
2 a young boy.

3 Q Just how does Mr. Horbelt feel about a police
4 officer being killed? How does that --

5 A Well, I never really thought about it before, but
6 I guess we feel -- and I am not sure it is right
7 -- it is like a greater crime than a civilian being
8 killed, but I don't think that is right to consider
9 it that way. But you basically do, without
10 realizing it. It gets more publicity and more
11 significance, it being a police officer.

12 Q Of course, the law sets aside certain individuals:
13 police officers, firemen, people who work at our
14 prisons, and sets those people aside and says,
15 "Yes, if you are killed by someone and they know
16 who you are and they know what you do for a
17 living --

18 Okay?

19 A Yes.

20 Q -- we are going to make the punishment more
21 severe and protect the people that protect us.
22 Okay?

23 Firemen protect us. Police officers
24 protect us. People at the prison protect us.

25 What we tell these people is: "If you

1 are killed in protecting us, we are going to make
2 that person who kills you more accountable."

3 A I didn't know that was so. Is that so?

4 Q Yes. That is why we set aside -- don't set aside
5 a police officer, just because we say let's pick
6 police officers -- but if someone kills police
7 officers, you can pretty much tell what his feelings
8 would be towards the rest of us. Probably a
9 person who would kill a police officer would not
10 have any trouble killing someone else if they
11 got in the way. Would you agree with that?

12 A No. I wouldn't agree with that. I think where
13 a person is confronted by a police officer with
14 a gun and his life is threatened as opposed to
15 a civilian who is unarmed and not protected, that
16 would be more reason to shoot at the police
17 officer who is protected.

18 Q The fact that the policeman has a gun out?

19 A That would be different.

20 Q That would tell you something different about the
21 fellow?

22 A Yes.

23 Q You've got a doctor and a dentist and a warehouse-
24 man as children?

25 A Yes.

1 Q You've done very well.

2 A Yes.

3 Q Are they all still living in the Houston area?

4 A No.

5 Q Whereabouts are they?

6 A Only one is in Houston.

7 Q Where is the doctor?

8 A The doctor is in Kansas and the dentist is up
9 around Rusk, Texas. I don't know whether you know
10 where that is.

11 Q I am not sure. I am a Yankee and came to go to
12 law school and sort of stayed.

13 A The dentist, by the way, it didn't influence me,
14 but he is a dentist for the state correctional
15 institution, and he is the in-house dentist,
16 and his offices and everything are there and
17 supplied by -- he takes care of the dental
18 requirements of the people.

19 Q The prisoners?

20 A Of the people in this correctional institution.
21 They are not all criminals. Some are mentally
22 ill, et cetera, some of them.

23 Q Have you ever discussed with him some of the
24 problems?

25 A No, I haven't seen him since he graduated from

1 dental school. We had a family argument, and I
2 haven't seen him.

3 Q Do you play golf at the Deerwood Country Club?

4 A Yes.

5 Q Do you play that much?

6 A Not very often.

7 Q Do you have questions of me as to anything we
8 have discussed?

9 A No. I would like to impress upon you again it
10 would be very, very difficult for me to ever,
11 ever reach the decision to put someone to death.

12 Q Let me ask you this --

13 A But not impossible.

14 Q We have talked today in hypotheticals. Okay?

15 A Yes.

16 Q If you were on this jury and if you find this
17 Defendant guilty of capital murder --

18 A Yes.

19 Q -- I will guarantee you right now Mr. Moen and
20 I will be before you and eleven other people asking
21 you to answer both of these questions yes
22 depending on the evidence.

23 A I realize that.

24 Q We are actively seeking the death penalty in this
25 case. All right?

1 A I understand.

2 Q If you were the foreman of that jury, and after
3 hearing the evidence, you believed he was guilty
4 along with eleven other people, could you sign
5 the verdict form saying, "Yes, Your Honor, we find
6 the Defendant guilty of capital murder"?

7 A I think I could.

8 Q And at the punishment stage, could you sign the
9 verdict answering this question yes and the
10 second question yes if it were proved to you,
11 knowing he would receive the death penalty?

12 A I could.

13 Q It wouldn't be easier, but you could do it if the
14 evidence called for it? Can you make that
15 guarantee?

16 A I could.

17 THE COURT: Before you begin, I want to
18 make all of you aware I have an appointment at
19 noon. We have fifteen minutes. If we are not
20 through, we will take it up after that.

21
22 EXAMINATION

23
24 QUESTIONS BY MR. ELIZONDO:

25 Q Mr. Horbelt, how are you today?

1 A It's an unusual day for me.

2 Q I imagine it is.

3 A Yes.

4 Q You work at Todd Shipyards and have been there
5 thirty-seven years?

6 A Yes.

7 Q Are you the general manager of the whole shipyard
8 or the manager of a certain area of this
9 particular yard?

10 A For Houston.

11 Q How many employees do you have under your employ?

12 A It runs from 300 to 700 in total yards.

13 Q You have a Todd Shipyard in Seattle, don't you?

14 A Yes, and several places in the United States
15 we have yards.

16 Q As the Prosecution told you, this is a capital
17 murder case, and in a capital murder case, as in
18 all cases in Texas, the State has the burden of
19 proof. The burden of proof is to prove to you
20 as a prospective juror this case beyond a
21 reasonable doubt to your satisfaction. They have
22 to prove to you that in Harris County, Texas,
23 on a particular day, this Defendant shot a
24 police officer in the lawful discharge of an
25 official duty knowing at the time that he was a

1 police officer. They must prove that to you
2 beyond a reasonable doubt.

3 The term reasonable doubt will not
4 be defined for you. There is no legal definition
5 of the term reasonable doubt. The judge won't
6 give you one. I won't give you one, and he can't
7 give you one, but all I can do is give you a
8 comparison and analogy.

9 Across the street at 301 Fannin
10 in the civil courthouse where they try cases over
11 personal injuries, workmen's compensation cases,
12 sometimes for millions of dollars, the burden of
13 proof over there is proof by a preponderance of
14 the evidence, the greater weight of the credible
15 evidence. The one that has the most credible
16 evidence wins.

17 In the civil courthouse -- I am sorry.
18 I am in the criminal courthouse -- where a
19 person's life or liberty is literally at stake
20 in this case, as in this case, the legislature
21 side before we can convict anybody, before we
22 can forfeit anybody's life, the State of Texas
23 will have a heavier burden, and that burden will
24 be to proof beyond a reasonable doubt.

25 So you can see or you understand maybe

1 that in the criminal courthouse where a person's
2 life or liberty is literally at stake, the burden
3 of proof is higher, is greater.

4 Do you agree with that or disagree with
5 that?

6 A I heard what you said and I understand it.

7 Q Do you agree?

8 A I don't know why it is that way, but it is.

9 Q You don't know why it is that way?

10 A No, I don't. I don't understand.

11 Q What do you mean by that?

12 A Well, it seems like that in a contract case --

13 Q They are fighting over money?

14 A I don't agree with it. I think in a contract
15 case you could reach a conclusion as to what was
16 right or wrong.

17 Q Correct.

18 A And make a definite conclusion that positively
19 this person was right and this one was wrong.
20 I think individually we could make that decision.
21 It wouldn't be that this guy is forty percent
22 and this one is sixty percent, so I am going to
23 give him the money. I don't agree with that part
24 of it.

25 Does it make sense?

1 Q I see what you are saying, but in the civil
2 courthouse, you would only have to believe, let's
3 say, in your hypothetical, that he was sixty
4 percent; sixty percent of the greater weight of
5 the evidence was on his side, and therefore, you
6 would find in his favor.

7 A If that were the instructions, I think we could
8 do it, yes.

9 Q Do you see or do you understand that in the
10 criminal courthouse the burden of proof, the
11 State's burden of proving their case is a heavier
12 burden?

13 A Given the circumstances you have described, I
14 agree they certainly are, yes, sir.

15 Q Do you agree with that or disagree?

16 A I agree with it, yes.

17 Q The State of Texas normally will proceed in a
18 criminal case, they will normally -- they will
19 read the indictment to you, to the jurors, and
20 the Defendant will then either plead guilty or not
21 guilty.

22 I can assure you as actively as they are
23 seeking the death penalty, we will be seeking the
24 not guilty from the jury.

25 After the Defendant pleads not guilty,

1 then the State will put on its evidence. They
2 will call witnesses to the witness stand and
3 they will give their version of the facts.

4 You as a juror will be able to see,
5 sitting right there in the jury box, you will be
6 close to the witnesses and be able to watch their
7 demeanor, how they testify, and their inconsistent
8 statements, and based on that, you can believe
9 some of, all of, or not all of their testimony.
10 You will be the judge of the facts. The judge
11 will be the judge of the law.

12 After they get through testifying, the
13 State will then rest its case. That means, "That
14 is all we have." At that point in time, the
15 Defendant can, if he chooses, he can testify. He
16 can put on evidence. He doesn't have to, but
17 let's assume for a minute he doesn't put on any
18 evidence whatsoever and we rest our case also.

19 You'd go back in the jury deliberation
20 room --

21 A. Uh-huh.

22 Q -- and you are sitting back there and saying to
23 yourself, "Maybe he did it. I don't know, but
24 I think he did it, but it hasn't been proven to
25 me beyond a reasonable doubt."

1 In that type of situation, what would
2 your verdict be?

3 A I would have to find him -- if I came to the
4 conclusion they had not proved it beyond a
5 reasonable doubt, I would have to say not guilty.

6 Q But you can say or you can see where you might
7 be put in a switch where, in your own mind, you
8 might say, "I think he did it"?

9 A I imagine that's exactly the thought process that
10 would go on, right, during the testimony, and
11 eventually when you reach that decision --

12 Q Okay.

13 A -- I think that is the decision that has to be
14 made.

15 Q Right, but can you see where you might say to
16 yourself, "I think he did it, but they haven't
17 proven it to me beyond a reasonable doubt, and,
18 therefore, I am going to find him not guilty"?

19 A Yes. That is what I keep saying. I almost
20 would lean heavily that way. I almost feel I
21 would, because I find giving the death penalty
22 a very difficult thing to do.

23 Q It should be. Rightfully so.

24 A I would be swayed tremendously the other way.
25 I would have to be completely, absolutely

1 convinced.

2 Q Beyond a reasonable doubt?

3 A Yes. Almost beyond the point of a reasonable
4 doubt.

5 MR. BAX: Based on that last response,
6 based on almost beyond a reasonable doubt, the
7 State will have a challenge.

8 THE COURT: I will let you have him back
9 in a minute.

10 Go ahead.

11 Q (By Mr. Elizondo) I am sorry, but I didn't hear
12 you. Would you say you would hold the State to
13 a higher burden than what the law provides?

14 The law says the State only has the
15 burden of proving their case to you as a juror.

16 A I say I think in my mind unless it was crystal
17 clear that the Defendant was guilty, except in that
18 case, that is the only case I would find him
19 guilty. Otherwise, I would find him not guilty.

20 Q Well, crystal clear --

21 A In other words, no doubt, positive in my mind from
22 what I heard.

23 Q We might be getting caught in semantics here. I
24 am not sure.

25 The law says that the State has to

1 prove its case to you beyond a reasonable doubt,
2 not beyond all doubt, a shadow of a doubt, not
3 beyond all doubt, because the only way they could
4 do that would be if they had a videotape.

5 A We agree the problem of reasonable doubt is hard
6 to define.

7 Q You wouldn't hold them to a greater burden than
8 the law provides?

9 A What would happen, I would have to decide what
10 is reasonable because it is not being explained
11 to me, and in my case, it would be very, very hard
12 to prove that the fellow was guilty.

13 Q But you could follow the law, couldn't you?

14 A I could try it. Yes.

15 MR. ELIZONDO: That is all we could
16 ask.

17 I submit he is qualified.

18 MR. BAX: Judge, may I ask him one or
19 two questions?

20
21 EXAMINATION

22
23 QUESTIONS BY MR. BAX:

24 Q Mr. Horbelt, let's go back to your marijuana case
25 you were on. Okay?

1 A Yes.

2 Q In that case, the State had to prove its case
3 beyond a reasonable doubt.

4 Of course, in that case, the punishment
5 the fellow was looking at was probably a fine or
6 jail term up to six months, not talking about
7 significant punishment. Usually those cases are
8 handled by probation the fellow receives, usually
9 a slap on the hand.

10 A I didn't know that at the time.

11 Q From what I understand, what I think you are
12 telling us -- and correct me if I am wrong --
13 when we are talking about capital murder, when we
14 are talking about the death penalty --

15 A Yes.

16 Q -- when you used the term crystal clear --

17 A Yes.

18 Q -- absolutely positive, probably beyond the
19 point of reasonable -- I think that is basically
20 --

21 A It may be. It may be, yes. It may be.

22 Q Basically, I think what you are telling us, before
23 you could find someone guilty of capital murder,
24 just to Mr. Horbelt, I would have to prove
25 something to you beyond all doubt?

1 A Almost to that point.

2 Q If we were talking about whether someone had a
3 Baggie of marijuana and knew it was a Baggie of
4 marijuana, okay? In that type of case, I wouldn't
5 have to prove to you as much that the person were
6 guilty simply because of the consequences of the
7 verdict?

8 A I think so. I think in the other case, the
9 evidence appeared to me to be so overwhelmingly
10 one way that there wasn't any doubt.

11 Q Let me give you an example of someone who came
12 through here and see if you could fit yourself
13 with this person: A fellow who said, "I believe
14 in the death penalty. I can understand why we
15 have the death penalty and the reason for it,
16 but before I could find someone guilty of a
17 death penalty case, you would have to prove to me
18 beyond a shadow of a doubt," and he told us that
19 because he said, "I would always have to live with
20 myself and wonder what would happen if someone
21 else came forward and admitted they did the crime."
22 Do you understand?

23 A True.

24 Q They almost said, "I wouldn't hold the State to
25 that inhuman proof," but he was honest enough to

1 tell us, "I don't think I could be a fair juror
2 in the case because I would always have a doubt,
3 and as long as I had a doubt, I would find a person
4 not guilty, knowing they would face the death
5 penalty."

6 A That is what I am almost saying to you. It would
7 have to be a tremendously strong case. I am
8 trying to be as honest as I can.

9 Q Whether you are talking about this case or any
10 case, is there anyone here who feels they can't
11 sit in judgment?

12 A That is an easy out. The thought crossed my mind
13 as to that.

14 Q I don't want you to say anything but what you
15 mean. You are going to be the one that has to
16 live with what you tell us today. You will
17 probably end up sitting on this jury.

18 If you tell us, which I think takes
19 more courage, your telling us how you feel -- it
20 is not a way out and you've got to live with
21 yourself when it's all over -- and if you are
22 telling us, "Mr. Bax, Mr. Elizondo, because of
23 the way I feel, I cannot sit in judgment of a
24 person requiring the death penalty. I could not
25 sit -- beyond all doubt, I would require proof

1 beyond all doubt," and if that is the way you
2 feel, that is fine.

3 A I think I almost feel that way, yes.

4 Q Almost feel that way? That is a hard term for us
5 to deal with.

6 A I know.

7 Q Ms. Layne is taking down everything we are
8 talking about. Okay?

9 A Okay.

10 Q Someday, some other court is probably going to
11 be looking at what we are talking about, and for
12 them it must be crystal clear what your feelings
13 are. All right?

14 A All right.

15 Q Are you telling me I would have to prove to you
16 to your satisfaction beyond all doubt that the
17 person was, number one, guilty, and, number two,
18 these questions should be answered yes? In other
19 words, do I have to prove to you something more
20 than I would to someone who didn't have your
21 feelings, you know, about the death penalty?

22 A I think I would be very hard to convince and more
23 difficult than some other people would be, right.

24 Q Basically because of your feelings on the death
25 penalty?

1 A Yes.

2 Q The finality of it?

3 A Not the death penalty. I am not against the death

4 penalty anymore than ninety-nine years in jail.

5 It may be more practical, but I will have a difficult

6 time reaching that conclusion.

7 Q Can you imagine any fact situation?

8 A I could do it. I could do it. What I am trying

9 to say is I could do it.

10 Q If it were proved --

11 A If, in my own heart, I was convinced the guy did

12 it.

13 Q And could I convince you someone did it even if

14 you had a doubt in your mind, or would I have to

15 relieve every doubt in your mind: time of day,

16 color of socks --

17 A Almost every doubt I think, yes.

18 Q You may have five witnesses that come before you

19 and say, "This man did it," and you may five other

20 witnesses that come before you and say, "Someone

21 else did it."

22 Could you in that situation like that

23 ever resolve that conflict, or if you had two

24 sides, would you always have a reasonable doubt?

25 A I think that that would depend a lot upon what

1 the people said.

2 Q I guess my last question -- and I will get off
3 -- would you hold me to a higher burden of proof
4 than the law requires in a capital murder case
5 where we are seeking the death penalty?

6 Fine if you would, and fine if you
7 wouldn't. We need to know how you feel.

8 A I would try not to, but it would be very, very
9 difficult.

10 Q I don't think anyone would go back there and on
11 purpose try to -- do you think subconsciously it
12 might affect you in the sense that you may not
13 be impartial in judging the facts of the case
14 because of your feelings?

15 A I would try to be impartial, but I would also feel
16 I would be influenced by my thoughts.

17 MR. BAX: No questions.

18 THE COURT: I must recess at this point
19 until 1:30, and we will come back.

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

22 THE COURT: Bring Mr. Horbelt back in,
23 please, sir.

24 All right, sir. You may proceed.

25

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1 EXAMINATION

2
3 QUESTIONS BY MR. ELIZONDO:

4 Q Mr. Horbelt, did you have a nice lunch at the
5 cafeteria?

6 I don't have more questions to really
7 ask you. Mr. Bax went through them pretty much
8 in detail.

9 We will pass you at this time.

10 MR. BAX: We will excuse this juror,
11 Your Honor.

12 THE COURT: Mr. Horbelt, thank you
13 very much. I didn't realize they were that close
14 to closing before lunch.

15 THE JUROR: That is all right.

16 Thank you very much.
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1 JACK D. LEE,
2 was called as a prospective juror and responded to
3 questions propounded as follows:
4

5 EXAMINATION
6

7 QUESTIONS BY MR. BAX:

8 THE COURT: Come around, Mr. Lee, and
9 have a chair, please, sir.

10 You may proceed.

11 Q (By Mr. Bax) Good afternoon, Mr. Lee.

12 It is Officer Lee, I take it?

13 A Detective. I am a Burglary and Theft detective.

14 Q Have we met before at intake or anywhere?

15 A I have seen you before.

16 Q How about Bob Moen? Have you seen him before?

17 A Yes. I have seen him before.

18 Q A lot of people we have been talking to about the
19 facts, they have no idea what particular case it
20 is.

21 I am sure you probably recall the case.

22 A Oh, yes. I know.

23 Q You are with the Houston Police Department?

24 A Yes, sir.

25 Q Do you feel there is anything, first of all, in

1 your background as being a Houston Police officer
2 that would prevent you from being a fair and
3 impartial juror in a case such as this?

4 A No, sir.

5 Q Did you take part in any of the investigation of
6 this case whatsoever?

7 A No, sir.

8 Q Were you ever at the scene at Edgewood and
9 Walker on July 13th?

10 A No, sir.

11 Q What shift do you work on Burglary and Theft?

12 A 7:00 to 3:00.

13 Q When all of this took place, I imagine you were at
14 home.

15 A Yes, sir.

16 Q This took place at 10:00 o'clock at night.

17 A Yes, sir.

18 Q Did you know Officer James Harris?

19 A No, sir. I didn't know him.

20 Q Did you know anyone in his family or anyone that
21 knew of him over there at the police department?

22 A No, sir. Not that I know of.

23 Q By your information concerning this case, have you
24 ever read the offense report or --

25 A No, sir. Never.

1 Q You've never talked to any of the officers
2 investigating this case?
3 A No, sir. I have not..
4 Q Have you watched news accounts on TV?
5 A I have watched news accounts.
6 Q Have you read articles in the newspaper, the
7 Post or the Chronicle?
8 A Yes.
9 Q Based on any information concerning this case,
10 whether it came from the newspapers, TV, or the
11 grapevine at work there, have you formed any
12 opinion at this point in time as to the guilt or
13 innocence of the Defendant?
14 A No, sir, I have not.
15 Q Did you even know before today that a person by
16 the name of Ricardo Guerra was charged with this
17 offense?
18 A No, sir. I don't even know the name. I never
19 did pay any attention to it in the paper.
20 Q I am going to take you through this rather quickly.
21 I know you have testified many times.
22 A Yes.
23 Q And I think through your testimony and experience
24 with the court, you know what would be expected
25 of you as a juror.

1 A Yes.

2 Q Is there anything, before we go further, about

3 your experience with law enforcement and the

4 courts that would cause you a problem in sitting

5 on this case?

6 A No, sir. Not that I know of.

7 Q Officer Lee, or Detective Lee, do you believe in

8 the death penalty?

9 A Yes, sir. I sure do.

10 Q Do you understand the death penalty is not

11 automatically assessed because a person is

12 convicted of capital murder?

13 A Yes, sir. I understand that.

14 Q I don't think I need to go through the various

15 phases of capital murder. I am sure you are

16 familiar with all kinds.

17 A Yes, sir.

18 Q Are you familiar with the questions?

19 A Yes, sir.

20 Q Do you understand that if all twelve jurors believe

21 that the answer to Question 1 should be yes --

22 A Yes, sir.

23 Q -- and Question 2 should be yes, if the jury

24 answered in that manner, the Defendant would be

25 sentenced to death?

1 A Yes, sir.

2 Q Simply because you find a person guilty of capital
3 murder does not automatically mean these questions
4 should be answered yes.

5 A No.

6 Q But the answers to these questions should be based
7 upon the evidence, and there is nothing automatic
8 about the answers to these questions.

9 A Yes, sir. That is right.

10 Q If the Defendant, of course, chooses not to
11 testify at a criminal trial, you cannot use that
12 failure to testify against him.

13 Can you afford this Defendant that
14 right?

15 A Yes, sir. I can.

16 Q And all Defendants are presumed to be innocent.
17 The fact that they are indicted and represented by
18 attorneys gives rise to no inference of guilt.

19 Can you follow that law?

20 A Yes, sir.

21 Q The State has to prove its case beyond a reasonable
22 doubt.

23 A Yes, sir.

24 Q That term will not be defined for you, and I am
25 sure you have heard lawyers talk to jurors about

1 that in the past.

2 Would you have any problem applying
3 that burden of proof in a criminal case such as
4 this?

5 A No, sir. I wouldn't have.

6 Q I think the evidence in this case may show that
7 this Defendant is an illegal alien. Of course,
8 the jurors should not take that into consideration,
9 as to whether or not he would be found guilty or
10 not guilty.

11 Would that fact alone, that he is an
12 illegal alien, bias or prejudice you in any way
13 in listening to the facts of the case?

14 A No, sir. It sure wouldn't.

15 Q A person -- of course, you know that capital
16 murder means only life or death.

17 A Yes, sir.

18 Q If a Defendant were found guilty of a lesser
19 included offense of murder, the punishment range
20 is then five years to life. If the jury assesses
21 punishment at somewhere under ten years, ten to
22 five years, the jury could recommend probation
23 if they felt it was proper.

24 Can you envision any set of facts --
25 and I am sure you have seen in investigating

1 cases, a case where perhaps even though a person
2 has taken the life of another person, probation
3 is still the proper punishment for the verdict
4 under all the facts and circumstances?

5 A It is possible.

6 Q When you say "it is possible" --

7 A I don't think many people can say there's a number,
8 but I think there are some that are deserving of
9 probation.

10 Q Of course, there might be some police officers
11 testifying in this case. I am sure some of the
12 police officers you may know, some of the
13 detectives over there --

14 A Maybe.

15 Q -- at Homicide.

16 You would be required, of course, to
17 judge their credibility as they testify.

18 A Yes.

19 Q And not tell the other jurors, "Well, I know Joe
20 Blow personally," and try to influence the jurors
21 in any manner over there. I am sure you wouldn't
22 do that.

23 Can you understand that all witnesses,
24 whether they be police officers or whatever they
25 may do, don't take the stand with automatic

1 believability?

2 A That is right.

3 Q Detective Lee, do you have questions of me? I
4 have gone through it quickly, but I am sure with
5 your experience with the police department, you
6 know as much as I do.

7 A Yes. I surely do.

8 MR. BAX: No further questions.

9

10 EXAMINATION

11

12 QUESTIONS BY MR. ELIZONDO:

13 Q Mr. Lee, you have been a police officer for
14 thirty-two years; is that correct?

15 A Yes, sir. That is correct.

16 Q Have you ever been in the Homicide Division?

17 A No, sir. Never have.

18 Q How long have you been in Burglary and Theft?

19 A I've been a detective since 1958; went in Burglary
20 and Theft, and have been there ever since.

21 Q Do you know Cavazos?

22 A No, sir. Sure don't.

23 Q How about J. R. Roberts?

24 A J. R. Roberts, I don't know him by name, but I
25 may know him when I see him. I work the day shift

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1 over there, and some of the officers I don't know
2 by name.

3 Q How about Mr. G. L. Blankenship?

4 A Blankenship, I think I know him.

5 Q How long have you known him?

6 A Oh, it's been years. I met him in baseball, but
7 wouldn't recognize him.

8 Q You wouldn't recognize him?

9 A Wouldn't recognize him unless someone introduced
10 him to me at length. I know we have an officer
11 by the name of Blankenship, if that is the one
12 I am thinking about.

13 Q What about J. R. Arocha?

14 A No. I don't know him.

15 Q J. M. McMahon?

16 A McMannis?

17 Q McMahon.

18 A I think I know him just by meeting is all. I never
19 --

20 Q How long have you been meeting or seeing him?

21 A I haven't been seeing him. Wouldn't recognize him
22 by seeing him.

23 Q What floor is Burglary and Theft on?

24 A That same floor.

25 Q Same one as Homicide?

1 A Same one as Homicide, yes.

2 Q How about J. Robinette?

3 A Robinette, I don't know.

4 Q J. K. Newman?

5 A Newman?

6 Q Newman.

7 A Newman. Oh, yes. I know Newman.

8 Q How long have you known Newman?

9 A Oh, for years; twenty-five years.

10 Q What do you know him from? Just from the police

11 force?

12 A Only the department.

13 Q Do you talk to him on few or many occasions?

14 A The only time I talk to him is when I go -- we

15 have a few prisoners, and when we are working on

16 a case and burglary is involved, I go and speak

17 with him about it.

18 Q You have known him for twenty-eight years; is that

19 correct?

20 A About that.

21 Q You have known him twenty years?

22 A Twenty years.

23 Q If he were a witness, would you give him more

24 credibility automatically?

25 A No, sir.

1 Q Would you give him the same credibility as
2 everybody else?
3 A Everybody would be the same to me.
4 Q D. A. Straughan or Straughan?
5 A No.
6 Q Larry Trepagnier?
7 A No.
8 Q A. Palos?
9 A No, sir.
10 Q M. E. Rodriguez?
11 A No, sir.
12 Q Mr. R. Edwards?
13 A I know some Edwards, but I am not sure if that
14 is the one -- the initials --
15 Q G. L. Bratton?
16 A D. L. Bradley?
17 Q Bratton.
18 A Bratton. No, sir. I don't know him.
19 Q C. A. Dealejandro?
20 A No, sir. I don't know him.
21 Q C. D. Templeton?
22 A No, sir.
23 Q A. G. Christal?
24 A No, sir.
25 Q M. I. Moreno?

1 A No, sir. I don't know him.
2 Q R. R. Ruth?
3 A How do you spell that Ruth?
4 Q R-U-T-H.
5 A No, sir. I don't know him.
6 Q C. J. Clark?
7 A No, sir.
8 Q J. C. Worton?
9 A Worton?
10 Q Yes, sir.
11 A No, sir.
12 Q C. W. Grant?
13 A How do you spell that?
14 Q G-R-A-N-T.
15 A No, sir.
16 Q B. D. Lott?
17 A B. G. Lott?
18 Q B. D. Lott.
19 A B. D. Lott. No, sir. I don't know him.
20 Q C. J. Clark?
21 A I think I know Clark. I am not sure if that is
22 the same Clark I am thinking about. Is he a
23 detective?
24 Q Yes.
25 A I think I know him by meeting him.

1 Q What is this Clark's first name, the one you were
2 thinking of?
3 A I don't know. I just call him Clark.
4 Q C. J. Clark, I believe, is a patrol officer.
5 A No. I don't know him.
6 Q Do you know Danita Smith?
7 A What was that first name?
8 Q Danita Smith.
9 A No, sir.
10 Q C. E. Anderson?
11 A No, sir.
12 Q Charles Anderson, the firearms expert?
13 A No, sir.
14 Q Amy Heeter?
15 A No, sir.
16 Q Have you ever heard of her?
17 A No, sir. I don't even -- I don't even know what
18 division she works in.
19 Q L. L. Cooper?
20 A Cooper, I think I know.
21 Q The fingerprints man?
22 A Yes.
23 Q How long have you known Mr. Cooper?
24 A Oh, about five years I believe. I ran prints
25 through there.

1 Q Have you talked to him on few or many occasions?
2 A Just a few times. Have gone to have cases run
3 myself.
4 Q Based on what you know about Mr. Cooper, would
5 you automatically give him more credibility?
6 A No, sir.
7 Q R. M. Jordan?
8 A That sounds familiar, but I can't place him.
9 Q R. M. Gatewood?
10 A No, sir.
11 Q D. R. Bostock?
12 A Bostock. I know him.
13 Q How long have you known him?
14 A Ever since he's been on the police department.
15 Q Which is how long?
16 A Around twenty years.
17 Q Would you automatically give him more credibility
18 because of what you know about him?
19 A No, sir.
20 Q B. E. Frank?
21 A French?
22 Q Frank.
23 A No, sir. I don't think I know him.
24 Q J. Montero?
25 A No, sir.

1 Q J. M. Castillo?
2 A No, sir.
3 Q J. L. Waltman?
4 A Waltman?
5 Q Yes, sir.
6 A No, sir.
7 Q M. E. St. John?
8 A No, sir.
9 Q F. E. Ybarra?
10 A Esquibar?
11 Q Ybarra.
12 A Oh, no, sir.
13 Q D. E. Roberts?
14 A Roberts?
15 Q Roberts.
16 A No, sir.
17 Q T. C. Bloyd?
18 A I am sorry. I can't hear the last.
19 Q Bloyd.
20 A Bloyd? No, sir.
21 Q J. G. Burmeister?
22 A Burmeister. I know him.
23 Q How long have you known him?
24 A Ten years.
25 Q Would you give him any more credibility because

1 you know him?

2 A No, sir.

3 Q J. M. Donovan?

4 A Donovan? I am not sure.

5 Q Homicide detective, John Donovan?

6 A Yes. I know him.

7 Q How long have you known him?

8 A Five or ten years.

9 Q R. W. Holland?

10 A No, sir.

11 Q J. T. Neely?

12 A Neely, I know, yes, sir.

13 Q How long have you known him?

14 A Ten or fifteen years.

15 Q Would you give him more credibility because of

16 what you know or feel about him?

17 A No, sir.

18 Q E. T. Yanchak?

19 A No. I don't believe I know him.

20 Q I believe it is Eugene.

21 A It sounds familiar, but I can't place him.

22 Q A. T. Herman?

23 A Herman, yes. I know him.

24 Q How long have you known him?

25 A Ten years.

1 Q Would you give him more credibility because of
2 what you know about him outside the department or
3 anywhere else?
4 A No, sir.
5 Q B. W. West?
6 A No.
7 Q L. E. Weber?
8 A No.
9 Q C. W. Kent?
10 A Kent?
11 Q Carl Kent, homicide detective.
12 A I think I know him, just as a speaking acquaintance
13 is all. I never worked with him or around him.
14 Q Okay, and none of these people that you know --
15 you wouldn't give them any more credibility over
16 anybody else because of what you know about them?
17 A No, sir.
18 Q These people have been subpoenaed by the State
19 as you might be aware of. They are all Houston
20 Police officers.
21 A No, sir. I didn't know anything about that.
22 Q The reason I am asking you all these names, this
23 is a pretty bad offense.
24 A Yes, sir.
25 Q It is murder of a police officer, and the State

1 is going to be asking for the death penalty, and
2 we will be asking for not guilty.

3 A Yes, sir.

4 Q And if the evidence doesn't show or prove to you
5 beyond a reasonable doubt that the man is guilty,
6 then it will be your job to find him not guilty.

7 You realize that?

8 A Yes, sir. I sure would.

9 Q And I am telling you that because all of these
10 people I have mentioned, I'm wondering if you
11 could go up to them and say at a later date, "I
12 found Ricardo Guerra not guilty."

13 Could you do that if the State didn't
14 prove their case beyond a reasonable doubt?

15 A I could do it, yes, sir.

16 Q How long have you believed in the death penalty?

17 A I guess ever since I was about twenty years old,
18 I guess.

19 Q Okay. That is back before you were a police
20 officer?

21 A Yes, sir. It sure was.

22 Q Do you think you can judge this man and give him
23 a fair and impartial trial knowing he's been
24 indicted by the Grand Jury, you know?

25 A Yes, sir. I think I could.

1 Q And he is represented by two lawyers, and it might
2 come to your knowledge he is an illegal alien.

3 Would you hold that against him?

4 A No, sir.

5 Q Would you give him a fair and impartial trial?

6 A Yes, sir.

7 MR. ELIZONDO: Your Honor, we would
8 challenge for cause because he is a Houston
9 Police officer and acquainted with many of the
10 witnesses in this case, and also the prosecutors,
11 and also the prosecutors, also on that, we would
12 have a challenge for cause.

13 THE COURT: Overruled.

14 MR. ELIZONDO: We will excuse him.

15 THE COURT: Mr. Lee, thank you very
16 much. We appreciate your time.

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1 HELEN JAYROE SOUTHERN,
2 was called as a prospective juror, and responded to
3 questions propounded as follows:
4

5 EXAMINATION
6

7 QUESTIONS BY MR. MOEN:

8 (The prospective juror had a very
9 brief conversation with the judge out of the
10 hearing of the court reporter.)

11 THE COURT: Have a seat.

12 Mr. Moen and Mr. Elizondo, come up,
13 please.

14 (Discussion at the bench between the
15 Court and counsel out of the hearing of the court
16 reporter.)

17 Q (By Mr. Moen) Is it Southern? Is that how you
18 pronounce your last name?

19 A Yes, sir.

20 Q Just the way it looks?

21 A Yes, sir.

22 Q The judge just had a conversation with us after
23 you had a conversation with him a second ago.

24 Did one of your children get run over
25 by a police officer at some time? What happened?

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1 Can you tell me about that?

2 A Do you want me to tell you?

3 Q Please. Would you?

4 A As far as I know --

5 Q What do you know that happened? What did you hear

6 happened?

7 A He was chased by a policeman and was killed. He

8 was on his motorcycle.

9 Q It was an automobile-motorcycle chase?

10 A Yes.

11 Q What were they chasing him for? Traffic

12 violations? Do you know? Did you hear or get

13 any type of idea what happened?

14 A I don't know.

15 Q Did that happen here in Houston, Texas?

16 A I don't know.

17 Q Was your son living with you at home at the time?

18 A No, sir.

19 Q How old a boy was he?

20 A Twenty-one.

21 Q Did he go to school here in town?

22 A No, sir. He went to San Jacinto for a while.

23 Q Okay. How long had you been here in town before

24 that happened?

25 A Well, we had lived here and then we moved away,

1 and when we came back, it was two years.

2 Q Did he come back with you?

3 A Yes, sir.

4 Q Did you hire a lawyer or anyone to find out what

5 happened --

6 A No, sir.

7 Q -- what the facts were surrounding your son's

8 death, or anything?

9 A No, sir.

10 Q Still to this day you don't know why he was

11 fleeing or if he was, in fact, fleeing or what

12 even happened?

13 A No, sir.

14 Q How was it or who was it who notified you of your

15 son's death? How did you find out about it?

16 A My daughter called me.

17 Q She was notified first?

18 A Yes, sir.

19 Q Who was she notified by?

20 A A minister.

21 Q Okay. What type of occupation did your son have

22 before he was killed?

23 A He worked for U.S. Steel.

24 Q I appreciate your being frank with us. I hate

25 to even go over the facts surrounding your son's

1 death.

2 How long ago was this?

3 A Three years.

4 Q I hate to bring it up and I appreciate it.

5 Obviously, you are an honest person with your
6 feelings, and although I know it is difficult for
7 you to mention to the judge, I appreciate that.

8 This case, as I think the judge told
9 you this morning, involves a police officer.

10 This man is charged with having killed
11 a police officer, and I think you indicated to the
12 judge you didn't feel like you could be fair, and
13 I appreciate your also telling us those were your
14 feelings. I know it was probably difficult for
15 you to say that, and I take it, based on what
16 happened to your son when you told the judge you
17 couldn't be fair, I take that on face value when
18 you indicate you couldn't be fair or impartial to
19 the police officer based on what happened to your
20 son.

21 A I would be fair, but it would be hard.

22 Q Okay. Well, that is different than saying you
23 couldn't be fair.

24 What you just told me, you could be,
25 but it would be hard to be fair?

1 A That's right.

2 Q Do you feel like in your mind that right now
3 you at least have some feelings in favor of the
4 Defendant because of the fact, just the general
5 fact that a police officer was killed, and what
6 happened to your son, would it be fair to say
7 you have some leanings or some feelings in favor
8 of the Defendant and his side of the case because
9 of your son and the fact this man is charged with
10 killing a police officer?

11 A No, sir.

12 Q You are not leaning one way or the other as a
13 prospective juror here today?

14 A No, sir.

15 Q Why do you feel you can't be fair and impartial?
16 It sounds like you could be to me.

17 Why do you hesitate to be on a case
18 like this? I know you have reservations. I can
19 see on your face you do, and, obviously, you
20 wouldn't have stopped and talked to the judge as
21 you did if you didn't have reservations about your
22 own feelings about the possibility of being a
23 juror on a case like this.

24 What kind of reservations do you have
25 or what is going on in your mind right now?

1 A Like I say, I can be fair. I can be honest, but
2 it would be awfully trying and hard on me if I
3 had to go through it, and that is just how I
4 feel.

5 Q Let me explain some things to you about the
6 procedure involved in a case like this.

7 How do you feel about the death
8 penalty, first of all? Do you have feelings in
9 regards to that? Do you feel like your feelings
10 concerning the death penalty would even allow you
11 to be a juror on a case like this? I guess that
12 is the first question we ought to ask, rather
13 than go into the type of case it is.

14 How do you feel about the death penalty?
15 Do you feel like your feelings concerning the death
16 penalty, the taking of another life, would ever
17 allow you to be a juror on a case and return a
18 verdict like that? Some people tell us they could
19 and some people tell us their feelings --

20 A It would be hard. It would take a lot of things.

21 Q Or they tell us their religious beliefs wouldn't
22 allow them to be jurors. We ask everyone that
23 off the bat, whether their feelings would allow
24 them to be a juror on the case.

25 Do you feel your feelings would allow

1 you to participate in a case like this?

2 A Yes.

3 Q How long have you been in favor of the death
4 penalty or believed in the death penalty? How
5 long have you been of that frame of mind?

6 A How long have I been of that frame of mind?

7 Q Uh-huh.

8 A Oh, I don't know. I really don't know.

9 Q Would it be fair to say or assume on my part
10 that is pretty much the way you have felt all of
11 your life?

12 A Yes.

13 Q But do you feel like, given your feelings
14 concerning what happened to your son and why it
15 was he was killed or what resulted in his being
16 killed, chased by a police officer, and him being
17 on a motorcycle, do you feel like your feelings
18 in that regard would ever allow you to be on a
19 jury and return a verdict you know would result
20 in someone receiving the death penalty for having
21 killed a police officer?

22 Do you follow me on what I am saying?

23 A No.

24 Q Okay. Do you feel like you could get over here
25 and be a juror on a case where a man was accused

1 of killing a police officer and return a verdict
2 that would result in someone receiving the death
3 penalty for having killed the police officer?

4 Do you feel like you could ever do that because
5 of what happened to your son and the facts
6 surrounding his death?

7 A If I was convinced he was guilty.

8 Q Okay. So, what you are telling me is, even in
9 spite of what happened to your son, you could be
10 a juror on a capital murder case where someone was
11 charged with having killed a police officer, and
12 you could return a verdict that would result
13 in that man receiving the death penalty for having
14 killed a police officer and put your feelings aside?

15 A Yes, sir.

16 Q I just want to be clear in my mind you understand
17 what my obligation is. My obligation is not just
18 to be fair to the Defendant. That is not what my
19 job is as a lawyer. I am representing the family
20 of the police officer who was killed, and that is
21 my job, and I am going to be asking the people
22 over here in the jury box to be giving him a
23 fair trial just like I would anybody else, any
24 citizen who has been wronged by some criminal.
25 I will ask the jurors to do the same thing, to

1 give my clients a fair trial as well as the
2 Defendant. That is your obligation as a juror.

3 I think you can see the reservations
4 I have where a juror like yourself tells me what
5 happened to your loved one, your son, and, of
6 course, my obligation, as being the representative
7 of the family of the officer, I have some reservations
8 in my own mind as to whether you could be a juror
9 in the case, and obviously, you had reservations
10 in your mind as to whether or not you could be fair.
11 At least, I get the feeling you have reservations
12 in your mind, and you had to, at least to make a
13 comment to the judge about it, which I feel it
14 was right for you to do that. I am not saying it
15 was wrong. It would have been wrong for you not to
16 tell us.

17 See the situation I am in?

18 A Yes.

19 Q Kind of like a situation -- imagine just a
20 hypothetical for me just a second.

21 Imagine you are being tried for
22 something, for having done some crime, and someone
23 stands up and says, "I hate ladies who wear glasses
24 who have brown hair who come with white flowered
25 blouses to the courtroom, but I would try to put

1 that out of my mind and be fair, but I hate people
2 like that. Gosh, do I hate them. I try to put
3 that out of my mind."

4 Do you see where a lawyer representing
5 you under those circumstances might turn to you
6 and say, "I wonder if that person could be on the
7 jury panel. I think they are giving an indication
8 of how they really feel about you. What should
9 we do?"

10 And that is what I am asking you. I
11 can't go inside your mind. I know you've got
12 reservations in your heart and mind.

13 If you feel you can't be fair on the
14 case, don't feel like you are any less a citizen
15 than anyone else. You have had a tragic event
16 take place to a loved one in your life. You have
17 a right to feel the way you do feel.

18 The only thing we ask of you is please
19 reach as deep as you can inside your mind and
20 heart and let me know exactly how you feel.

21 Could you be a fair and impartial
22 juror on the case, or would you find it hard to
23 be fair and impartial because of the event that
24 has taken place in your life?

25 A I can be fair, yes.

1 Q Is that an answer you could live with even a
2 couple of weeks from now if selected as a juror
3 on this case?

4 A Yes.

5 Q I want it to be an answer you will bind yourself
6 to for all times.

7 You see, what we have been doing for
8 five weeks now is selecting jurors to be on this
9 case, and the law does not require any juror to
10 be a juror on a capital murder case, not yourself,
11 Ms. Southern, or any other person who comes before
12 us. Not Mr. Lee who was here a minute earlier or
13 the man before him are selected as jurors on a
14 case like this.

15 You know how someone winds up being a
16 juror in a case like this? We tell them what is
17 required of them and they tell us they can do it.

18 We live in a society where no one is
19 required to be a juror unless they basically want
20 to be. If your basic feelings, or if you have
21 feelings of partiality or feelings toward either
22 side in the case, which would keep you from being
23 a juror, all we ask you to do is tell us, because
24 we would not ask you to violate your feelings or
25 conscience and heart, and the only way we know

1 that is if the juror tells us.

2 You see how someone winds up being a
3 juror in the case?

4 A Uh-huh.

5 Q That is why I say: Give us an answer that you
6 can keep two weeks from now, not just now.

7 I know you are surrounded by strangers
8 and you think, "I will get myself in trouble."
9 That couldn't be further from the truth. The
10 only way you could get yourself in trouble --
11 I am not talking about legal trouble -- is not to
12 be absolutely true to yourself in the feelings that
13 you have.

14 You are not any less a citizen because
15 of the tragedy that has come into your life, and
16 because of the feelings that have arisen in your
17 heart and you find because of that tragedy, than
18 any other person that comes into this courtroom
19 whatsoever.

20 You are entitled to the way you feel
21 and believe.

22 The only thing we need to know is exactly
23 how you feel, and I don't want you to have any
24 doubts in your mind. I don't want there to be
25 a doubt in your mind and heart as to exactly how

1 you feel and exactly whether or not you could
2 serve on this case.

3 Do you follow me on that?

4 A Uh-huh.

5 Q Now, the way that a person receives the death
6 penalty in our state, and, of course, not all
7 murders are punished by the death penalty -- do
8 you know that?

9 A Yes, sir.

10 Q There are only ten instances in which a person
11 can be punished and actually put to death for
12 having committed a murder: To murder while you
13 are breaking into someone else's home; for the
14 rapist to kill his rape victim; for the kidnapper
15 to kill the kidnap victim; for the robber to kill
16 his robbery victim; for an arsonist to murder; for
17 anyone to kill a police officer or fireman in
18 the course of their official duties; to kill for
19 money; murder for hire; for a convict in a penal
20 institution to kill anyone who is employed there
21 at the prison system; or for a convict in the
22 penal institution, while he is escaping, to take
23 anyone else's life during the course of that
24 escape. Those are the only cases where someone
25 can be put to death for having committed one of

1 those murders.

2 This man on trial is charged with having
3 killed a police officer during the course of his
4 official duties. The judge mentioned earlier some
5 of the facts of the case.

6 Do you remember hearing anything or
7 reading anything about the case at all?

8 A I wasn't reading anything -- I wasn't in town at
9 that time.

10 Q This took place on July 13th. Where were you on
11 July 13th? What were you doing?

12 A July 13th?

13 Q Of this year.

14 A I was probably in the state of Tennessee. I was
15 out of state the whole month of July.

16 Q Were you visiting someone July 13th?

17 A My daughter.

18 Q Your son who used to be a police officer in New
19 Orleans, what is he doing now?

20 A He has a cab company in New Orleans.

21 Q How long was he a police officer before he left?

22 A Eleven years.

23 Q And I take it he left to go into private business
24 in the cab company?

25 A Yes, sir.

1 Q Let me get back -- I am talking about the death
2 penalty -- in just a second.

3 The way a person receives the death
4 penalty is by answering the two questions on my
5 left, and depending upon the jurors' answers to
6 those questions -- no one tries to hide anything
7 from you -- depending upon the jurors' answers to
8 those questions, you know exactly what is going to
9 happen to the man on trial.

10 By your answers and the other jurors,
11 the man will be put to death or receive a life
12 sentence in the Texas Department of Corrections.

13 If both questions are answered yes,
14 the man will receive the death penalty.

15 If a no answer is given to either one
16 of the questions, the man receives the life sentence
17 rather than the death penalty.

18 Okay. All twelve jurors must unanimously
19 agree that is what their verdict should be before
20 a question can be answered yes, but only ten
21 before a question can be answered no.

22 Do you follow me on the distinction
23 there?

24 A Yes.

25 Q Ten to answer a question no; all twelve to answer

1 a question yes. Okay?

2 A Yes.

3 Q Now, the juror answers those questions, regardless
4 of their personal feelings -- did you know that?
5 Probably you didn't.

6 Let me explain how that works. You
7 could be a juror on a case where a man had committed
8 capital murder, and after you heard all the facts
9 of the case, you felt in your heard and mind the
10 man shouldn't receive the death penalty, yet all
11 the evidence indicated to you that your answers
12 to those questions should be yes. Do you know
13 what your obligations should be under those
14 circumstances?

15 A What?

16 Q To answer both questions yes and put your personal
17 feelings aside.

18 Do you see how that could be a very,
19 very difficult decision for a juror to reach and
20 to perform? Do you see how difficult that might
21 become?

22 A Yes.

23 Q The law also says that jurors have to take an
24 oath, and that will be an oath you will have to
25 take, Ms. Southern, before you serve on this jury

1 panel, that you will not let your answers to these
2 questions be affected by the punishments the man
3 might receive.

4 Some jurors say because of the type of
5 case it is, or because of the fact the man might
6 receive the death penalty, I would have to be
7 really, really convinced, in fact, have all doubt
8 removed from my mind before I could answer all
9 these questions yes because of my feelings about
10 the type of punishment that the man might receive,
11 and the law says that jurors do not have to have
12 all doubt removed from their mind or be convinced
13 to where all doubt is removed from their mind, only
14 believe beyond a reasonable doubt that is what their
15 answers should be, and they are to put their personal
16 feelings aside.

17 I will get back to that in just a
18 second.

19 Let me ask you to look at this first
20 question; if you haven't had an opportunity to read
21 those, go ahead and read them. I want to talk to
22 you about them.

23 This first question would ask you to make
24 a determination about the conduct of the man on
25 trial that has been found guilty of capital murder.

1 You are to decide whether the conduct on the part
2 of that man that caused the death of the deceased,
3 was it deliberate conduct and was it done with a
4 reasonable expectation the deceased would die.

5 Do you follow me on that first question?

6 A Yes.

7 Q Let me give you a hypothetical example of how
8 the first question applies in a hypothetical case.
9 Okay?

10 A Uh-huh.

11 Q Imagine a man who goes into a convenience store
12 to rob the person there and he goes inside with a
13 loaded gun. It is early in the morning. He takes
14 the cash from the lady working there. She turns
15 all the money over to him and she is scared like
16 any person should be, and he, not thinking there
17 are other witnesses around, fires two bullets and
18 kills her, shoots her once in the chest and once
19 in the head, and she dies.

20 Unbeknownst to him, she steps on an
21 alarm and notifies the police and they are waiting
22 outside the store.

23 That man has committed robbery-murder,
24 which under the laws of our state is capital
25 murder. That is what we talked about earlier.

1 Remember?

2 A Yes.

3 Q The jury, after finding this man guilty of
4 robbing her and killing her, would then have to
5 decide, in answering this first question, as to
6 whether the conduct on the part of the man, the
7 firing of the bullets into her body in the portions
8 of her body that were struck, was that deliberately
9 done and was it done with the reasonable
10 expectation that she would die.

11 Do you see where Question 1 is a two-
12 part question?

13 A Yes.

14 Q Do you feel like that is the type of question
15 you would be able to answer, depending upon the
16 evidence that you would hear?

17 A I suppose so.

18 Q Well, when you say, "I suppose so," I don't mean
19 to argue with you, but we need to have a definite
20 answer now. We can't put you in the jury box
21 supposing you can do it.

22 I am not trying to pick at you. All I
23 am trying to do is plead with you; if you feel
24 you can be a juror, tell us. Make these definite
25 decisions in your mind now, and if you feel you

1 cannot tell us that, now please do not put yourself
2 in the position of being a juror if you feel you
3 could not do it.

4 A I had rather not serve on it.

5 Q I get those feelings, but the only way I can do
6 anything about it or ask the judge to do anything
7 about it as far as excusing you from jury service
8 is for you to tell me. We have been talking a bit,
9 and I am not trying to trick you and I know you
10 have some reservations about being on this case
11 and about serving as a juror.

12 Can you tell us what is going on in your
13 mind and how you feel?

14 A Well, like I say, if he was found guilty -- do
15 you want me to tell you I believe in the death
16 penalty?

17 Q No, ma'am. I don't want you to tell me that. If
18 that is the way you feel in your heart, that is
19 what I want you to tell me, but I do not want
20 to put words in your mouth. I do not want to get
21 you to agree with me at all, because I am not the
22 one who has to be a juror on this case. You are,
23 only if you feel you can be, and what I am asking
24 you to do is please do not put yourself in the
25 position of being a juror on this case unless you

1 are absolutely sure you can be.

2 If you can't do it, if you don't feel
3 you can be a juror, tell us you can't and tell
4 us why you can't, but please do not agree with me.
5 I don't want you to do that unless you really do
6 agree with me.

7 But I am not trying to talk you into
8 anything.

9 A. Like I say, I'd rather not, under the circumstances.
10 If it wasn't in a murder trial, yes, I could sit
11 up here and do my job, but I don't think I really
12 could.

13 Q Because of the type of case it is, a capital
14 murder case?

15 A Yes.

16 Q And also because it involves the death of a police
17 officer?

18 A That is right.

19 Q When you say you had rather not -- and I am not
20 quarreling with you -- you understand me. I am
21 not -- can you be as specific as you can be about
22 what type of feelings you are having in your mind
23 and heart right now?

24 Can you please be as specific as you
25 can as to what is going on in your mind, what

1 causes you problems with being a juror in this
2 type of case and your feelings concerning the
3 death penalty?

4 A Yes.

5 Q Can you be as specific as you can about what your
6 feelings are concerning the death penalty? How
7 will that affect you as being a juror on a case
8 like this?

9 I know it is difficult to speak in
10 front of people who are strange like this, but
11 as best as you can do it, can you tell us what
12 your feelings are about the death penalty and how
13 that causes you difficulty being a juror on such
14 a case?

15 A Well --

16 Q Just say it the best you can.

17 A I would have to be positive, sure that it was
18 deliberate and that he deserved the death penalty.

19 Q What would it take to make you positive and be
20 sure like you say?

21 Of course, that is what I would expect
22 of every juror, to want to be positive and sure,
23 but what would it take to be positive and sure
24 to convince Ms. Southern?

25 A Well, I guess I would just have to see all the

1 evidence put in front of me first, have to make up
2 my own mind.

3 Q Okay. This question over here is a question that
4 asks you to make a determination about a man's
5 conduct.

6 Do you feel you could do that, based
7 on the evidence? After you had heard the evidence,
8 do you feel like you could answer that question?

9 A Yes.

10 Q Now, this second question asks you to make a
11 determination about what type of person is on
12 trial. It is a little different from the first
13 question. The second question asks you to make
14 a determination as to whether or not there is a
15 probability. Does a probability exist that the
16 man on trial is the type of person who would
17 criminal acts of violence that would constitute
18 a continuing threat to society.

19 Before you can answer the second question
20 yes, you have to believe there is a probability,
21 not a certainty -- and I think you know why --
22 the only person I know of in this entire world
23 that could tell us what a person will certainly
24 do in the future is God Almighty himself, and you,
25 as a juror, will not have to put yourself in the

1 position of playing God.

2 You are asked, if you can, you are asked
3 to make the best judgment decision you can about
4 the kind of person on trial. Is he the type of
5 person that would probably commit criminal acts
6 of violence that would constitute a continuing
7 threat to society?

8 And criminal acts means any type of
9 criminal acts of violence: criminal mischief,
10 assaults, burglaries, rapes, murders, et cetera,
11 et cetera, all the criminal acts of violence.

12 Is he the type of person that would
13 probably do those types of things?

14 Do you follow me on what the second
15 question asks?

16 A I would still have to have the evidence and stuff.

17 Q I understand. I understand.

18 Is there anything about the way the
19 second question is worded that would make you
20 feel like it would be -- make it impossible to
21 be answered?

22 A No, sir.

23 Q Do you feel like you could answer that question
24 yes or no depending upon the evidence you would
25 hear?

1 A Yes.

2 Q Now, the judge will tell you, and I am going to
3 tell you, that you do not have to be convinced
4 beyond all doubt, any doubt, or a shadow of a doubt
5 before you can say by your verdict that a man is
6 guilty of a crime or before you can answer these
7 questions yes. You do not have to believe beyond
8 all doubt, all doubt, or a shadow of a doubt.
9 The only burden of proof is to prove to you beyond
10 a reasonable doubt.

11 Do you follow me on that?

12 A Uh-huh.

13 Q The only thing I want to ask you is this: Some
14 jurors come in and say, "Mr. Moen, I understand
15 you have to prove it beyond a reasonable doubt,
16 but before I could answer those questions, you
17 will have to convince me beyond all doubt. If
18 I have any doubt at all, I will not be able to
19 answer those questions yes knowing he would
20 receive the death penalty," and that is fine.

21 People are entitled to feel that way,
22 but they have to tell us.

23 Is that the way Ms. Southern feels? Is
24 that what you would have to have? Would all
25 doubt have to be removed from your mind? Would

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1 you have to be convinced beyond all doubt before
2 you could answer yes, given your feelings
3 concerning the death penalty and given your feelings
4 about the type of case where a man is charged
5 with having killed a police officer?

6 Did you follow the question, what I was
7 asking you?

8 A If there wasn't a doubt in my mind? Yes.

9 Q If there was a doubt in your mind -- I didn't
10 understand.

11 A If there wasn't -- if I could be convinced myself
12 after the facts were laid out that he was guilty,
13 yes.

14 Q If you had any doubts in your mind, what would
15 you do? Would you answer the questions no if
16 you had doubts in your mind?

17 A Yes.

18 Q You understand that the burden of proof is not
19 proof beyond all doubt. Okay?

20 What I am getting back to again is
21 this: As a lawyer who represents a family of
22 the police officer who was killed, the judge
23 will tell you my obligation is to prove to the
24 jurors -- and I have a right to expect there will
25 be twelve jurors here who will act, if I have

1 proved the case beyond a reasonable doubt --

2 I have a right to expect those people will not
3 make me prove to them beyond any, all, or a shadow
4 of a doubt, because that is not what the test is.

5 I understand from what you are telling
6 me, though, before you could find someone guilty
7 of capital murder or before you could answer those
8 questions yes, would you have to have all doubt
9 removed from your mind and be convinced beyond
10 all doubt before you could answer the questions
11 yes?

12 A In my mind, I wouldn't have a doubt if the facts
13 was out there.

14 Q Okay. I am not -- let's just take the -- let's
15 not talk in terms of hypothetical facts.

16 Let's just talk in terms of general
17 concepts of law.

18 The burden is to prove to you beyond
19 a reasonable doubt, not to remove all doubt from
20 your mind.

21 Do you understand that?

22 A Yes.

23 Q I have said it a couple of times already. The
24 proof is beyond a reasonable doubt.

25 The only thing I want to make sure of

1 is this: If I prove to you the answers to these
2 questions should be yes and I prove it beyond
3 a reasonable doubt, not all doubt or a shadow
4 of a doubt or any doubt, but prove it beyond a
5 reasonable doubt, would you answer the questions
6 yes or would you answer them no because I had not
7 proven them beyond all doubt?

8 A It would be yes.

9 Q Would I have to prove to Ms. Southern beyond all
10 doubt before she would answer those questions yes?

11 MR. ELIZONDO: Your Honor, objection.
12 This is repetitious.

13 THE COURT: Overruled.

14 Q (By Mr. Moen) I am sorry.

15 A What was the last one?

16 Q Would I have to prove to Ms. Southern beyond all
17 doubt before she could answer those questions
18 yes?

19 A No.

20 Q Okay, then. I am a little confused.

21 I thought you indicated to me you had
22 to be convinced and not have any doubt in your
23 mind, and we talked about the burden of proof and
24 you used the phrase a couple of times that made
25 me kind of jump back a little bit and be scared.

1 You indicated you would have to be convinced,
2 you know, beyond all doubt and have all doubt
3 removed from your mind.

4 Do you understand you may have doubts
5 about these questions, may have doubts about what
6 type of man is on trial, about whether there is a
7 probability, but there is no obligation to convince
8 you beyond all doubt, and it can be perfectly
9 proper for a juror to have doubts about Questions
10 1 and 2 and still answer the questions yes as
11 long as the jurors believe beyond a reasonable
12 doubt that is what their answers should be?

13 There is no requirement all doubt be
14 removed from your mind, and the only thing I want
15 to be real clear on is to be sure Ms. Southern
16 would not hold Lawyer Bax and myself and the
17 family of Officer Harris to be convinced beyond
18 all doubt. Only God can do that.

19 Do you understand that?

20 A Yes.

21 Q You may have some lingering doubts about these
22 questions, but it is unfair for you to expect us
23 to prove it beyond any, all, or a shadow of a
24 doubt, but if that is the way you feel --

25 Is that the way you feel, or is that

1 not the way you feel? Tell us now.

2 A I would rather not have a doubt about it. I want
3 to be sure of myself.

4 Q Okay. I understand that.

5 I mean, I think you can see from Question
6 No. 2, just by the way the question is written,
7 that you may always have some type of doubt in your
8 mind about Question No. 2 in your answer because
9 it asks you basically to make a prediction about
10 a person, doesn't it?

11 A Yes, sir.

12 Q Based on the evidence, you know, about the man.

13 Do you feel like you would ever be able
14 to answer that question yes regardless of what
15 evidence you would hear, or never be able to
16 answer that question yes because of what it asks
17 you to do?

18 MR. HERNANDEZ: Objection, Your Honor.
19 It's been answered twice by her.

20 Q (By Mr. Moen) Do you follow what I was getting
21 at or did that interruption break your train of
22 thought?

23 A Well, if I convinced myself, yes.

24 Q The only thing I was getting at is this: See,
25 this question asks you to make a determination

1 about what type of person is on trial.

2 A Uh-huh.

3 Q Whether there is a probability he would engage
4 in criminal acts of violence.

5 Do you see where you might always have
6 a doubt in your mind about Question 2?

7 A Yes.

8 Q It asks you to make a prediction about a person.

9 A Yes.

10 Q And, of course, there is always the possibility
11 that your prediction about a person could be
12 wrong.

13 A Right.

14 Q So the only thing I want to know is given your
15 feelings about the fact that you want to be
16 convinced and don't want any doubts in your mind,
17 do you feel that is the type of question you
18 could answer yes? Do you feel there is any way
19 you would be able to answer yes?

20 A Yes.

21 MR. ELIZONDO: Objection --

22 Q (By Mr. Moen) Now, let me ask you this: Before
23 these questions were ever presented to you as a
24 juror, you have already found a man guilty of
25 capital murder, which is to intentionally and

1 knowingly take another life such as in the
2 hypothetical we have talked about, the killing
3 of the cashier at a convenience store.

4 What is your definition of the phrase
5 "deliberate"? Do you have a definition for that?
6 What does deliberate mean to you?

7 A To do it intentionally.

8 Q If you had returned a verdict and found someone,
9 in fact, guilty of intentionally taking another
10 human being's life in the course of committing
11 one of the crimes we have talked about or in the
12 course of killing a police officer during the
13 course of his official duties, would you
14 automatically answer Question 1 yes?

15 A Yes.

16 Q When it came down to answering Question No. 2,
17 if you had, in fact, been convinced from the
18 evidence that this man, in fact, had done what he
19 was charged with, robbery-murder, rape-murder,
20 or murder of a police officer or fireman, and you
21 heard from all the evidence in your mind that he
22 had done that act, what would your answer be to
23 Question No. 2?

24 A Yes.

25 Q And you would answer that question as well?

1 A Yes.

2 Q Okay. Would that be enough of an indicator for
3 you, if you were convinced the man had, in fact,
4 committed the awful type of crime he was charged
5 with; would that be enough of an indicator to you
6 to indicate what kind of man that man on trial
7 was?

8 A Yes.

9 Q You will have to use -- one of the things I wanted
10 to point out to you, where we got these questions
11 from, and I don't want to take credit for them.

12 It was the legislature who drew these
13 questions up for you to use and jurors to use in
14 cases like this. You will have to use your own
15 definitions for these words. That is why I ask
16 the definitions. You will have to use your own
17 definitions for probability, deliberately, et
18 cetera. Okay?

19 Let me talk to you about a couple of
20 other things.

21 You have some obligations as a juror
22 on a case like this. You have to presume -- one
23 of the things the judge will have to tell you,
24 tell you, Ms. Southern, and the rest of the
25 jurors is that before you hear the evidence to

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1 help you decide whether the man is guilty or not
2 guilty, the judge will tell you the Defendant is
3 entitled to a presumption of innocence, it is
4 called.

5 As he sits here today, he is presumed
6 innocent, and what the judge will ask you to do,
7 if you can, is presume the Defendant is innocent
8 and not feel like or think that he is guilty just
9 because he has been indicted by a Grand Jury,
10 that they have heard some type of evidence and
11 returned an indictment charging him with the death
12 of an officer. The fact he has two lawyers
13 representing him and finds himself in this
14 courtroom is no evidence of guilt. The Defendant
15 is presumed to be innocent.

16 Do you feel you can do that, or do you
17 feel that where there is smoke, there is fire,
18 or if the Grand Jury indicted him, there must be
19 some evidence he did something? The Grand Jury
20 indicted him with this crime, and here he is in
21 the courtroom represented by two lawyers, and
22 there's got to be evidence about something?

23 What are your feelings about that?

24 A I guess he is innocent until proven guilty.

25 Q Okay. Good.

1 Now, did you know at any criminal
2 trial the Defendant doesn't have to testify
3 unless he wants to?

4 A Yes.

5 Q Did you know the Defendant can remain silent at
6 his own trial if he wants to, and if you are a
7 juror on this case or any other case, you might
8 have to decide the facts on what you hear from
9 the witness stand and not anything from the
10 Defendant?

11 How do you think that might make you
12 feel, if you didn't hear anything from the
13 Defendant, if he chose to remain silent, even
14 though charged with a very, very serious crime?

15 Do you think that would affect you at
16 all?

17 A Well, I don't know.

18 Q You know, a lot of people who come down just like
19 yourself don't realize the Defendant, if he
20 doesn't want to, doesn't have to testify at his
21 own trial, and for whatever reason, can remain
22 silent, and the Defense doesn't have to put on
23 witnesses if he doesn't want to.

24 They can, if they feel it's the best
25 strategy, they can remain totally silent and not

1 call witnesses if they don't want to.

2 Seems like it would be a crazy thing to
3 do, but if they feel it is the best thing, they
4 can do that.

5 What do you think you might do as a
6 juror if you heard witnesses called by the State
7 and never heard the Defendant call witnesses to
8 prove he wasn't guilty? What type of verdict
9 do you think you would reach under those
10 circumstances?

11 A I don't know.

12 Q It is pretty hard to do much of anything except
13 find a person guilty if he didn't put on any type
14 of testimony.

15 How do you feel about that?

16 A When the lawyers give all the evidence?

17 Q No, I am talking about a situation where they don't
18 put on anything, remain silent, don't call witnesses
19 on their behalf; the Defendant doesn't testify,
20 and the only witnesses you hear from are the
21 witnesses called by the State.

22 A I don't know.

23 Q Okay. How do you think you might feel if you were
24 confronted with a situation like that?

25 A I don't follow you here.

1 Q Okay. Well, I am trying to find out what your
2 feelings are concerning a situation that comes
3 up more often than you suspect at these criminal
4 trials we have, where people like yourself aren't
5 aware of the fact, you know, the Defendant doesn't
6 have to prove anything. He has the opportunity
7 to call whatever witnesses he wants, if he wants
8 to, or he doesn't have to call any witnesses.

9 He can get on the witness stand and
10 testify if he wants to, or he doesn't have to,
11 and I am trying to see what your feelings would
12 be.

13 What do you think you might do if the
14 only witnesses you heard from were called by the
15 State, called by Mr. Bax or myself, and you never
16 heard a single witness called on the part of the
17 Defendant, or the Defendant never even testified?

18 How do you think you might feel? Do
19 you think you might hold that against the
20 Defendant or --

21 A Yes.

22 Q For not having explained his side of it or
23 offered any type of defense?

24 A Yes.

25 Q Do you feel like in your heart and mind at

1 least, Ms. Southern, before you could really be
2 convinced as to what your verdict ought to be,
3 you should hear something from the Defendant,
4 hear something from him?

5 A Yes.

6 Q That is a pretty natural reaction. I don't quarrel
7 with your feeling that way. That is a fairly
8 normal reaction.

9 I know you are a mother and raised your
10 children, and I am sure you resolved your feelings
11 with the children the way most mothers did and
12 listened to both sides of the story and made a
13 decision?

14 A Yes.

15 Q The judge will charge you now about the
16 credibility of witnesses. He will talk to you
17 about --

18 What he will tell you in that regard
19 is as a juror, you have a right to believe or
20 disbelieve everything a witness says even though
21 the witness is under oath, and that sounds crazy,
22 doesn't it, to think you would find yourself as
23 a juror listening to someone who raised their
24 right hand saying, "So help me God, I will tell
25 the truth," and then disbelieve what they might

1 say, even though they had taken an oath to tell
2 the truth?

3 But as a juror, you have the right to
4 do that because I think you realize, Ms. Southern,
5 that we live in an unperfect world, that there
6 are many people in the world who will not tell
7 the truth, even though they have taken an oath
8 to do so.

9 I think it would be great if we lived
10 in a world where the opposite situation existed,
11 where everyone was a truth-teller, so jurors
12 should decide.

13 The only thing the judge will tell you
14 is in deciding whether you believe or disbelieve
15 things, you shouldn't give anyone more belief
16 because of his or her job, police officers as
17 well.

18 Do you feel you could put aside any
19 feelings you have towards the police because of
20 what happened to your son?

21 A Sure.

22 Q And judge them as you would any other person?

23 A Sure.

24 Q That applies to the Defendant, too. If the
25 Defendant decides he wants to testify, you judge

1 him like any other witness. Does he make sense
2 or not make sense? Should I believe him or not?

3 You might, as well, find yourself in
4 that type of situation, where four or five
5 witnesses are pointing the finger and saying, "I
6 saw this man do this," and he gets on the stand
7 and says, "I didn't do it. He did it. Someone
8 else did it. It wasn't me."

9 Those are the type of things jurors
10 decide every day.

11 A Uh-huh.

12 Q I saw you tentatively shake your head. I take
13 it you could do that?

14 A Yes.

15 Q Now, let me talk to you about one final thing,
16 and that is in regards to the range of punishment
17 for the offense of murder.

18 The reason I talk about it is because
19 murder is a lesser included offense of capital
20 murder.

21 What that means is basically this:
22 You could be a juror on a capital murder case
23 where someone was charged with capital murder,
24 and you could actually find the person guilty of
25 the offense of murder.

1 How would that come about? I need to
2 give you an example.

3 Let's take the hypothetical situation
4 where a man was charged with robbery-murder
5 where he killed the cashier. Let's say he was
6 indicted for capital murder and then you hear for
7 the first time that what really happened there
8 at the store was that the man had been dating
9 that woman for a couple of years, and she was
10 getting ready to break up with him and was running
11 around with another man, and he was terrifically
12 upset and angry about it, that he had followed her
13 to the store, argued with her earlier that day,
14 followed her to the convenience store with a
15 pistol, got angry again, and shot and killed her.

16 Do you see where that could not be a
17 capital murder because that is not robbery-murder,
18 but it would be murder?

19 A Uh-huh.

20 Q But the jurors' verdict in that case should be
21 murder, but not capital murder.

22 Now, the range of punishment for murder
23 is different from capital murder.

24 The range of punishment for murder is
25 five to ninety-nine years or life, and the jury

1 can consider giving probation to a Defendant even
2 though they have found him guilty of the offense
3 of murder.

4 Do you follow me on that?

5 A Uh-huh.

6 Q Can you imagine any set of circumstances in your
7 mind, imagine the most sympathetic murder case
8 you can, where someone else intentionally and
9 knowingly has taken another person's life, and
10 imagine the most sympathetic case you can, and
11 can you imagine you, as a juror, if you had found
12 someone guilty of murder, being able to consider,
13 if you felt it were a proper case, being able to
14 recommend probation?

15 Can you imagine any murder case where
16 you would be able to do that as a juror?

17 A Put them on probation?

18 No.

19 Q I am not trying to change your mind. You are
20 entitled to feel that way, but I want you to think
21 of the most sympathetic case where a man or
22 woman has taken another's life, a battered wife
23 case or facts that amount to a mercy killing.

24 Are you telling me that in the most
25 sympathetic case you can think of, probation is

1 not a proper punishment for a person who has
2 taken another's life?

3 Is that the way you feel?

4 A Yes.

5 Q I hope for the period of time we have talked, you
6 understand that I have not been trying -- at
7 least, I hope you don't think I have -- I have not
8 been trying to change your mind at all. I have
9 been trying to dig at you. I don't want to use
10 the phrase pick at you, but I have been trying to
11 pick at you to answer out how you feel.

12 There are not any circumstances you
13 can think of where you feel probation is proper?

14 A No.

15 Q Is that a fair statement?

16 MR. MOEN: Judge, I think that is all
17 I have, and based on the responses of the juror,
18 we would challenge.

19 THE COURT: Mr. Elizondo?

20 MR. ELIZONDO: Your Honor, I would like
21 to know under what theory he is challenging. The
22 last response or --

23 THE COURT: That would be my assumption,
24 based upon the fact she could not consider
25 probation.

1 MR. ELIZONDO: Judge, in --

2 MR. MOEN: In light of all her
3 responses, particularly responses to answers 1
4 and 2 as well as her feelings regarding the
5 possibility of the Defendant not testifying, not
6 testifying as well as 35.13, which I think is the
7 section that says we are entitled to rely on any
8 aspect of the law; we are entitled to rely on it
9 for punishment.

10
11 EXAMINATION

12
13 QUESTIONS BY MR. ELIZONDO:

14 Q Ms. Southern, how are you doing?

15 A Okay.

16 Q It's been a long day, hasn't it?

17 A Uh-huh.

18 Q I need to talk to you a little bit about what
19 Mr. Moen is talking about. It's a little -- I
20 hate to go straight into it, but murder carries
21 a wide range of punishment, and it is almost unfair
22 to even give the question, can you give probation
23 in a murder case, without giving hypotheticals,
24 you know, because there are many ways murder is
25 committed in our state.

1 Let me give a couple of hypotheticals.

2 Let's assume a husband and wife have
3 been married for fifty years. The husband gets
4 real sick. He is being supported only by life-
5 support systems, and being fed through the veins.
6 He has been in the hospital, let's say, for nine
7 or ten months. This is costing the family a lot
8 of money, using up retirement and is going to
9 leave the poor wife destitute.

10 So the man talks to the wife and says
11 to her, "Look, I have had a long life. Go ahead
12 and pull the plug in the life-support system.
13 This way, you can at least have some money left
14 over so you can live on it," and the wife pulls
15 the plug and he dies.

16 Under our law, she has committed
17 murder. She has intentionally and knowingly
18 taken a life of somebody.

19 A Uh-huh.

20 Q Let's assume in that hypothetical it goes to a
21 jury and that they consider probation.

22 In that hypothetical, could you consider
23 probation in that hypothetical, or any kind of
24 murder case?

25 MR. MOEN: Excuse me. I object to him

1 staking her out as to what she would do in a
2 specific case. She needs to make a qualification,
3 generally speaking.

4 THE COURT: Okay.

5 Q (By Mr. Elizondo) Is there any kind of murder
6 case in your own mind now where you could consider
7 probation in any murder case, any kind of murder
8 case?

9 A In that particular one.

10 Q In any case in your own mind, can you consider
11 probation?

12 Let me give you another one. There are
13 a husband and wife who have been living together
14 --

15 MR. MOEN: Excuse me. Can we have
16 an answer to the first question?

17 MR. ELIZONDO: I believe she was
18 confused.

19 THE COURT: Can you do that?

20 THE JUROR: If I was laying there
21 suffering, I would want them to take the needle
22 on me.

23 Q (By Mr. Elizondo) Let me give you another
24 example. A husband and wife have been married.
25 The wife is working all the time, and the husband

1 doesn't work. His favorite occupation is to come
2 in drunk every night and beat his wife up, beat
3 the children and abuse everybody there. That
4 is all he does. He drinks, wastes all his moneyy
5 on drinks, and comes home and beats his wife up
6 every day.

7 One day he comes home again, and the
8 wife says, "I am not taking any more of this. I'm
9 not taking any more," and she kills him. And
10 then she is prosecuted for murder.

11 You can see in that case how a jury
12 might consider probation.

13 Let me give you another case. A husband
14 comes home and sees his two children beaten up
15 and killed and his wife has been sexually molested,
16 and right before she dies, she tells her husband,
17 "Joe Blow down the street did it."

18 He goes to Joe Blow's house, knocks on
19 the door, and Joe Blow opens the door and he says,
20 "Did you do this to my wife and children," and
21 he says, "Yes, I did, and I enjoyed it." The
22 husband shoots and kills him and that, too, is
23 murder. And hypothetically, let's say the jury
24 considers probation.

25 I am not trying to limit you to these

1 facts and hypotheticals I have given you, but
2 use your imagination and see if you can think of
3 a proper case in your own mind where you can
4 consider probation, not give it, but consider
5 probation.

6 A On murder charges?

7 Q Uh-huh.

8 A Nope.

9 Q You couldn't in the hypotheticals I have given
10 you?

11 A No.

12 MR. MOEN: I think her answer is very
13 definite, Judge, with the hypothetical confronted
14 her by the Defense attorney, and for that reason,
15 we renew our challenge.

16 MR. ELIZONDO: Let me go to the other
17 challenge and come to this one.

18 THE COURT: We have a challenge.

19 MR. MOEN: Regardless of the other
20 challenge, Bowen versus State is extremely clear
21 as to what action the State can take where the
22 juror has given a response like she has in regard
23 to the answers she has given.

24 THE COURT: Ms. Southern, just so it is
25 clear in my mind, there are no circumstances

1 where you would consider probation in a murder
2 case?

3 THE JUROR: No, sir.

4 THE COURT: I will sustain the State's
5 challenge.

6 Ms. Southern, you will be excused from
7 jury service.

8 Thank you.

9 THE JUROR: Thank you.

10 MR. MOEN: Thank you, Ms. Southern.

11
12
13
14 H. R. BRIDGES,
15 was called as a prospective juror and responded to
16 questions propounded as follows:

17
18 EXAMINATION

19
20 QUESTIONS BY MR. BAX:

21 THE COURT: Relax, and hopefully, you
22 won't be here too long.

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

24 A Good afternoon.

25 Q How are you this afternoon?

1 A Glad to be alive every day.

2 Q Okay. Sorry to have to keep you waiting around

3 as long as we have.

4 Have you ever served on a jury before,

5 or is this the first time you --

6 A No.

7 Q You have listed here you have either been a

8 witness or been a family witness of someone who

9 was in a capital murder case some years ago.

10 A Yes.

11 Q Would you tell me about this?

12 A This case involved a patient I had treated, and

13 he was a Defendant in the case.

14 Q He was a Defendant in the capital murder case?

15 A Yes.

16 Q Was that here in Houston?

17 A Yes.

18 Q How long ago was that?

19 A I haven't had a chance to check my records. I

20 would say five or six years ago.

21 Q Was he a patient of yours prior to being charged

22 and tried for the offense of capital murder?

23 A Before and after.

24 Q Before and after?

25 A Yes.

1 Q Did you testify in that case?

2 A Yes.

3 Q And were you a fact witness or a character
4 witness?

5 A Fact witness.

6 Q I am not trying to pick at you, but I am trying
7 to know a little about you, and both sides want
8 to know.

9 Were you a witness for the Defense
10 or for the State?

11 A I was called by the State.

12 Q What was the Defendant's name?

13 A Freddie Thompson.

14 Q Freddie Thompson?

15 A Yes.

16 Q Do you recall what court that was in?

17 A No, I do not.

18 Q Do you recall either the prosecutor's name --

19 A No, I do not.

20 Q When you say a fact witness, were you a fact
21 witness as to the guilt or innocence of Freddie
22 Thompson?

23 A It involved more of his medical condition, his
24 medical circumstances and physical abilities.

25 A As to whether he would be capable, in his condition,

1 to have committed such a crime, I take it?
2 A Yes.
3 Q And I take it his defense was then, "A person in
4 my physical condition could not have done this
5 crime"? It would be highly improbable or
6 impossible?
7 A That seemed to be the flavor of it. I was only
8 on the stand forty, forty-five minutes.
9 Q And was the outcome of your testimony basically
10 that he could or could not have committed that
11 type of offense?
12 A He could not have.
13 Q He could not have?
14 A Correct.
15 Q Even though you were called by the State as a
16 witness, the testimony you gave, I guess, would
17 have been prejudicial to the State and favorable
18 to the Defendant?
19 A Yes.
20 Q Do you know what the outcome of that case was?
21 A He was acquitted.
22 Q Okay. So there wasn't anything in terms of an
23 alibi or anything like that? You were just
24 testifying to your knowledge of his physical
25 condition and whether that would have allowed him

1 to commit such a crime?

2 A Yes.

3 Q Anything about that case that would affect you
4 in being a juror now, from a different
5 perspective than a witness?

6 A I don't believe so, no.

7 Q You have mentioned that there is something about
8 your job, and I am sure at the emergency room you
9 see all kinds of people that come through there
10 from both sides --

11 A Yes.

12 Q -- people who are victims and people who
13 perpetrate crimes, and for one reason or another
14 --

15 A Well, I probably see more victims than I do
16 others. The police custody cases are usually taken
17 to Ben Taub. The hospital where I work, it is
18 just not set up for custody cases.

19 Q Of course, your line of work is to save people,
20 to extend a person's life, I guess?

21 A Yes.

22 Q The reason we talk to jurors individually in a
23 case like this is because of the serious
24 punishment involved.

25 If a person is found guilty of capital

1 murder, they can receive one of two punishments,
2 either life imprisonment or the death penalty;
3 nothing less than that.

4 We talk to people individually so we
5 can get to know them and let them feel as free
6 as they can and be honest with their answers.

7 You see, the only way a person becomes
8 a juror in this case is frankly by the way they
9 answer their questions and whether they themselves
10 believe they can participate in that type of
11 trial.

12 You see, we have many different types
13 of people that come before us. Some people say,
14 "I believe in the death penalty, and if I believe
15 someone guilty, I would calmly assess the death
16 penalty.

17 That one is too strong to be a juror.

18 Other people come in and say, "I could
19 never assess the death penalty. There is no way
20 I could do that. My religious background, the way
21 I was taught, would not allow me to participate
22 in a trial." That person is not qualified to be
23 a juror either.

24 What we are looking for is twelve
25 people who can listen to the evidence and return

1 the death penalty without doing violence to
2 their beliefs.

3 You see, I guess a lot of people could
4 come in and say, "I disagree with the death
5 penalty, but I can still sit on the jury."

6 That would be in violation of their
7 beliefs, where the law said, "I can believe in
8 the death penalty," but their personal beliefs
9 said, "I can't."

10 So, with that introduction, tell us how
11 you believe about the death penalty, whether being
12 a doctor, spending a lifetime in saving people,
13 whether you could participate in a procedure which
14 may ultimately go directly in contrast to the
15 life of a person saving the life of an
16 individual.

17 A It would be a direct contrast, not just my training,
18 my beliefs, my professional oath which starts out
19 my training, and after you have spent all your
20 energies and efforts in preserving lives, there is
21 no way that I could go with the death penalty.

22 Q My father is a surgeon. I have talked to him.
23 This is about the sixth death penalty case I have
24 sat on, and I have talked with him about it on
25 occasion, and he is of the same frame of mind

1 you are, and I said I understand, but it is hard
2 for me to understand a person sixty-five years
3 old, and who has saved lives for forty years of
4 that time, and he can't understand the death
5 penalty.

6 I take it that is basically what your
7 position is?

8 A True.

9 Q I take it that --

10 How long have you been practicing
11 medicine?

12 A Since 1946.

13 Q Was your opinion the same even prior to your
14 undertaking the study of medicine?

15 A My religious beliefs leaned me that way in years
16 previous to that.

17 Q Even besides your profession, your upbringing and
18 religious background, it would be fair to say you
19 are in opposition to the death penalty?

20 A Yes. My father was a preacher, and I guess
21 religion was drummed into me even before I
22 understood what religion was.

23 Q Okay.

24 A But as long as I can remember, my convictions have
25 been in that vein.

1 Q Can you -- those are really deep-rooted feelings,
2 and no one here is going to try to change your
3 opinion. I don't think we could if we wanted to.
4 Okay?

5 But we are not here to debate the
6 pros and cons of capital punishment, and I thank
7 you for being as honest as you have been with me
8 in telling us how deep-rooted these feelings are,
9 going through your profession, but even as a
10 child growing up, these were instilled by your
11 parents and what not.

12 Can you envision any situation where
13 Dr. Bridges could participate in a death penalty
14 verdict?

15 A No, I can't.

16 Q We can sit here, and I can go through some pretty
17 gory fact situations, and I am sure you, as most
18 people, have probably seen some situations that
19 would make people sick.

20 Is there any fact situation, no matter
21 how gory I can make it, thirty children being
22 killed, that would change your position on the
23 death penalty?

24 A No.

25 Q I have to take you through some fundamental steps

1 required by law and see if your response would
2 be different in these situations.

3 Could you even envision yourself finding
4 a person guilty of capital murder knowing if you
5 did find him guilty, he would be subject to one
6 of two possible punishments, life or death, or
7 would your convictions prevent you from a finding
8 of guilty if you believed it?

9 A My feelings about the death penalty are still the
10 same.

11 Q I am sorry?

12 A My feelings about the death penalty are still the
13 same.

14 Q Would those strong feelings you have prevent you
15 from even finding a person guilty of capital
16 murder?

17 Some people say it would; some people
18 say it wouldn't. They say the problems come in
19 when we get to the punishment.

20 A It would influence me, because that is still at
21 the end of the tunnel.

22 Q Let me ask it this way: We always hear terms like
23 bias and prejudice and partiality and impartiality,
24 and usually when we hear those terms, we think of
25 them as bad terms, but I think you will agree we

1 all have biases and prejudices, and there are
2 areas where we can be impartial and areas where
3 we cannot be impartial.

4 Do you feel that perhaps your feelings
5 toward the death penalty and the opposition to it
6 would affect your decision to be impartial in
7 listening to the facts of the case -- and I don't
8 expect, Doctor, for you to say, "I would
9 consciously disregard my oath as a juror," but
10 can you see where subconsciously, because of your
11 feelings as a juror, it may affect the way you
12 listen to the evidence, the way you evaluate all
13 the evidence?

14 A I find that question still difficult to answer.

15 Q It is a very difficult question to answer.

16 I think what you are telling me is, in
17 a proper case, if you believed beyond a reasonable
18 doubt, you could find a person guilty of capital
19 murder, which would just, if you do that, that is
20 either life or death.

21 A That probably exists.

22 Q Let's assume, just to make-believe now, that you
23 have found someone guilty of capital murder, you
24 and eleven other jurors. You have heard the
25 evidence, and though perhaps reluctantly, you

1 participated in the guilty verdict with the
2 eleven other jurors. Okay?

3 At the punishment stage, as the judge
4 explained to you earlier, these two questions
5 would be submitted to the jury. The jury doesn't
6 go back there and say, "Judge, we assess the
7 punishment at death," or, "Judge, we assess the
8 punishment at life," but by the way these two
9 questions are handled by the jury, the judge must,
10 by law, sentence the Defendant to life or death.

11 First of all, I take it if this
12 procedure were such you had to say life or death
13 in your verdict, you could never say death, no
14 matter what the facts were?

15 A That is true.

16 Q Can you ever envision yourself answering both
17 these questions yes, no matter what the evidence
18 was, knowing two yes answers would require the
19 judge to sentence the man to death?

20 A I can't see answering both of them yes.

21 Q For the record again, so someone else one day
22 will understand, if the evidence showed Question
23 1 should be yes, could you answer it yes knowing
24 one more yes answer would result in the death
25 penalty?

1 Would you fail to answer it, or answer
2 no to assure a life sentence?

3 A I would probably fail to answer.

4 Q Assume with me that you had answered Question 1
5 yes. Okay? And you get down to Question No. 2,
6 and you know in your mind if you answer that one
7 yes, with a guilty verdict behind you, and with the
8 answer to No. 1 yes, if the answer to No. 2 is
9 yes, he is going to receive the death penalty,
10 and, of course, as a juror, you have to assume
11 that punishment will be carried out someday.

12 Could you ever answer Question 2 yes
13 in that regard?

14 A I couldn't be a party to it.

15 Q Okay, so no matter what the facts were, even if
16 the evidence showed the answers should be yes,
17 you would either fail to answer it or answer it
18 no because your personal beliefs would never allow
19 you to answer these questions yes; is that
20 correct?

21 A That is correct.

22 Q Now, Mr. Elizondo or Mr. Hernandez in a few
23 seconds may have a few questions of you. I am
24 not going to go into gory situations or tell you
25 a guy may have been to the penitentiary twenty

1 times. It doesn't matter what the facts are,
2 is it that Dr. Bridges couldn't participate in
3 two yes answers that would result in the death
4 penalty? You just couldn't?

5 A You have summed it up nicely.

6 MR. BAX: I have a challenge, Your
7 Honor.

8 THE COURT: Do you have any questions?

9
10 EXAMINATION

11
12 QUESTIONS BY MR. HERNANDEZ:

13 Q So what we are getting at is two double negatives,
14 in other words: your religious beliefs and
15 professional belief, right? Sort of like, not
16 only no, but, "Hell, no," and there is not a case
17 or set of facts where you could serve as a juror
18 in a capital murder case, is there?

19 A I can't envision one.

20 Q Even all the gory details I can sit here all day
21 and tell you about --

22 MR. HERNANDEZ: That is all.

23 THE COURT: Doctor, thank you so
24 much. The State's challenge will be sustained.
25 You will not be required to serve.

1 Thank you very much.

2 MR. BAX: Thank you, Doctor.

3
4
5
6 CYNTHIA MAIRE MATTHEWS,
7 was called as a prospective juror and responded to
8 questions propounded as follows:

9
10 EXAMINATION

11
12 QUESTIONS BY MR. MOEN:

13 THE COURT: Are you ready?

14 MR. MOEN: Yes, sir.

15 THE COURT: Ms. Matthews, if you would,
16 just relax. We will be through shortly.

17 You may proceed.

18 Q (By Mr. Moen) Ms. Matthews, my name is Bob Moen.
19 I am with the District Attorney's Office here in
20 town, and seated behind me is a fellow by the name
21 of Dick Bax, also with the District Attorney's
22 Office, and together, we will be representing the
23 family of a man named J. D. Harris.

24 It is alleged that back on July 13th
25 of this year, he was killed by Ricardo Aldape

1 Guerra. It is alleged and it will be proved
2 that at the time Officer Harris was a police
3 officer in town.

4 The judge asked if you had read or
5 heard anything about the case, and I take it from
6 your silence you had not read or heard anything
7 about the case at all?

8 A Just what I read in the paper and knew.

9 Q There is nothing wrong with having heard about a
10 case, read about it, seeing something on television
11 or having read something in the paper, et
12 cetera.

13 The only reason we ask in the first
14 place is to see if jurors have formed an opinion
15 that would interfere with their being a juror.

16 There is nothing wrong with their having
17 read or heard something.

18 What I want to do is find out what your
19 feelings are, find out how you feel about some of
20 the aspects of the law that will come up during
21 a trial like this, see how you feel.

22 If you have any questions, please don't
23 hesitate to ask me. If you have disagreements,
24 anything at all we can clear up for you, please
25 ask me. The last thing we want to do, if we can

1 avoid it, is have jurors have questions when
2 they have passed into the box, have questions
3 they can't discuss that they can ask us now.

4 Let me explain something else to you
5 as well. There are no right or wrong answers
6 at this time. It is informal and it should be
7 an informal proceeding. I know it is difficult
8 at times to think of this as being an informal
9 proceeding. You are here in a room with six or
10 seven different strangers, almost feel you have
11 done something, because you are here in a room
12 trying to answer questions, but it is informal,
13 and there are no right or wrong answers, only
14 the way you feel.

15 I want to ask you in a second your
16 feelings concerning the death penalty, whether or
17 not your feelings concerning the death penalty
18 would allow you to be a juror on a capital murder
19 case and return a verdict you know would result
20 in someone receiving the death penalty, whether
21 you could do that or not because of your feelings
22 on the death penalty.

23 But before I do that, let me explain
24 something to you about capital murder cases.

25 Not all murders that take place in our

1 state here in Texas are punished as capital
2 murders.

3 Capital murders are only murders that
4 take place during the commission of one of five
5 crimes: First of all, a murder in a burglary;
6 a rapist to kill his rape victim; kidnapping;
7 robbery; arson-murder; a policeman or a fireman
8 killed; a convict to kill in a penal institution,
9 people we employ to work in a penal institution;
10 or for a convict to kill anyone while escaping;
11 or murder for hire.

12 Those are the only murders that fall
13 within the definition of capital murder, and,
14 of course, the way a person receives punishment
15 for that crime is by people answering questions
16 that appear to my left.

17 With that in mind, can you tell me what
18 your feelings are concerning the death penalty?
19 Would they allow you to be a juror in a case like
20 that?

21 A I believe in the death penalty.

22 Q Is that the way you have felt most of your adult
23 life?

24 A That is the way I have felt.

25 Q You've got, obviously, still the majority of your

1 adult life. Is that pretty much the way you
2 have felt?

3 A I have always thought that way.

4 Q Is that pretty much a thought process, a
5 combination of being brought up by your mother
6 and father as well?

7 A Probably a combination. My mother and father
8 as well.

9 Q I want to ask you something about your personal
10 information sheet.

11 Let me explain our procedure. I know
12 you have had some training in law enforcement
13 towards becoming a certified police officer.

14 Is that your goal or some study you
15 have been interested in?

16 A I would like to maybe be a reserve for someone,
17 but I don't know if I want to go into it full-
18 time. I've got until April to make up my mind.

19 Q Bear with me a little bit. I know some of this
20 stuff might be old. You might be aware of it.

21 A It is interesting.

22 Q Let me go over it anyway in case you may not have
23 heard about it or have forgotten something you may
24 have heard.

25 The first stage of the trial is devoted

1 to whether the Defendant is guilty or not guilty,
2 and you will reach your verdict based on the
3 evidence at that time and you will go with the
4 other jurors and decide what your verdict should
5 be.

6 If, in fact, you vote guilty, you will
7 come out and take your seat in the jury box and
8 we will proceed to the second phase of the trial,
9 and the second phase is devoted to what the
10 jurors' answers to these two questions ought to
11 be.

12 At the second phase or punishment
13 phase, the law allows Mr. Bax and myself the
14 opportunity to present additional evidence. The
15 jury can hear about crimes which the man has
16 committed for which he has not yet been convicted,
17 but anything within the confines of the United
18 States, or the Constitution, anything deemed
19 admissible by the Court for the jury to hear to
20 decide what their answers to these questions
21 should be. That is the last thing the jury does.
22 They take all the evidence they have heard from
23 both parts of the trial and go to the jury room
24 and decide what their answers will be.

25 Two yes answers and the man will receive

1 the death penalty. A no answer to either
2 question and the man will receive a life sentence
3 rather than the death penalty.

4 Have you had a chance to read these
5 questions to yourself earlier?

6 A Yes, sir.

7 Q Let's talk about the first question to start off
8 with. The first question would ask you, as a
9 juror, to make a determination about the conduct
10 of the man on trial. It asks was his conduct
11 that caused the death of the deceased deliberate
12 and was that conduct done with the reasonable
13 expectation that the deceased or another would
14 die.

15 It's actually a two-part question, and
16 it asks you to make a determination about the
17 conduct of the man that the jury has found guilty
18 of capital murder. Was that conduct done with
19 the reasonable expectation the deceased would die?

20 Let me give you a hypothetical example
21 and show you how that question applies. It is
22 a question the jury answers based on the facts
23 they have heard that have indicated to them they
24 should find the man guilty of capital murder.

25 Let me give you an example. Imagine

1 a man who goes into a convenience store in the
2 early morning hours and confronts a cashier and
3 she is afraid as anyone would be. He points the
4 pistol at her and demands the money and she turns
5 the money over to him. It appears to him at that
6 time she is the only witness. Rather than be
7 identified at a lineup later, he decides to shoot
8 her and kill her. He shoots her once in the head
9 and chest, and she dies.

10 Unbeknownst to him, she steps on an
11 alarm and the police are waiting outside and he
12 is arrested. He has committed capital murder,
13 robbery-murder.

14 The question would be the same as in
15 every type of capital murder case; what type
16 of conduct was there on that man's part?

17 When you take a loaded pistol, point
18 it at another human being and fire bullets into
19 their body, is it reasonable to expect a human
20 being will die when shot in the portions of his
21 or her body, when shot with a loaded gun?

22 It is pretty much a common sense,
23 straightforward question answered based on the
24 facts of the crime itself.

25 Now, the answer to the question,

1 however, is not automatically yes just because
2 the jurors have found the man guilty of capital
3 murder.

4 Let me give you another example of
5 how the answer could be no, even though a
6 person was convicted by a jury of capital murder.
7 Okay?

8 Imagine the same circumstance, same
9 hypothetical, but inject something different.

10 Let's say the person who is inside and
11 kills the cashier is a thirty-five-year-old ex-
12 con who has managed to talk a seventeen-year-old
13 into going with him, and the seventeen-year-old
14 goes with eyes open, knows they are going to rob,
15 and let's say the thirty-five-year-old even
16 provides the weapon for the seventeen-year-old,
17 says stand outside and any cars that come by,
18 let me know. I am going in and get the money.
19 Nothing will happen. We will split it up.

20 He's got no records or convictions,
21 the seventeen-year-old doesn't. He hears a shot,
22 has no idea of what is going on inside the store,
23 throws his gun down and flees.

24 Under our law of parties, however,
25 people who act together to commit a crime can't

1 come to the courthouse later, can't say, I was
2 really surprised. A surprise defense can't cut
3 it. People who commit a crime together are
4 equally responsible for the crime committed, but
5 I think you can see, when the jury was deciding
6 under the seventeen-year-old if he were convicted
7 under our law of parties of capital murder, I
8 think you can see where your answers would be
9 different. There would be no conduct that caused
10 her death. Sure, there was conduct that caused
11 the commission of the robbery, but the part that
12 caused her death, was it deliberate? I think you
13 can see how the jury could arrive at different
14 conclusions to No. 1, even though they had found
15 the Defendant guilty of the offense of capital
16 murder.

17 That is why I mentioned earlier, even
18 though a man is found guilty, or woman is found
19 guilty of capital murder, it doesn't mean that
20 either one of the questions is automatically
21 answered yes, but it is a determination the jury
22 makes based on the evidence. They decide what
23 part did that person play in the man or woman's
24 death and was that part that they played
25 deliberate conduct done with the reasonable

1 expectation the deceased would die.

2 Now, the second question is different
3 from the first. It asks you to make a determination
4 about the type of person on trial. What type
5 of person do we find ourselves in the courtroom
6 with? Is the man on trial for capital murder the
7 type of person where there exists a probability
8 this person would commit these types of criminal
9 acts of violence, and would those acts
10 constitute a continuing threat to society?

11 The legislature drew these questions
12 up and did not give us a definition for these
13 words, and you will have to use your own
14 definitions for those words, probability and
15 society.

16 The only thing I wanted to point out to
17 you is the word probability is not certainty, and
18 I think you realize the only person in the entire
19 world who could predict to a certainty is the
20 Almighty himself, and he will not be a witness in
21 this case, and you are not required as jurors to
22 put yourselves in the position of playing God.

23 You are asked, however, to make the
24 best judgment decision you can about the man on
25 trial based on all the evidence you hear as to

1 whether or not there is a probability he would
2 do these types of acts or commit these types of
3 acts that would constitute a continuing threat to
4 society.

5 Now, the phrase "criminal acts of
6 violence" is all-inclusive. It includes any type
7 of criminal act of violence, from the most minor
8 assault to the most serious type of violence we
9 can talk of. It involves crimes against property,
10 burglary, breaking and entering motor vehicles,
11 et cetera, any of those types of acts. Is there
12 a probability those were the type of acts he
13 would engage in? Would they constitute a
14 continuing threat to society?

15 I think you realize from your common
16 sense, like all the other jurors do, once a man
17 is found guilty of capital murder, the place he
18 winds up spending the rest of his life in until
19 the sentence is carried out is the penitentiary.
20 The only thing I wanted you to be aware of is
21 that -- and if you agree or disagree with me, that
22 is fine -- there are people in the penitentiary,
23 people we ask to work in the penitentiary to keep
24 our prison system working for us, and we ask those
25 people, and I think they have a right to expect

1 they can work in an atmosphere where they can be
2 safe from the people who are confined there.

3 Would you agree or disagree that
4 convicts who are serving their debt to society
5 have a right to be free from fear of being harmed
6 by being confined with other convicts who have
7 committed crimes and find themselves in the
8 penitentiary as well?

9 A Yes.

10 Q As to those Questions 1 and 2, you will have to
11 use your own definitions for the words that
12 appear in the questions.

13 Do you have any questions of me about
14 1 and 2 now that we have had a chance to go over
15 them?

16 A Not really.

17 Q Do you feel those are the type of questions you
18 could answer? Whether you answer yes or no, that
19 is your business, but do you feel those are the
20 type of questions you could answer depending upon
21 the evidence you might hear?

22 A I could answer them.

23 Q Okay. Let me talk to you about some of the things
24 required of you by your jury service.

25 The judge will give you five or six

1 things in writing. After all of the evidence is
2 presented at the first phase, the guilt-or-
3 innocence phase of the trial, the judge will type
4 you up on a legal-size piece of paper the law
5 that applies to a capital murder case, and the way
6 the jury reaches a verdict, they take all the
7 evidence and read the law and see if the facts
8 fall within the law the judge has given them.

9 The judge will put in five or six things
10 that directly affect the jury. He will tell you
11 first of all the Grand Jury indictment is no
12 evidence of the Defendant's guilt. The jury is
13 not to consider that as any evidence of the
14 Defendant's guilt.

15 The analogy I draw for jurors like
16 yourself is the Grand Jury indictment is kind of
17 like the starting pistol in a race. Before the
18 pistol goes off, the race can't begin, and it's
19 not evidence that anything took place.

20 You decide what took place on July
21 13th if you are a juror, based on what you hear
22 from the witness stand. All right?

23 A Okay.

24 Q He will tell you about the presumption of
25 innocence and he will tell you that the Defendant

1 is presumed to be innocent, and as a prospective
2 juror, you are to give that presumption.

3 What does the presumption of innocence
4 mean? Not to insult your intelligence, I think
5 you realize in a hypothetical case the man who
6 kills in the convenience store or runs outside,
7 one who commits the offense, is just as guilty
8 on the day he committed the crime as the day he
9 comes to the courthouse to answer to twelve
10 jurors, but jurors who don't know anything about
11 the case are to presume the man innocent and base
12 their verdict on what the witness is telling them
13 from the witness stand in the courtroom.

14 Do you see how that presumption of
15 innocence works?

16 A Yes.

17 Q The judge will also tell you the burden of proof
18 in a criminal case always rests with Mr. Bax and
19 myself. We have the burden of proving to you
20 beyond a reasonable doubt. That is the burden
21 in the criminal courthouse. That burden never
22 shifts to the Defense. I don't want you to think
23 the trial is not a wide-open proceeding. It is.

24 Either side can call witnesses if they
25 want to. If a Defendant wants someone to come

1 to the courthouse, all they have to do is issue
2 a subpoena to the clerk and she will give it to
3 the Sheriff's Office who will, in fact, serve
4 that person individually and bring that person
5 to the courthouse, even if they're not wanting
6 to come. They will still come. They can do this
7 without expense to themselves or the lawyers.
8 They can get whatever witnesses they want to prove
9 whatever they want. The trial is a wide-open
10 proceeding.

11 The only difference is they don't have
12 the burden of proving, the burden of doing that.
13 If they want to, they can. If they feel it would
14 be the best strategy for them not to say anything
15 and remain silent, well, we might disagree with
16 them with that as being the right thing to do,
17 but they can still do that if they choose to for
18 some reason, because the only ones who have to
19 prove to you what took place on July 13th is Mr.
20 Bax and myself, and we have to prove it beyond a
21 reasonable doubt, not all doubt or a shadow of
22 a doubt.

23 Those are the phrases often heard on
24 television. It has to be proved beyond a
25 reasonable doubt. That applies to these questions

1 as well.

2 Before you can answer either question
3 yes, you would have to believe beyond a reasonable
4 doubt that from the evidence Mr. Bax and I present,
5 that is what your answers should be.

6 Please don't hesitate in telling Mr.
7 Bax and I that we didn't, if we don't prove it.
8 If we don't prove it, it is our problem. We
9 don't expect jurors to violate their oaths in
10 any aspect of the case, but to reach a fair
11 verdict to both sides based on the evidence that
12 is presented to them. Okay?

13 A. Yes.

14 Q. The judge will tell you -- this is another thing
15 -- he will charge you on -- I am trying to get
16 my thoughts straight -- he will tell you when you
17 judge the credibility of the witnesses, a juror
18 should not give a witness any more or less
19 belief because of a witness' job. You see, in the
20 eyes of the law, a person, just because of his
21 or her job, is not entitled to any more or less
22 belief just because of their job.

23 After a person gets on the stand and
24 testifies, then it is perfectly permissible for
25 the jurors to consider that person's job in

1 judging the believability of the witness.

2 For example, a doctor testifying about
3 medical injuries, a police officer with a number
4 of years experience testifying about his
5 investigation and what it indicated to them, then
6 it's perfectly permissible, after witnesses
7 testify, for a juror to consider that witness'
8 job.

9 I am merely talking about before a
10 witness gets on the stand. I don't care if it's
11 the favorite minister of our church, if it's the
12 police officer we have known all our lives, a
13 lawyer, doctor, candlestick maker, baker, however
14 that goes, regardless of a person's job, he is
15 not entitled to any more or less belief because
16 of a person's job.

17 Do you follow me on that charge from
18 the Court?

19 A Yes.

20 Q Okay. Let me talk to you about a couple of other
21 aspects of the law, and I want to ask you some
22 personal questions.

23 We have talked about -- and I think
24 you mentioned earlier the range of punishment
25 for murder being five to ninety-nine years or

1 life, and the reason I talked about that in
2 the first place was because of this. Someone
3 could be charged with the offense of capital
4 murder and could find a person guilty of not
5 capital murder but the offense of murder instead,
6 and here is how that matter arises, and let me
7 give you an example of what we are talking about.

8 Imagine a situation or the example I
9 gave you earlier about the man who went in the
10 store and killed the cashier. Let's say there
11 were witnesses in the store, and let's add a
12 couple of things to the hypothetical. They
13 thought the cashier was robbed during a robbery.
14 Why else would he shoot her except to take money
15 from her, and they felt it was a robbery-murder,
16 and he was indicted by the Grand Jury for
17 robbery-murder, but the jury heard what
18 really happened is that the man -- I am speaking
19 hypothetically -- what really happened is the
20 man knew this woman and had dated her off and
21 on for a number of years. She was getting ready
22 to leave him for someone else, and he was
23 extremely jealous and upset about it and she had
24 had an argument earlier that day, very violent
25 argument. He confronted her about the same

1 argument at the store, had a pistol with him,
2 got extremely angry, produced his gun and killed
3 her, and that jury hears those facts and they
4 found out that was not what took place. It was
5 not a robbery-murder.

6 You see, he is not guilty of capital
7 murder, but guilty of murder, because the case
8 (sic) did not take place during a robbery as
9 first suspected.

10 Then the jury would decide what the
11 punishment would be; the range of punishment is
12 from five years to a maximum of ninety-nine years
13 or life, and the jury can, if they feel it is a
14 proper case, even though the jury has found a man
15 guilty of murder, they can recommend probation
16 to the judge.

17 Have you ever heard that phrase
18 probation before?

19 A Yes, sir.

20 Q I think you are probably familiar with how it
21 works, but let me, just out of an abundance of
22 caution, explain it to you anyway.

23 The only way a man or woman can receive
24 probation for a felony offense when a jury has
25 found them guilty of murder, is if the jury,

1 first of all, unanimously agrees among themselves
2 that the person should receive no more than ten
3 years in the penitentiary. The jury has to be
4 in unanimous agreement that the punishment should
5 be ten years or less.

6 If the jury agrees on that, then the
7 jury can then discuss among themselves, and
8 either accept or reject whether or not they are
9 going to recommend probation for this person they
10 have found guilty of whatever crime it is, whether
11 they are going to recommend probation to the
12 judge.

13 If they recommend probation, it is a
14 binding recommendation. The judge must follow the
15 jurors' recommendation, and the jury can either
16 accept or reject the idea of probation.

17 Do you follow me on how probation
18 works?

19 A Yes.

20 Q And see, anyone who has even been convicted of
21 murder can ask for probation. It doesn't make any
22 difference. It can be the worst crime in the
23 world.

24 I guess it goes back to the phrase,
25 "It doesn't hurt to ask." The jury might decide

1 a man should spend nine or ten years in the
2 penitentiary for robbery or a rape case, and
3 they don't consider probation.

4 Probation only arises where the jury
5 has heard all the facts and decides that the
6 punishment should be ten years or less, and also
7 are in unanimous agreement that it is the type
8 of case where the man is deserving of probation.

9 The only reason I take so much time
10 to explain that to you, I want to ask you: If
11 you were a juror on a case where someone had been
12 found guilty of an offense, even the offense of
13 murder, if you felt the facts indicated to you
14 it was a proper case for ten years or less on
15 the punishment scale, and also the facts indicated
16 to you it was a case for probation, would you be
17 able to consider probation on such a case, even
18 though you had initially found the person guilty
19 of murder?

20 A Yes, I could.

21 Q Well, I take it you can at least conceive of some
22 fact situation in your mind, even though a person
23 has committed the offense of murder, where
24 probation might be a proper punishment?

25 A Yes, sir.

1 Q Do you have any questions of me so far?
2 A No.
3 Q Okay. It seems like there was something else I
4 wanted to talk to you about, but it has been
5 easy to talk to you, because you've got some
6 knowledge of the proceedings and the law involved.
7 Even a little bit helps. It makes
8 it easier.
9 What is your mother's occupation, if
10 she has worked outside the home?
11 A She is a teacher.
12 Q Where does she teach at?
13 A Aldine High School.
14 Q What is your daddy's occupation?
15 A He works for the City of Houston. He is a
16 surveyor.
17 Q Do you have brothers and sisters?
18 A Yes, I do. I have a brother and a sister.
19 Q Are they older or younger than yourself?
20 A Both of them are younger.
21 Q Are both in school?
22 A One is attending Texas Tech University, and the
23 other is in high school in Aldine.
24 Q He doesn't have your mom for a teacher, does he?
25 A No.

1 Q Now, someone in your family -- well, I take it
2 both yourself and your fiance -- looks like you are
3 getting married.

4 A Didn't set a date. The reason I took that class
5 was because of him. I wanted to get to do things
6 more with him.

7 Q Your fiance, is he a deputy constable?

8 A He is a reserve for Officer Rankin.

9 Q He also has another occupation?

10 A He is a fireman.

11 Q What is his name?

12 A Glen Rightmire.

13 Q Rightmire?

14 Who is Terry Lee, the D.P.S. officer
15 you know? Is that a personal friend of yours
16 or your friend?

17 A It is my friend.

18 Q Is Terry a fellow or a gal?

19 A It is a man.

20 Q And how well do you know Terry Lee?

21 A I have known him for about a year and a half.
22 He goes to my church.

23 Q And David Ross, is that a kind of mutual friend
24 of yours?

25 A Yes.

1 Q A mutual friend of yourself and your fiance --

2 A Yes.

3 Q -- and Glen Rightmire, that is your fiance?

4 A Uh-huh.

5 Q You see how quick I am? I grabbed on that right
6 away.

7 What type -- I see that you enjoy
8 hunting as one of your hobbies. Is that something
9 you and Glen do together?

10 A Yes.

11 Q What type of hunting?

12 A Bow hunting, dove, deer.

13 Q Do you have any questions of me about anything
14 so far?

15 A No, sir.

16 Q Let me talk about one final thing before I pass
17 you to the Defense attorneys, and they will have
18 questions to ask you.

19 I think the evidence in the case will
20 show the Defendant is an illegal alien, and well,
21 there were two things I wanted to talk about.

22 I forgot one.

23 The only thing I wanted to point out
24 in that regard is, because the Defendant in this
25 case or any case is an illegal alien does not

1 mean he is guilty or not guilty of anything.

2 The only thing I would ask you to do
3 is put the guilt or innocence thing out of your
4 mind and decide whether he is guilty or not
5 guilty on the facts, what they tell you he did
6 or did not do.

7 Do you feel you could do that?

8 A Yes, sir.

9 Q The fact he is an illegal alien can tell you about
10 the kind of person he is when answering Question
11 2, for instance, based on the facts and what
12 the witnesses tell you from the witness stand,
13 but don't consider the fact that he is an illegal
14 alien when deciding his guilt or innocence.
15 Okay?

16 A Okay.

17 Q Did I talk about the Defendant's failure to
18 testify? I don't think we did.

19 I want to tell you in any criminal
20 case, as the judge mentioned earlier, any
21 Defendant, regardless of the crime they are
22 accused of, has the right to get on the stand
23 and tell his or her version of what happened,
24 or the Defendant can, in fact, not say anything,
25 can remain silent. It doesn't mean the jurors

1 can't wonder why or what a person might want to
2 say or even wish to hear both sides of the story.
3 Those are all pretty natural reactions.

4 All of us, before we make a decision,
5 like to hear, get as much input as we can and
6 hear both sides of the story, but in a criminal
7 case at the courthouse, sometimes jurors have to
8 decide without hearing from the Defendant, and
9 if the Defendant does not testify, although I
10 anticipate he will, but if the Defendant does not
11 testify, the judge will tell you you are to base
12 your decision on what you hear from the witness
13 stand and not base your decision on what you
14 have heard or not heard from him. You decide.

15 If he testifies, you judge him like
16 any other person, whether he is telling the truth
17 by his demeanor, et cetera.

18 Do you understand that?

19 A Yes.

20 Q Let me talk with Mr. Bax and see if he has other
21 questions, and if not, we will pass you to the
22 Defense.

23 (Consultation between attorneys.)

24 Q (By Mr. Moen) Mr. Bax reminded me of something
25 I didn't talk to you about, and we have been

1 covering it with everybody. I forgot it.

2 When answering these questions, the
3 judge will give you within the charge that in
4 addition to the fact it takes twelve jurors to
5 answer yes, he will tell you you must not discuss
6 and must not let the other jurors discuss how
7 long the Defendant would have to serve in the
8 Texas Department of Corrections if he were to
9 receive a life sentence. He will tell you that
10 is within the jurisdiction of the Board of Pardons
11 and Paroles.

12 MR. ELIZONDO: Objection, Your Honor.
13 The prosecutor is stressing the law of parole.

14 Q (By Mr. Moen) He will tell you that is within
15 the discretion of the Board of Pardons and
16 Paroles to decide how long the Defendant would
17 have to serve. Jurors will not discuss that
18 among themselves. They will look at what the
19 judge told them, and if they persist in talking
20 about it, give us a rap on the door and let us
21 know what is happening because if someone does
22 that, we have to go to trial all over again.
23 It is the type of conduct that would make us
24 start the proceedings all over again. Okay?

25 A Okay.

1 Q If you are a juror on this case, I look forward
2 to serving with you.
3

4 EXAMINATION
5

6 QUESTIONS BY MR. ELIZONDO:
7

8 Q Hello, Ms. Matthews. How are you?

9 A Fine.

10 Q This is our fifth week, a pretty long time for
11 us.

12 I believe you are number eighty-three
13 or eighty-four -- eighty-six. I am sorry.

14 We have ten people selected so far,
15 and we need another two people.

16 This part of the trial is what is known
17 as voir dire examination.

18 Voir dire, they tell me, means to speak
19 the truth. The reason you are up there is to
20 ask you a few questions and see how you feel about
21 different things. That is why we need to talk to
22 you at length. I don't mean to embarrass you or
23 in any way humiliate you by these questions, but
24 we need to know your answers to these questions,
25 There are no right or wrong answers, and all we
want to know is how you feel.

1 A Okay.

2 Q This case is a capital murder case, capital murder
3 of a police officer.

4 A Uh-huh.

5 Q This kind of case, as in any kind of case in Texas,
6 the State must prove to you beyond a reasonable
7 doubt that this man committed the offense. They
8 must prove to you that on a particular day here
9 in Harris County, Texas, this Defendant shot and
10 killed a police officer in the lawful discharge
11 of an official duty knowing at the time he was
12 a police officer. They must prove it to you beyond
13 a reasonable doubt.

14 The term reasonable doubt will not be
15 defined for you. The judge won't give you any
16 definition. The judge won't and I won't. I don't
17 have a legal definition. There is none, but all
18 I can tell you is that across the street where
19 they try lawsuits over there for contract disputes,
20 disputes over personal injuries, over medical
21 malpractice, over workmen's compensation, sometimes
22 for lots of money, sometimes for millions of
23 dollars, the burden of proof over there is by
24 a preponderance of the evidence, the greater
25 weight of the credible evidence.

1 Over here on this side, the legislature
2 said before you can forfeit somebody's life or
3 liberty, literally in this case, the legislature
4 said the State will have a higher burden, the
5 burden of proving their case to you beyond a
6 reasonable doubt.

7 How do you feel about that?

8 A Well, it depends on the evidence given, whether
9 you can prove somebody guilty beyond a reasonable
10 doubt. Yes, you could, depending on what the
11 facts are, and what they have to show you and
12 prove to you, you can, I feel.

13 Q What do you feel about the heavy burden they
14 have? Do you think that is right or wrong?
15 Just how do you feel?

16 A Sometimes it is wrong because of the things that
17 are happening and people are getting away with
18 things, and because you have to prove it to such
19 an extent, it seems like they are getting away
20 with things.

21 Q And like I say, all I want to know is just how
22 you feel about this.

23 Do you think the State should have that
24 heavy burden?

25 A Sometimes, no. I don't feel like they should.

1 Q When you say "sometimes," it makes me a little
2 leery. I need to know.

3 Let's assume -- to quote an example or
4 give an example that Mr. Bax gave -- sometimes
5 is not a definite answer -- you have a mallet in
6 your hand, and I say, "Ms. Matthews, if I put my
7 hand in front of you, are you going to bang it
8 with that mallet?"

9 I am a little leery of putting my hand
10 there.

11 Do you think the State should have the
12 burden of proving this case beyond a reasonable
13 doubt, or do you think it's too much of a burden
14 and they ought to prove it by a preponderance of
15 the evidence, the greater weight of the credible
16 evidence?

17 A I would say no; I don't think they should have to
18 prove it beyond a -- but then again, yes. It
19 depends on the circumstances.

20 THE COURT: Is that a definite maybe?

21 MR. ELIZONDO: That is a definite
22 maybe.

23 THE JUROR: I guess.

24 Q (By Mr. Elizondo) What do you mean "circumstances"?

25 A Depending on what the crime was and what was

1 done and the evidence and the record.

2 Q Let me go further and see how you feel about
3 certain things.

4 Let's assume -- you know, you will ask
5 yourself if you are on this jury panel, you will
6 see how the State goes about proving their case
7 beyond a reasonable doubt. They go ahead and
8 call witnesses and they sit in the witness stand,
9 and you are sitting in the jury box close to the
10 witnesses, and you can watch their demeanor, and
11 by watching their demeanor, any inconsistency
12 they might have, you can more or less give them
13 credibility or not give them credibility, and
14 it is your decision. You can believe some of,
15 all of or none of what a witness testifies to.
16 You will be the judge of the facts. Judge
17 Oncken will be the judge of the law.

18 So you will hear these people and
19 they will come up there and take the stand, and
20 they will put on more people, and after a while,
21 they will rest their case. That means, "That is
22 all we have."

23 Let's assume for a minute that we rest
24 our case, and we don't put on any evidence
25 whatsoever, and you go back in the jury room and

1 you are thinking to yourself, and you are saying,
2 "I think he did it. Maybe he did it, but I
3 haven't been convinced beyond a reasonable doubt
4 that he did it."

5 In killing a police officer, in that
6 situation, what would your verdict be?

7 A I wouldn't know.

8 Q Pardon?

9 A I wouldn't know. If I had to be convinced --
10 you are right. I would have to be convinced to
11 a reasonable doubt.

12 Q Beyond a reasonable doubt?

13 A Right.

14 Q What would your verdict be? Let's say you are back
15 there and you are saying, "I think he did it.
16 Maybe he did. Maybe he killed a police officer,
17 but I haven't been convinced beyond a reasonable
18 doubt."

19 In that situation, what would your
20 verdict be?

21 A I don't think I could give you an honest one,
22 because that is somebody else's life. That is
23 --

24 Q What do you mean by that?

25 A I mean that is somebody's life that you are

1 deciding on.

2 Q Sure.

3 A And you would have to be convinced in your own
4 mind that he is either guilty or he is innocent.

5 Q Right.

6 A And I wouldn't want somebody, wouldn't want to put
7 someone away that is not guilty. I wouldn't want
8 to do that unless they were.

9 Q In that situation that I gave you, what would
10 your verdict be?

11 A If I were not convinced, I would say not guilty.

12 Q Even if you thought in your mind he might be
13 guilty?

14 A If I did not know, did not know and believe
15 with everything I had seen, I would probably say
16 not guilty.

17 Q You would probably say, or would say?

18 A I would say I believed not guilty.

19 Q You did not believe what?

20 A Did not believe he did it. If you had not
21 convinced me of it, I would say not guilty.

22 Q Let's say you are back there and you are saying,
23 "Maybe he did it. I think he did it. I haven't
24 been convinced beyond a reasonable doubt, but he
25 didn't testify and the Defense didn't put on any

1 evidence at all," and you are sitting back there,
2 you know, and you are saying to yourself, "They
3 didn't put on any evidence. I think he did it.
4 I haven't been convinced beyond a reasonable doubt.
5 I think he did it though. I am going to go ahead
6 and find him guilty."

7 Would you do that?

8 A No.

9 Q You can say --

10 A I would say no. I wouldn't do that.

11 Q Would you want him to testify?

12 A Yes. I probably would. I would.

13 Q Why would you want him to testify?

14 A Just to hear his side of the story from his
15 point of view.

16 Q What if he didn't testify at all? Would you
17 wonder about what he might have said or done?

18 A Yes. I would wonder. I would wonder.

19 Q Would you hold it against him?

20 I know we are brought up to hear --
21 we are always going to hear two sides, always
22 want to make up our minds and decisions on two
23 sides. It's only human, I guess, and proper, but
24 the law says this man does not have to testify,
25 and let's say he doesn't testify and you are

1 wondering what he could have said, and you are
2 back in the jury deliberation room, and would
3 you hold that against him?

4 Once again, there are no right or
5 wrong answers, but once you are back there, we
6 can't talk to you anymore. I need to know what
7 you mean.

8 A Yes. I think I probably would hold it against
9 him.

10 Q You would or probably would?

11 A I would.

12 Q You would hold it against him?

13 A Yes, I would.

14 Q Of course, this would be the most important
15 day of his life.

16 A If it was mine, I would want to defend myself.

17 Q Sure.

18 A That is only right, you know.

19 Q You would want him to at least get up and explain
20 to you, or to your satisfaction, why he is not
21 guilty?

22 A Right.

23 Q Or prove his innocence to you?

24 A Right.

25 Q And so you would want him to testify?

1 A Yes, I would.

2 Q And if he didn't testify, that would be a strike
3 against him?

4 A It would be a doubt in my mind; yes, it would be.

5 Q It would be a strike against him, right?

6 A Yes.

7 Q Now, you know he has been indicted by the Grand
8 Jury, the Harris County Grand Jury, for
9 instentionally and knowingly killing a police
10 officer, and he is represented by two lawyers.
11 He's got an interpreter here.

12 Do you think, like -- again, you know,
13 do you think where there is smoke, there is fire?

14 A Yes. Yes.

15 Q And you know they didn't go back and pick him up
16 by the scruff of the neck and say, "Come with
17 me. We think you are guilty of killing a police
18 officer."

19 Do you think he is guilty of something
20 because he is there?

21 A No, I don't.

22 Q You don't think he is guilty of anything?

23 A Not because he is there.

24 Q Do you think he is guilty because he got indicted
25 by the Grand Jury?

1 A I don't know that.
2 Q Pardon?
3 A I don't know that. I don't know if he is guilty
4 or not.
5 Q Pardon?
6 A You are asking me if I think he is guilty because
7 he's been indicted?
8 Q Yes.
9 A I don't think he is guilty -- I don't know
10 anything.
11 Q Do you think there is something?
12 A Something's happened, you know.
13 Q Would you hold what you think against him in a
14 trial of the case, if I have made it clear?
15 A Just because he's been indicted doesn't mean
16 he is guilty.
17 Q That is what is, "Where there is smoke, there is
18 fire," I have always talked about.
19 A Not just because he's been indicted, I would not
20 hold it against him. I wouldn't, because I don't
21 know.
22 Q What do you think he is doing here?
23 A I really don't know. They have, you know,
24 evidently found something they can hold him on,
25 but I don't know that is what they found.

1 Q Do you think there is any evidence of guilt just
2 because he is right here right now?

3 A No, sir, I don't.

4 Q Let's assume for a minute that you have found
5 him guilty of intentionally and knowingly killing
6 a police officer. This trial, as in all trials
7 in Texas, is divided into two parts.

8 The first part is the guilt-or-innocence
9 stage, a separate and distinct part.

10 If he is found innocent, we go to the
11 second part, and if he is found not guilty, that
12 is all they wrote.

13 While we are talking about that, let
14 me talk about your boyfriend and people you know
15 that are law enforcement officers.

16 If I were across the street at 301
17 Fannin and I was representing a doctor,
18 representing him in a malpractice case and I were
19 talking to people who were doctors, I would be
20 leery of putting them on a jury panel for fear
21 they would say, "Well, this doctor is being sued
22 by a lawyer, and I might be sued at some time,
23 and I will be sympathetic toward the doctor,"
24 so I would be leery of putting them on the jury
25 panel.

1 Do you see what I mean?

2 A Yes, I do.

3 Q I see you have had thirty-two hours at becoming
4 a police officer, a peace officer.

5 A Yes.

6 Q Would you be more sympathetic toward the State's
7 case or anything, or the family of J. D. Harris?

8 You know, I suspect that the widow will
9 testify, and that will be pretty emotional, I
10 would assume.

11 A I would probably be a little sympathetic. I
12 probably would. Yes.

13 Q Well, as a result of your being sympathetic,
14 would you hold it against the State -- I mean,
15 against my man, or would you benefit the State
16 by virtue of your sympathy?

17 A I wouldn't hold it against him, because I don't
18 know whether he is guilty or innocent.

19 Q But based upon your sympathy, would you make the
20 State's case a little easier?

21 Again, you know, only you can tell
22 us that.

23 MR. MOEN: Objection, Your Honor, to
24 the form of the question, "make the State's case
25 a little easier." I don't see how she can

1 understand that.

2 MR. ELIZONDO: It is asking for an
3 answer.

4 MR. MOEN: He needs to ask a question
5 she is capable of understanding.

6 THE COURT: You may underestimate her
7 powers of understanding.

8 MR. MOEN: I assumed she's as confused
9 as he has got me.

10 MR. ELIZONDO: Would you sit down?

11 Q (By Mr. Elizondo) Do you understand the question?

12 A What you are asking me is: Would I be more
13 sympathetic toward him?

14 Q Yes, towards the family of J. D. Harris.

15 A Yes, I would. Somebody's lost their life because
16 of somebody, and somebody's committed the crime,
17 you know, and they need to find, you know, the
18 guilt or innocence of whoever did it.

19 Q Right.

20 A You know, and I would feel sorry for them. Yes,
21 I would.

22 Q For the family of J. D. Harris?

23 A For the family.

24 Q As a result of the way you feel for the family
25 of J. D. Harris, would you have a bias -- and I

1 hate to use the word "bias" because if you use
2 the words bias or prejudice, all of a sudden,
3 people say, "I am not biased or prejudiced,"
4 but everybody's got a bias or prejudice of some
5 form or another, either consciously or
6 subconsciously or some way or another.

7 Unconsciously, as a result of the
8 way you feel about the family of J. D. Harris --
9 and I expect the widow will testify -- would
10 you have a bias against this man for or against
11 him or for or against the State?

12 A Well, I don't think I could be prejudiced or
13 biased towards him because I don't know if he is
14 guilty or innocent. Now, I would feel sorry for
15 the family and everyone involved, yes. Yes, I
16 would feel sorry for the family and probably be
17 a little biased or prejudiced towards him.

18 Q Let's assume you find him guilty and we go to the
19 punishment phase. The punishment phase is
20 determined, of course, by the way you answer those
21 two questions. If two questions are answered
22 yes, it means automatically that he dies.

23 A Dies.

24 Q And two noes or one no means a life sentence.

25 If you have found him guilty of

1 intentionally and knowingly killing a police
2 officer, would you automatically answer those
3 two questions yes just so you could get the dire
4 result of death?

5 A. No.

6 Q. Okay. You know, the first question asks if the
7 conduct of the Defendant that caused the death
8 of the deceased was committed deliberately.

9 The word deliberately is underlined,
10 and, again, there is no definition of the word
11 deliberately. The judge can't give one. No one
12 can give one.

13 I was reading in Webster's, and
14 Webster's said to premeditate.

15 MR. MOEN: He sure did not say that.
16 For four weeks he said that is what someone told
17 him.

18 MR. ELIZONDO: Daniel Webster.

19 THE COURT: Get back to the law.

20 Q. (By Mr. Elizondo) Anyway, they tell me, reading
21 it or whatever, they say it means to ponder or
22 think about with a measure of consideration.
23 For instance, you will go in the jury deliberation
24 room and ponder or think about whether this man
25 is guilty or not.

1 What does the word deliberately mean
2 to you?

3 A It means intentionally.

4 Q Okay. Let me go to the first phase. In the
5 first phase, in the guilt-or-innocence phase,
6 you have found him guilty of intentionally and
7 knowingly killing a police officer. Then we will
8 go to the punishment phase.

9 In the punishment phase, you've got to
10 answer Questions 1 and 2 yes or no. Would you
11 automatically answer Question No. 1 yes solely
12 because you have found him guilty in the first
13 phase of intentionally and knowingly killing a
14 police officer?

15 A If he did it intentionally and knowingly, yes,
16 I would answer it yes.

17 Q Okay, and, of course, there are many ways to
18 look at a case.

19 To give you an example, the one Mr.
20 Moen gave you, the one about the thirty-five-
21 year-old ex-con that goes into the Seven-Eleven,
22 and I don't recall if he talked about the seventeen-
23 year-old, if he talked about the seventeen-year-
24 old as in the seventeen-year-old example, but the
25 seventeen-year-old is a lookout. The thirty-five-

1 year-old goes in there and takes the money and
2 kills the cashier and runs out.

3 You can see where the seventeen-year-old's
4 conduct didn't really cause the death because it
5 wasn't committed by him, really, but theoretically
6 and legally, he could be convicted for capital
7 murder.

8 Would you answer that yes also?

9 A No. No.

10 Q That is what I am trying to get at.

11 The No. 2 question is more or less
12 asking you to foretell or forecast the future.
13 It is asking you to determine whether there is a
14 probability that he will commit criminal acts of
15 violence that would constitute a continuing threat
16 to society.

17 Do you believe that anything is probable?

18 A Anything is probable, possible, yes.

19 Q So, what do you think the word probability means?

20 A That it is possible that he could do this again
21 or do something similar to this again.

22 Q Well, then, since you believe that it's probable,
23 or anything is probable, right?

24 A Right.

25 Q Would you automatically answer yes to Question No.

1 2 without regard to any evidence, solely because
2 you believe that anything is probable?

3 A No, I wouldn't. It depends on his background.
4 Maybe if he's been charged with anything else
5 before, his record.

6 Q Of course, you realize that the State would have
7 to prove to you beyond a reasonable doubt that
8 there is a probability that he would commit
9 criminal acts, more than one act of violence that
10 would constitute a continuing threat to society.

11 A Yes, sir.

12 Q And if they don't prove it to you beyond a
13 reasonable doubt, you would answer the question
14 no?

15 A Right.

16 Q Do you think that a person can change his mode of
17 behavior, his mode of conduct, his mode of
18 operations?

19 A Sometimes, yes, and sometimes, no. It depends on
20 maybe their age, how bad their record was before,
21 what they had done, and what they had been
22 convicted of this time as to whether they could
23 be reformed or not.

24 Yes, they can.

25 Q Anything is probable?

1 A That is a safe answer.

2 Q Let's assume you are back there and you were on

3 this jury panel and you go back there and you

4 do some deliberations and you are sitting back

5 there again and saying to yourself, "You know,

6 there is a probability he committed the offense.

7 I think he did, but I haven't been convinced

8 beyond a reasonable doubt, so I am going to find

9 him not guilty."

10 Could you do that?

11 A If I wasn't convinced? Yes, I could.

12 Q And you could go back and talk with Terry Lee

13 and tell him you did that?

14 A Yes, I could do that if I felt within myself he

15 wasn't guilty. I wouldn't want to convict him.

16 Q And you would talk to David Rose (sic) and tell

17 him, "I found a person who it was accused of

18 killing a police officer, found him not guilty"?

19 A Yes, sir.

20 Q You could do that?

21 A I could do that.

22 Q And you could tell your boyfriend?

23 A Yes, I could.

24 Q He is a fireman, right?

25 A Yes, sir.

1 Q You know, he is also covered under the same law,
2 under the capital murder law.

3 A Yes, sir.

4 Q You know, back again, back to this little example
5 I was giving you about this doctor being on my
6 jury, I would be a little leery, and I was just
7 wondering how do you feel about that?

8 A How do I feel about it? Law enforcement you
9 mean or --

10 Q Uh-huh.

11 A Well without them, there would be a lot of things
12 going on, and without them, this place would
13 be kind of crazy, I think. They should be
14 appreciated and protected. If anything happens
15 to them, you know, it is not hurting them, it is
16 hurting us, when something happens to them like
17 this.

18 Q Seeing as how you are studying to be a peace
19 officer and your boyfriend is a fireman and
20 your friends are police officers, can you guarantee
21 me you would give this Defendant a fair and
22 impartial trial in a trial of this type of
23 case, and, again, I want you to search yourself.

24 A If I was convinced beyond a reasonable doubt that
25 he was not innocent, or was guilty, I could give

1 you an honest answer; you know, if I felt in my
2 mind that he wasn't proven guilty by the evidence
3 and the witnesses or whatever, I could give you
4 an honest answer and say he was not guilty.

5 MR. ELIZONDO: Your Honor, we would
6 respectfully challenge her on the Defendant's
7 failure to testify and on the reasonable doubt
8 theory.

9 THE COURT: All right.

10 MR. MOEN: May I talk to her just
11 a second?

12 THE COURT: Sure.

13
14 EXAMINATION

15
16 QUESTIONS BY MR. MOEN:

17 Q Ms. Matthews, let me talk to you about something
18 we talked about earlier, and that is the
19 Defendant's failure to testify.

20 A Defendant has a right, regardless
21 of what he is charged with, whether a traffic
22 ticket, up to the most serious offense in our
23 state, which is capital murder. He has a right
24 if he wants to to get on the stand in his own
25 behalf and testify, or he has the right, for

1 whatever reason, to not get on the stand and
2 testify. He can remain silent even though it is
3 perhaps the most important day of his life. He
4 is on trial for such a serious offense. If he
5 sees fit or upon the advice of his lawyer
6 or whatever decision or facts go into the decision,
7 he can, if he decides, remain silent.

8 His lawyers will tell him, "Don't get
9 on the stand. You are an ex-convict. The jurors
10 will find out about it. Don't get on the stand.
11 You are a terrible witness. You slur your words
12 and sound like a jerk," or for whatever reason,
13 he could decide not to testify and say, "It will
14 just hurt my case," or, "Won't help my case if
15 I do," or for whatever reason. If a Defendant
16 does not testify in any case -- I am not talking
17 about this case, but any criminal case -- the
18 charge in the case is always the same. The judge
19 tells the jurors, "Base your verdict on what
20 you have heard."

21 A Sure.

22 Q And that silence is not evidence that a person
23 has or has not done anything. The judge won't
24 say it is wrong for jurors to wonder why the
25 Defendant didn't testify or to wish to have

1 heard from the Defendant.

2 MR. ELIZONDO: Objection. Misstatement
3 of the law.

4 Q (By Mr. Moen) Those are natural reactions.

5 THE COURT: Overruled.

6 Q (By Mr. Moen) The only thing a judge will tell
7 you is this, and that is that silence is not
8 evidence. Base your verdict on what you have
9 heard rather than what you didn't hear, and a
10 person is not entitled to be found guilty or
11 not guilty because of something that wasn't said.

12 Jurors should listen to what is said,
13 and if the witnesses convince them the person
14 should be, they should find them guilty. They
15 should say so. If the evidence does not meet
16 their burden of proof, if they are not convinced
17 after listening to the testimony, they say not
18 guilty.

19 Do you feel you could do that?

20 A I see your point.

21 Q Do you see what --

22 A I see your point.

23 Q If the Defendant did not testify, I take it from
24 what you tell me, you would not hold that against
25 him and find him guilty because he did not testify?

1 Would you?

2 A No.

3 THE COURT: I think there was another
4 objection on reasonable doubt, wasn't there?

5 MR. ELIZONDO: Yes, sir.

6 THE COURT: Do you want to address
7 that one?

8 MR. MOEN: She indicated she would abide
9 by the law of reasonable doubt. I don't have any
10 other questions other than I have asked her.

11 THE COURT: Anything further?

12
13 EXAMINATION

14
15 QUESTIONS BY MR. ELIZONDO:

16 Q Ms. Matthews, I hate to belabor the point, but I
17 have to talk to you and I have to find out how
18 you feel, and you told me earlier you would hold
19 it against him if he didn't testify, and now I
20 think you are saying that you wouldn't hold it
21 against him.

22 A Okay. I understand a little bit more about
23 everything, about hearing what you hear and using
24 that as your evidence and not what you don't
25 hear.

1 Q Uh-huh.

2 A So I understand a little bit better about which
3 is right. He does not have to testify, and if
4 he does or doesn't say anything, I can't hold that
5 against him because he didn't speak, and evidence
6 of what I do see and hear is what I can use to
7 judge something.

8 Q So then if he didn't testify, you wouldn't hold
9 it against him in any way, shape, form, or
10 fashion?

11 I can't talk to you once I get in
12 there. I need to know this.

13 A No, I wouldn't hold it against him.

14 Q Pardon?

15 A I would not.

16 Q All right.

17 A Okay.

18 MR. ELIZONDO: We will pass her, Your
19 Honor.

20 THE COURT: For the record, your
21 objection is overruled.

22 MR. MOEN: We will accept Ms. Matthews.

23 MR. ELIZONDO: For the record, two
24 challenges for cause: failure to testify and
25 her imposing a lesser burden on the State than

1 the theory of reasonable doubt. That is our
2 objection.

3 THE COURT: Both are overruled.

4 MR. ELIZONDO: Further, for the record,
5 we re-urge our motion to view the entire venire
6 before we exercise our peremptory challenges.

7 THE COURT: That motion will be denied.

8 MR. ELIZONDO: And we will excuse her,
9 Your Honor.

10 MR. HERNANDEZ: For sure.

11 THE COURT: Ms. Matthews, thank you
12 very much. We appreciate your patience. You will
13 be excused.

14 For the record now, based on having
15 reconsidered objections previously made to a
16 juror, Charles A. Deckert, the Court is going to,
17 out of an abundance of caution, grant the Defense
18 an additional strike to be used in lieu of the
19 one that was used on Charles A. Deckert.

20 MR. ELIZONDO: Your Honor, for the
21 record, just for the record, we would ask the
22 Court for five additional peremptory challenges.
23 We had to use peremptory challenges on Mr.
24 Deckert, Jerry Thagard, Jack Lee, on Cynthia
25 Matthews, and on Thurman Matthews, and Mr. Sadler

1 after objections, after challenges for cause
2 had been denied, and for that reason, we would
3 ask for six additional peremptory challenges.

4 THE COURT: That will be denied.

5 MR. ELIZONDO: Thank you, Your Honor.

6 (At this time court recessed for the
7 day.)