


Aldape: Trial Transcript  
(9/82) (voir dire) (v.18)

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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 XVIII  
STATEMENT OF FACTS  
VOIR DIRE EXAMINATION  
CONTINUED  
SEPTEMBER 30, 1982

**FILED IN**  
COURT OF CRIMINAL APPEALS

DEC 12 1983

Thomas Lowe, Clerk

3132

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September 30, 1982	
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1 THE COURT: Bring them out, please,  
2 sir.

3 (A panel of six prospective jurors  
4 were brought into the courtroom, and in their  
5 presence and hearing, the following proceedings  
6 were had:)

7 THE COURT: Good morning, ladies and  
8 gentlemen. My name is Henry Oncken. I am the  
9 judge of this court, the 248th District Court, and  
10 what we are doing, we are in the process of  
11 picking a jury to try a capital murder case.

12 Capital murder, of course, is  
13 punishable by either death or life in the  
14 penitentiary.

15 The Defendant in this case is Ricardo  
16 Aldape Guerra, who is seated at the table in the  
17 khaki-colored shirt, and the lady speaking with  
18 him is Linda Hernandez, who is an interpreter.  
19 We are providing him with an interpreter to  
20 interpret for him from English to Spanish.

21 He is represented by two attorneys,  
22 Mr. Candelario Elizondo and Mr. Joe Hernandez.

23 Mr. Joe Hernandez is no kin to Linda  
24 Hernandez.

5 The State is represented by Mr. Bob

Moen and Mr. Dick Bax.

The lady in front of you is Cindy Layne, and she is the court reporter, and she will take down every word we say in these proceedings, so when it comes your time to be a juror, remember she cannot take a nod of the head. Remember to speak out or whatever the case may be.

It is alleged in the indictment that on July 13th of this year, 1982, that this Defendant, Ricardo Aldape Guerra, took the life of one James D. Harris.

Mr. Harris was a Houston Police officer, and it is also alleged that Mr. Harris was in the performance of his official duties at the time he was killed.

This offense occurred out on Edgewood and Walker streets, out in the close eastern part of the city, the Harrisburg-Dumble area, if you are familiar with that.

Just to briefly recite some of the facts to see whether you know anything about the particular case, Officer Harris was shot three times in the face, and about a minute or a minute and a half later, there was a citizen who was in his car with two small children who was also

1 shot and killed, and about an hour later, the  
2 Houston Police Department had information as to  
3 where the suspects in the case may be located  
4 and went to that location, and there was another  
5 Houston Police officer shot five times, and he  
6 managed to return the fire of the individual who  
7 shot him, and he killed that individual.

8 With that brief recitation of the  
9 facts, do any of you know anything about this  
10 particular case? It is not wrong if you do.  
11 We just need to know about it.

12 MS. GUERNSEY: Basically, what was on  
13 the news.

14 THE COURT: Did you form any opinion  
15 as to the guilt or innocence of anyone?

16 MS. GUERNSEY: No, sir.

17 THE COURT: They will examine you more  
18 closely about that when they talk with you individ-  
19 ually, but we need to make that inquiry at this  
20 point.

21 Now, a capital murder case is tried a  
22 little differently than a normal case will be  
23 tried. All cases of a criminal nature are  
4 bifurcated trials. What that means is they are  
tried in two stages.

1           The first part of any criminal trial  
2 is the guilt-or-innocence stage, and at that stage  
3 of the trial, the jury hears facts about an event  
4 which occurred to make a determination whether  
5 the individual charged with that offense is  
6 actually guilty of that offense.

7           If the jury finds that Defendant guilty  
8 of that offense, then there is a second stage of  
9 the trial, and that is the punishment stage, and  
10 at that stage, the jury hears facts about the  
11 individual who has committed the event that he  
12 has been convicted for.

13           And in a case -- let's use the case of  
14 murder as opposed to capital murder -- the jury  
15 on the punishment stage will go back into the  
16 jury room and consider the evidence that they  
17 have heard in the whole case, and they will have  
18 a range of punishment to consider. That range  
19 of punishment will be not less than five years  
20 nor more than ninety-nine years or life in the  
21 penitentiary, and in addition to any penitentiary  
22 time, the Defendant could be assessed a fine of  
23 up to ten thousand dollars. So, the jury could  
24 go back in there and consider what they felt would  
25 be the proper number of years to be assessed in

1 that case, and they could come out and say, "Having  
2 found the Defendant guilty, we assess his  
3 punishment at, say, twenty-five years in the  
4 Texas Department of Corrections."

5 In a capital murder case, on the  
6 punishment stage, the jury goes back into the jury  
7 room and they don't consider how long a term the  
8 Defendant is going to serve. They answer in this  
9 case the two questions that are up there on the  
10 board, and if you will, take just a moment to  
11 glance through those and we will talk about that  
12 in a little more detail later.

13 All right. So the jury goes back then  
14 and considers all the evidence they have heard  
15 and answers those questions. If the jury comes  
16 back and says yes to No. 1 and yes to No. 2 --  
17 that is all they have to do, is say yes or no --  
18 if they say yes to both questions, it becomes  
19 my duty under the law to assess the punishment  
20 of this Defendant at death.

21 If the jury says yes to one question  
22 and no to another question, it becomes my duty  
23 to assess his punishment at life in the  
24 penitentiary.

25 Death or life in the penitentiary,

1 those are the only two punishments. There are  
2 no terms of years as in an ordinary murder case.

3 I don't mean to say "ordinary." No  
4 murder is ordinary, but as opposed to capital  
5 murder.

6 Now, when both sides have finished the  
7 evidence in this case, I will give you what is  
8 called, in legal terms, the charge of the Court.  
9 All that means is that I will prepare all the  
10 law applicable to the case you have heard, based  
11 upon the evidence that is submitted, and it will  
12 be given to you in writing and you will take it  
13 back into the jury room to read and to study and  
14 to apply to the facts that you have heard. It is  
15 called the charge of the Court, and you will hear  
16 that term, I am sure, mentioned throughout the  
17 examination, and exactly what all will be in that  
18 instrument I can't tell you at this point,  
19 because it depends on what is raised in the  
20 trial.

21 But there are certain basic things  
22 that will be in every charge, for any offense  
23 and any case, and those are the basic things I  
24 want to talk with you about and let the lawyers  
25 visit with you about when they talk to you about



1       some other things.

2               First of all, every person charged  
3 with a criminal offense is presumed to be  
4 innocent. The fact that he has been indicted  
5 for, arrested for -- or let me reverse that --  
6 arrested for, indicted for, and charged with an  
7 offense is absolutely no evidence of guilt. He  
8 is presumed to be innocent until such time as  
9 his guilt is established beyond a reasonable  
10 doubt, and I will tell you about that presumption  
11 of innocence in the charge.

12              The State has the burden of proof.  
13 No Defendant in a criminal case has any burden to  
14 prove anything. The State has brought the  
15 charges, and it is up to the State to prove those  
16 charges.

17              A Defendant in any case, this one, any  
18 other case you can imagine, has the right to  
19 remain silent. He doesn't have to say a word.  
20 His attorneys don't have to ask any questions.  
21 He can sit there absolutely mute, and if he does  
22 that, I will tell you in the charge you are not  
23 to take that as any circumstance of his guilt.

24              Again, the State must prove his guilt.  
25 He does not have to prove his innocence.

1           Now, there will be a lot of terms  
2 defined for you in the charge. I have used one  
3 several times now that will not be defined for  
4 you. I can only define things the legislature  
5 has defined for me, and they have not defined  
6 the term "beyond a reasonable doubt," even though  
7 that is the burden of proof the State has. They  
8 have not defined what that means.

9           To me, it means common sense, if you  
10 are convinced, after you have heard all the  
11 evidence the Defendant committed the crime, you  
12 find him guilty.

13          If you are not convinced, you find him  
14 not guilty. It is that simple to me.

15          Some others have different  
16 interpretations of it, but suffice it to say it  
17 will not be defined for you. You will have to  
18 make up your own minds if selected on this jury  
19 whether the State has proven to your satisfaction  
20 that the Defendant committed the crime.

21          I will likewise tell you in the charge  
22 that the indictment, which is another legal term,  
23 it is a pleading, a piece of paper on which are  
24 typed certain words which bring the charges  
25 against this individual which the court will try,

1 and the first thing the jury will hear, I will  
2 tell the State to present the indictment to the  
3 jury, and they will get up and read it to you,  
4 and that is the pleading.

5 I will tell you that pleading is  
6 absolutely no evidence of guilt. It is simply  
7 a pleading just like if you receive a traffic  
8 ticket.

9 A lot of folks consider that traffic  
10 ticket to be evidence of guilt, but it is only a  
11 pleading that the police officer has to prove in  
12 court, and he has to prove that just like the  
13 State has to prove what they bring against an  
14 individual in one of these courts.

15 Because the State has the burden of  
16 proof, they go first in everything. When we get  
17 to the actual interview of each juror, the State  
18 will ask you questions first, and then the  
19 Defense will follow. They will present evidence  
20 first. They have the right to open and close the  
21 arguments after all the evidence is in, and that  
22 is because they have that burden of proof.

23 Now, in any criminal case, in this one  
24 as well, there are thirteen -- any felony criminal  
25 case -- there are thirteen judges in the courtroom,

1 and I, in this case, will be the judge of the  
2 law, give you the law, rule upon objections, rule  
3 upon the admissibility of evidence, and that sort  
4 of thing. But I have no function in the  
5 determination of the facts involved in this case.  
6 That is the jury's function.

7 We serve on an equal basis, but we have  
8 entirely separate functions. I tell you what  
9 you can listen to and give you the law applicable  
10 to it, but you tell me and the Defendant what  
11 that means. You listen to the facts and you  
12 determine the facts.

13 You have the power to believe all,  
14 part of, or none of what a witness tells you.  
15 You judge their credibility and make up your  
16 minds based on all that, whether you find the  
17 Defendant guilty or not guilty.

18 Just a couple of other things, and one  
19 is that a jury during the course of a trial cannot  
20 ask questions. You cannot examine or cross-  
21 examine any witness.

22 You may have a question you would like  
23 to have an answer to, but it is up to the lawyers  
24 to answer that and not up to me or the jurors to  
25 develop the case. You may have a big question

1 in your mind, but unless they ask this question,  
2 you are not allowed to ask it.

3 In this stage of the trial, if you have  
4 questions about anything, when you are examined,  
5 we certainly want you to ask those questions.  
6 We want you to go into this with as much knowledge  
7 as you can about what is going on.

8 If you have a question about procedures  
9 and what is going on, please don't hesitate to  
10 discuss it.

11 The jury selection in a capital case is  
12 very informal, though very important.

13 In a normal case, we bring over thirty-  
14 six or forty jurors and they sit in these pews  
15 and we talk to them at one time. In a capital  
16 case, we bring over six at a time and the judge  
17 goes through what I am now doing, and then we  
18 talk to you individually, bring you in one at a  
19 time to examine you concerning your qualifications  
20 to serve on a capital jury, and it takes a long  
21 time.

22 We are in the fifth week of this, and  
23 have been at this a long time. We have ten  
24 jurors selected, and we need two more, and,  
hopefully, we will begin evidence in this case

1 Monday or Tuesday, but that remains to be seen.

2 Please, when you are examined as a juror,  
3 understand that it is informal, although it is  
4 extremely important, and we want you to relax  
5 and just visit with us, and none of these lawyers  
6 are going to try to embarrass you or lord over  
7 you the fact they know something about the law,  
8 and it is more than likely they don't know anything  
9 about what you do, and we don't expect you to  
10 know anything about what we do. Please don't get  
11 the idea anybody is trying to look down on you or  
12 anything else. We simply want to know how you  
13 feel about certain things and pose certain  
14 questions to you.

15 Please visit with us. We will be  
16 drinking coffee or Cokes, whatever, so please  
17 keep that in mind.

18 Okay. If you are selected today to  
19 serve on this jury, you will obviously not be  
20 required to spend the rest of the time with us  
21 until we complete the remainder of the jury  
22 selection. You will be allowed to go about your  
23 normal activities until we do complete the  
24 selection of the jury.

25 There may be a time, if you are on the

1 jury, where it would be necessary to have you  
2 stay overnight downtown in a hotel somewhere, but  
3 once the jury has the case for consideration,  
4 they cannot separate, so you may be required to  
5 spend a night or two with us at that time.

6 I anticipate the actual case will last  
7 somewhere between four and six actual trial days,  
8 maybe shorter than that. It could be a little  
9 longer, but that is about an average. I would  
10 say five days you will actually be in trial, so  
11 I need for you to be thinking about several things.  
12 First of all, how you feel about death as a  
13 punishment for a criminal offense -- and we are  
14 not going to argue with you, however you feel  
15 about it. If you are opposed to the capital  
16 punishment, to death as a punishment for crime,  
17 simply tell us that. Nobody is going to argue  
18 with you. You are entitled and have the right  
19 to have your own opinions.

20 These lawyers and this Defendant are  
21 entitled to know how you feel about it. They  
22 are not going to argue with you about any way  
23 you feel about any subject, and so please bear  
24 that in mind.

25 Now, our experience has shown that it

1 takes about, generally, on an average, about  
2 an hour to examine each juror. Some are shorter.  
3 Some may last a bit longer than that, but it  
4 generally takes about an hour, so I am going to  
5 excuse three of you until 1:30 this afternoon,  
6 and that will be Bobby Jean Foreman, James  
7 Andrew Chopp, and Susan Bentley.

8 There is no need for me -- I can almost  
9 bet you the last dollar I have in my pocket we  
10 will not get to you before this afternoon, so  
11 I don't want to make you sit around all morning.  
12 You may, if you would like to, if you would like  
13 to go shopping or go to work or go home until  
14 1:30, that will be fine, and Joanna Guernsey  
15 will be the first juror we examine. Then Mr.  
16 Gougenheim and then Mr. Smith.

17 So, do any of you have any questions of  
18 me at this point with the limited knowledge that  
19 you have of what is going on at this time?

20 Okay. These three that I said could be  
21 excused until 1:30 may now go wherever they want  
22 to go until that time, and, Ms. Guernsey, if  
23 you would, come up and have this chair, please,  
24 ma'am.

25 Mr. Gougenheim and Mr. Smith, if you



1 would like, you may go down to the basement and  
2 have a cup of coffee, and, Mr. Goughnheim, be  
3 available in twenty to twenty-five minutes just  
4 in case. Go back and have a seat in the hallway.  
5  
6  
7

8 JOANNA GUERNSEY,  
9 was called as a prospective juror and responded to  
10 questions propounded as follows:  
11

12 EXAMINATION  
13

14 QUESTIONS BY MR. BAX:

15 THE COURT: Please, as I said, just  
16 relax and visit with us.

17 Q. (By Mr. Bax) Is it Ms. Guernsey? Is that  
18 correct?

19 A. Uh-huh. That's right.

20 Q. As the judge told you earlier, my name is Dick  
21 Bax.

22 Seated behind me is Bob Moen. We are  
23 both Assistant District Attorneys, and we will be  
24 representing the State of Texas and the family of  
Officer James Harris in this case.

1                   The judge had mentioned briefly in  
2 sort of outline form some of the facts about this  
3 case to determine whether or not any of the  
4 jurors had, in fact, read something in the  
5 newspapers or seen something on the TV.

6                   Do you recall anything about this case  
7 at all?

8   A.   No, not really.

9   Q.   Of course, there is nothing wrong with having  
10 heard something about a particular case. It is  
11 almost impossible sometimes in this community  
12 anyway not to have heard a lot of things that go  
13 on as far as crime is concerned.

14                  We ask that question to determine  
15 whether or not a juror or prospective juror would  
16 have already created some type of opinion in their  
17 mind as to the guilt or innocence, and I take it  
18 --

19   A.   If I heard it, I don't remember.

20   Q.   As the judge mentioned earlier, it usually takes  
21 two hours to pick a jury in every criminal case,  
22 but because this a capital case where the  
23 Defendant if convicted will receive one of two  
24 possible punishments, if convicted, life or death,  
25 the law requires we talk to jurors individually.

1 I prefer it that way, even though it is time-  
2 consuming. It makes people more comfortable.

3 No one here is going to try to change  
4 your opinion on anything. We are not here to  
5 debate issues on capital punishment, but here to  
6 find out how you feel and whether your feelings  
7 and beliefs and scruples would allow you to serve  
8 on this type of jury. Okay?

9 We get a lot of people that come through  
10 -- I believe you are the eighty-fifth person we  
11 have interviewed -- out of the eighty-five, we  
12 have gotten ten jurors. We have many different  
13 opinions of people that come through. Some  
14 people say, "I believe in the death penalty if  
15 the facts call for it."

16 Some people come through and say, "I  
17 could never participate in that type of decision  
18 because of my religious and philosophical  
19 upbringing," or whatever -- "I could not  
20 participate due to my beliefs in a capital case.  
21 There are no circumstances where I feel I could  
22 be a party to the taking of a life of another  
23 person." That is fine. No one is going to  
24 quarrel with anyone that has that belief. Okay?

25 We are not going to try to change your

1 opinion if that is the way you feel. But, you  
2 see, the only way a person becomes a juror in  
3 a case like this is by the answers to the questions  
4 we are going to ask you, and based on those  
5 answers -- it's really, the honesty has to be  
6 to yourself because you are the one, although  
7 talking in hypothetical terms today, may be  
8 faced with the very issue we are talking about,  
9 the taking of a life of another human being.

10 Okay?

11 So, could you tell us how you feel?

12 A. I have been thinking about it all the way over  
13 here. I have never had it put to me where I had  
14 to make a decision right then and there. I think  
15 giving the death penalty doesn't bother me, but  
16 I would have to be sure in my mind that that was  
17 the person that -- there would have to be no  
18 doubt, absolutely no doubt, and a lot of proof  
19 that said it was him --

20 Q. Let me --

21 A. -- or her.

22 Q. I don't think there is anything wrong with that.  
23 I would hope people wouldn't come in here and  
24 say, "If I had a hunch somebody did something --"

25 A. I mean, like circumstantial evidence, that type

1 of thing, would not convince me.

2 Q So would you --

3 A It would have to be like somebody saw him do it  
4 before I would give the death penalty.

5 Q You know, some people have come in and told us  
6 because of the death penalty, because it is such  
7 a final judgment -- and it is. I mean, there is  
8 no way to reverse the death penalty once it has  
9 been carried out -- and some people have told us,  
10 "On any other type of case, I can understand the  
11 burden of proof being beyond a reasonable doubt,  
12 and I can understand if it's an automobile case  
13 where the jury had some doubt, but they can go  
14 ahead and find a person guilty."

15 Under the law, the burden of proof in  
16 a capital murder case is the same as if trying an  
17 auto theft case or a driving while intoxicated  
18 case, but again, a lot of people don't agree with  
19 that. They say, "Wait a minute. If you are asking  
20 me about taking the life of someone, I would hold  
21 you to a higher burden of proof."

22 A. That is what I am saying.

23 Q. What you are saying: beyond all doubt? Not any  
24 doubt in my mind?

25 A. That's right.

1 Q "Even if I was convinced beyond a reasonable  
2 doubt, if I still had a doubt about some factor  
3 of the case, I couldn't go along with it." Is  
4 that basically the way you feel?

5 A Yes.

6 Q There was some gentleman that told us, I think  
7 quite honestly, he said what would bother him  
8 if he participated in a death penalty verdict,  
9 what would happen if fifteen or twenty years  
10 down the road it turned up someone else confesses  
11 to that crime or somehow the person found guilty  
12 fifteen years earlier were found innocent.

13 A That happens.

14 Q Because of his personal feelings, he said, "You  
15 would have to prove it to me beyond all doubt,"  
16 and to be honest, there is no way you could  
17 honestly prove something beyond all doubt unless  
18 you saw it yourself. You see what I am saying?

19 A Well, no. I think I would trust someone like an  
20 eyewitness account type thing. I mean, they are  
21 in the courtroom. I mean --

22 Q How about -- can you imagine a situation where  
23 you had two sides, where you had, say, five, four  
24 or five witnesses come in and say the Defendant  
25 on trial, "I saw him commit this crime. I was

1       there, and I saw it," and you had four or five  
2       witnesses come in and say, "I saw somebody else  
3       do it."

4               You would have a conflict in testimony.  
5       Both sides cannot be correct.

6       A.   Uh-huh.

7       Q.   As a juror, you, along with eleven other people,  
8       your job would be to resolve that conflict.

9               Let me ask you this:  If you had two  
10       sides where you had, say, more than one eyewitness  
11       to an event and you had some saying the Defendant  
12       did it and some saying he didn't do it, would that  
13       automatically create some type of doubt in your  
14       mind that you would never be able to resolve in  
15       that type of conflict because you had two people  
16       who saw the same thing and different versions?

17       A.   I know they told us not to answer --

18               MR. ELIZONDO:  I object to the  
19       prosecutor trying to stake the juror out to find  
20       a certain set of facts.

21               THE COURT:  Overruled.

22       A.   I know you are supposed to answer yes or no, but  
23       at this point, I don't know.

24       Q.   The reason we tell you you have to know, pin you  
25       down to yes or no answers, this lady is taking

1 down everything we say.

2 A Uh-huh.

3 Q And someday, if some other court is looking at  
4 this, they have to know exactly what your position  
5 is. Okay?

6 A Yes.

7 Q Do you feel you would be able to resolve a conflict,  
8 or do you think because you have two sides, because  
9 of the way you feel --

10 A I can probably shorten this thing. I don't think  
11 I could do it. I really don't think I could give  
12 that fellow there the death penalty.

13 Q Could you, in your own words, tell how you feel?

14 Let me explain. He is a Spanish boy.  
15 He doesn't speak English.

16 A I am married to a Mexican.

17 Q All right.

18 A And I think I would get all mixed-up.

19 A I appreciate your being that candid in telling  
20 us that.

21 A He has already gotten my sympathy by the fact he  
22 doesn't speak English.

23 Q We talk in terms of bias --

24 A I am supposed to be honest.

25 Q And I appreciate what you are telling me.



1 I am going to ask you a few more  
2 questions and see if you follow me.

3 You have heard people use the terms  
4 "bias" and "prejudice" for people that, say,  
5 cannot be impartial in certain situations.  
6 Usually when we hear those terms and say those  
7 terms about one another, usually we take it as  
8 defensive. "Wait a minute. I am not a biased  
9 person, not a prejudiced person." But, I think  
10 we do know we have certain biases and certain  
11 prejudices.

12 A. Uh-huh.

13 Q. You have indicated at this point you feel some  
14 type of sympathy for the Defendant.

15 A. When you mentioned -- this is informal?

16 Q. Just whatever.

17 A. When you mentioned it would be like so many  
18 people saying they saw one thing and so many  
19 people saying they saw something else, the first  
20 thing that came into my mind would be two  
21 police officers saying one thing and two of his  
22 friends maybe in the house saying the other.

23 Q. Or you could have just --

24 A. And I don't think I could decide that. I am  
25 sorry.

1 Q And basically, because of your feelings --

2 A That may be -- I know there would always be a  
3 question as to whether he understood what was  
4 going on. I don't know the facts of the case  
5 yet. Maybe the facts would be just so blatant,  
6 right there, there wouldn't be a question in  
7 your mind, but I don't know.

8 Q Do you think -- you are the only one that can  
9 tell us this -- both sides in a criminal trial  
10 have the right to a fair trial?

11 There is no question we always talk  
12 about the Defendant's right to a fair trial.

13 A Uh-huh.

14 Q I am not going to downplay that. He is entitled  
15 to every constitutional right, the right to have  
16 the jury selected as we are doing, to have a judge  
17 here and make sure everything is done properly  
18 according to the law, but, you know, the other  
19 side, the officer's family has the right to the  
20 same fair trial and the State has the same right,  
21 and when we say this, we have to have twelve  
22 people not slanted one way or the other.

23 You see, it would be wrong to have  
24 twelve police officers on a case such as this for  
25 a jury. Okay?

1 A. Yes.

2 Q. Because they may come before us and say they can  
3 be fair, and subconsciously, because they are  
4 police officers and work in that area every day,  
5 they would perhaps be impartial (sic), wouldn't  
6 judge the facts the same way as someone not  
7 involved in that type of situation would. Okay?

8 I get the feeling from you, because  
9 of your association with your husband, the fact  
10 that the Defendant does not speak English, the  
11 fact that he has a Spanish origin, that those  
12 things might sway you a little bit or make you  
13 perhaps not completely impartial -- and I don't  
14 mean that consciously -- I don't think you would  
15 go to the jury room --

16 A. I don't think I would do that --

17 Q. -- and say I would find --

18 A. -- for that reason.

19 Q. But subconsciously, it might affect you in  
20 listening to the facts, where you might hear  
21 something and subconsciously say I am going to  
22 make that bend this way so it will be different.

23 Do you understand where I am coming  
24 from?

25 A. No.

1 Q Okay.

2 A But I know what you are trying to get at..

3 Q I am not trying to put words in your mouth.

4 A Uh-huh.

5 Q Because you volunteered to me that fact about  
6 the Defendant's status and what not.

7 You see, you are the only one who can  
8 tell us if that would prevent you from being  
9 impartial to the facts.

10 A I don't think that would prevent me from being  
11 impartial to the facts, but the facts would have  
12 to be clear-cut facts for me to do a death  
13 penalty.

14 Q Do you think you could ever even assess the death  
15 penalty or participate in it when it comes down  
16 to it? We are talking now hypothetically, and I  
17 know you haven't had time to think about it.

18 A There have been cases I have heard on the news.  
19 I have thought to myself: If I were on that case,  
20 the person would get the death penalty.

21 Q Of course, what do you think would happen if you  
22 were in that situation, though? I have done that  
23 a lot, too, thought if I had a chance --

24 A Correct. Yes.

25 Q When you finally get in that box and they finally

1 say, "Okay. It is your turn," some people say,  
2 "Gosh, I can't do it."

3 A. Probably not.

4 Q. Let me explain to you how the system works and  
5 see if you could. Okay?

6 A. Okay.

7 Q. Would you have any problem, or do you believe --

8 There are different ways you commit  
9 capital murder. Let me give you a brief rundown  
10 on the types of crimes.

11 A person can subject themselves to the  
12 death penalty if he kills someone during a  
13 robbery, go into a Utotem, and while taking the  
14 person's money at gunpoint, you shoot and kill  
15 someone. That is capital murder.

16 If you kill someone while breaking into  
17 their home or business, that is capital murder.

18 If a rapist kills his rape victim or  
19 a kidnapper kills his kidnap victim, or someone  
20 kills during the course of arson, any one of  
21 those situations, if you kill, it is capital  
22 murder.

23 If you kill a police officer or a  
24 fireman, that is elevated to capital murder  
25 if they knew they were a police officer or

1 fireman and they were in the official discharge  
2 of their duties.

3 If you are a prisoner and you kill an  
4 employee of the penal institution or kill anyone  
5 in an attempt to escape from the penal institution,  
6 that is capital murder, and the last set of  
7 circumstances, if you kill for money or if you  
8 hire someone to kill for you and the murder  
9 actually takes place, those are the only areas  
10 in which a person is subjected to the possibility  
11 of a life or death sentence.

12 Do you follow me so far?

13 A. Yes.

14 Q. Knowing how you feel, we want to know whether  
15 Ms. Guernsey could participate in that type of  
16 case. Do you think you could find someone guilty  
17 of the offense of capital murder if it were proven  
18 to you beyond a reasonable doubt, knowing if you  
19 did find him guilty, he would receive either  
20 life or death, or would your personal opinions  
21 and beliefs prevent you from even participating  
22 in a guilty verdict?

23 A. No, it wouldn't bother me there.

24 Q. You would be able to get by that, if it were  
25 proven to you, be able to find the person guilty

1 of capital murder?

2 A. Uh-huh.

3 Q. We go to a second trial.

4 Assume with me you are on a jury and  
5 have gotten over that first hump, have found a  
6 person guilty based on the evidence.

7 These two questions are then submitted  
8 to the jury. Okay?

9 Although the jury doesn't go in the  
10 back and say, "Well, let's assess the death  
11 penalty," or, "let's assess life" -- that is not  
12 the way it is done -- what is done is the way  
13 the jury answers these questions tells Judge  
14 Oncken what he must do. He's got no choice in  
15 the matter. He's got to do what your answers  
16 require him to do.

17 If all twelve jurors answer Question  
18 1 yes and all twelve jurors agree that the answer  
19 Question 2 is yes and that is the verdict  
20 returned, the judge must assess the death penalty  
21 even if the judge were of the opinion that, "No,  
22 this not a death penalty case." He would still  
23 have to do it if the jury answers the questions  
24 yes.

25 Do you follow me so far?

1 A. Yes.

2 Q. If either Question 1 or 2 is answered no, then  
3 the judge must assess life imprisonment. Okay?

4 A. Yes.

5 Q. I think you will agree life imprisonment is also  
6 very severe punishment. It is not as severe as  
7 the death penalty, but even if the jury were to  
8 answer one of these no, the man doesn't go home  
9 free. He is still going to do time in the  
10 penitentiary.

11 Do you follow me?

12 A. Yes.

13 Q. Assume you were on the jury and you have heard  
14 all the evidence concerning the Defendant's  
15 conduct and you believe that, "Yes, his conduct  
16 was deliberate and yes, it was done with the  
17 reasonable expectation that someone would die."

18 Would you answer that question yes  
19 knowing what your feelings are, or would it  
20 prevent you from perhaps answering it, knowing  
21 if you did answer it yes, it would only take one  
22 more yes answer by the jury to bring, in effect,  
23 the death penalty?

24 A. I think I could answer that yes.

25 Q. All right. Assume with me now you have found



1 him guilty and answered the first question yes  
2 with eleven other jurors. Now we get down to the  
3 second question. Do you know what happens if  
4 you answer this second question yes?

5 A. Uh-huh. Yes.

6 Q. You will be participating more or less in the  
7 death penalty by your verdict if you answer that  
8 yes. The judge will assess the death penalty.

9 Could you ever answer Question No. 2  
10 yes or do you feel just because of your feelings  
11 -- and there is nothing wrong with this -- you  
12 would either answer it no to assure a life  
13 sentence or just refuse to answer it?

14 You see -- and before you answer that,  
15 remember that, you know, you are the person --  
16 I can't tell you what to do in a situation like  
17 that. I am sitting out here. I am never going  
18 to have to make that decision.

19 A. Uh-huh.

20 Q. I won't be a juror. I know what I will be doing  
21 as a prosecutor. I will be asking the jury  
22 to answer these questions yes, actively seeking  
23 the death penalty, but I am not going to be the  
24 one back there deciding that, and you are the one  
25 that is going to be back there with eleven other

1 people and you will have to live with your  
2 verdict from that day forward if you can do it.  
3 If you can do it.

4 If you feel you are not the type of  
5 person who could ever answer both questions yes  
6 knowing the death penalty would result, that is  
7 fine, but we need to know now so you won't be  
8 put into that position, to have to come into  
9 conflict with your personal beliefs and oath as  
10 a juror.

11 A. No, I can't do it I think.

12 Q. And that is fine. It takes more courage --

13 A. I feel one way, but when it got down to it, I  
14 would have to live with that the rest of my life.  
15 I don't want to live with that.

16 Q. It takes more courage for a citizen to come before  
17 us at this point in time and say, "I can't do it.  
18 I can see it's necessary. I can see where I  
19 read in the newspapers where someone else could  
20 do it, and I can see where someone in the  
21 newspaper should receive the death penalty, but  
22 as far as myself, the way I have been brought up  
23 and believe, I could not look at myself in the  
24 mirror day after day after it's over," and that  
25 is fine.

1                   We are not going to grab you by the  
2 scruff of the neck and make you sit on the jury.  
3 Our law doesn't require a person to sit on a  
4 jury where it would violate their beliefs and  
5 cause them such a conflict between their personal  
6 beliefs and what the evidence would be. That  
7 is just not right.

8   A.   I don't think I could do that, no.

9   Q.   In a moment, Mr. Elizondo or Mr. Hernandez are  
10 going to talk to you and come up with some pretty  
11 gory fact situations and ask you to imagine some  
12 guy who kidnaps a busload of five and six-year-old  
13 school children and takes them out and demands a  
14 ransom, and after the ransom is paid, shoots and  
15 kills them all indiscriminately.

16               They are going to be asking you if  
17 you could say yes, it was deliberate, and yes,  
18 it was with a reasonable expectation someone would  
19 die, and yes, that person probably would commit  
20 criminal types of violence in the future.

21               I think you could answer those  
22 questions.

23   A.   Yes, I could.

24   Q.   But if you were answering those questions knowing  
25 the death penalty would result, you don't think

1       you could answer the questions, no matter what  
2       the facts were, knowing the answers would result  
3       in the death penalty? Some facts in your mind  
4       might call for the death penalty, but Ms.  
5       Guernsey could not personally do that?

6       A. I wouldn't want to do it.

7       Q. And if you wouldn't want to do it --

8       A. More than likely, I would answer no when it got  
9       to the second question.

10      Q. We talk in terms of will you automatically answer  
11      one of the questions no to avoid the death  
12      penalty.

13                   I take it that is what you are basically  
14      saying?

15      A. I probably would.

16      Q. Even if you wouldn't automatically answer it,  
17      because of your feelings, would you be impartial  
18      as to what the facts were in deciding the  
19      answers?

20                   I can't look at you and think you are  
21      the type of person that would disregard your  
22      oath as a juror.

23      A. No, I wouldn't.

24      Q. And when I use the word "impartial," it is an  
25      example like this: You know, the Sunday Blue

1 laws, where they say you can't sell certain items  
2 on Sundays, it is a ridiculous law to me. I went  
3 to the store and wanted to buy a utensil. I was  
4 going to make some food, which is unusual. Okay?  
5 They said, "We can't sell you this spatula." I  
6 have a bias against that law. I don't agree with  
7 it. I've got to follow it, but I don't agree  
8 with it.

9 If I was on a jury with a man charged  
10 with violating the Blue Laws, I could be fair, but  
11 I know because of my views, my opposition to that,  
12 my personal beliefs, I would try to distort the  
13 facts a little bit and try to come around so I  
14 could convince myself the man was not guilty. I  
15 don't think I would be impartial in that type of  
16 case. In an auto theft case or some other type  
17 of case, I think I probably could.

18 Do you see what I am saying?

19 A. Yes.

20 Q. And I think you are telling me you don't want to  
21 do it. You don't think you could do it, no matter  
22 what the facts were.

23 A. Right.

24 Q. Those seem to be pretty strong feelings.

25 A. I mean, when it gets down to somebody's life,

1 that is where I begin to get a little shaky,  
2 and I don't think I could do it.

3 Q. Okay.

4 A. I have to say no, don't I?

5 No, I can't do it.

6 Q. Okay, then. No matter what the facts are, how  
7 convinced you are -- that is what he is going to  
8 ask --

9 A. You are trying to make me think maybe I will  
10 change my mind if the facts were bad enough,  
11 which I probably might do. I am very wishy-  
12 washy, but I know I have to say yes or no, and  
13 I am getting very confused.

14 I probably better read those questions  
15 and answer them now.

16 Q. You can't do that. There is no evidence before  
17 us. I can't go into the facts. That wouldn't  
18 be fair to either side. It would be as if we were  
19 trying the case while picking a juror.

20 A. I have always told myself I could do this, assess  
21 the death penalty, but the more you say and the  
22 more I think about it, the answer is no, because  
23 I was on a jury in a federal case in February,  
24 and I felt -- after I had made the decision and  
25 the way the thing was settled, it was three months

1 later before I could sleep good. I was still  
2 mulling over it in my mind.

3 Q. That was not even a death penalty case.

4 A. No, it was not, so I don't think I could.

5 Q. In a case like that, in a federal case, the judge  
6 is going to be the one --

7 A. What I want to say, it is not that I don't believe  
8 in the death penalty. It is that I can't assess  
9 it.

10 Q. You believe in the death penalty?

11 A. Yes.

12 Q. And you can see where it aids society?

13 A. But don't ask me to do it.

14 Q. Do you think you could live with yourself?

15 A. No.

16 Q. And do you think you would be comfortable with  
17 yourself?

18 A. No.

19 Q. That is probably the strongest feeling you will  
20 have, to be able to participate in a death penalty  
21 case. Nothing would prey on your mind more than  
22 that one. That would probably be the heaviest  
23 decision you would ever have to make.

24 A. Right.

25 Q. And what I think you are telling me is, no matter

1        what the facts are -- I am not trying to put  
2        words in your mouth, but the reason I do this,  
3        the law makes the question.

4        A.    Why can't I make the statement I could not do it?

5                THE COURT:    The law requires we have  
6        other facts.

7                THE JUROR:    Can I smoke?

8                THE COURT:    Yes.

9                THE JUROR:    I want to smoke.    I think  
10       clearer when I smoke.

11               MR. BAX:    I can give you the name of a  
12       doctor who gives shots in the nose to make you  
13       stop.    I am not reformed yet, though.

14       Q.    (By Mr. Bax)    If you tell me there is no case  
15       under any fact situation where you could return  
16       two no answers under any circumstances, that  
17       would satisfy me and everybody else at this point  
18       in time.

19       A.    Where I could not answer -- right?

20       Q.    If you were to tell me.    I think what you just  
21       mentioned to the judge, in no fact situation,  
22       no matter what the facts were and how awful the  
23       facts were, in no situation could you personally  
24       answer both of these questions yes, that you  
25       would also answer one or the other no to avoid



1 the death penalty and assure a life sentence,  
2 which would make you sleep better at night, that  
3 is fine, and if that is what you are telling us  
4 --

5 A. I could not answer both of those questions. No  
6 is the answer to that question.

7 Q. I am not going to try to change your mind.

8 MR. BAX: Your Honor, at this time,  
9 the State would have a challenge.

10 THE COURT: Mr. Elizondo?

11 MR. ELIZONDO: May I have a few moments?

12  
13 EXAMINATION

14  
15 QUESTIONS BY MR. ELIZONDO:

16 Q. Ms. Guernsey, how are you doing?

17 A. Beginning to feel I am on trial.

18 THE COURT: Don't feel that way.

19 Q. (By Mr. Elizondo) I hope you don't feel that  
20 way.

21 In a capital murder case, we pick  
22 twelve jurors, and we can strike persons for  
23 whatever reasons we want.

24 Yesterday, for example, we had a  
25 police officer as a juror, thirty-two years on

1 the force --

2 MR. BAX: Judge, I am going to object  
3 to this line of questioning. It has nothing to  
4 do with this challenge at this point in time as  
5 to how many peremptory challenges we have, whether  
6 we can strike people for whatever reason, had  
7 a police officer here yesterday.

8 THE COURT: Sustained.

9 Q (By Mr. Elizondo) Let me go ahead and go into  
10 the facts -- I am sorry, not the facts -- but how  
11 jurors are selected on a capital murder case.

12 Every trial in Texas is divided into  
13 two parts. The first part is the guilt-or-  
14 innocence stage. The second part is the  
15 punishment stage.

16 If he is found guilty, if twelve  
17 jurors believe beyond a reasonable doubt that he  
18 should be found guilty, then he will be found  
19 guilty, and then we go to the punishment phase.

20 At that point in time, the jurors are  
21 to answer these two questions, and if they believe  
22 beyond a reasonable doubt that the answer to  
23 Question No. 1 should be yes, then they should  
24 answer that yes, and if they believe beyond a  
25 reasonable doubt that the answer to Question No.

1           2 should be yes, they should also answer yes.

2                   There are many types of cases, many  
3 types of criminal cases in Harris County alone,  
4 much less the state of Texas. There are many,  
5 many different types of gruesome situations, and  
6 I hate to even go into them, but I have to, because  
7 it is the proper question to ask you.

8                   It is almost unfair to ask you can you  
9 give the death penalty period, point-blank, with-  
10 out giving you any situations, fact situations,  
11 where I know you have talked with your husband  
12 before over other situations and said, "This  
13 guy should die for what he has done."

14                   Let me give you an example of a guy  
15 going all over the country, Canada, Michigan,  
16 Beaumont, Houston, killing women, and he finally  
17 gets caught, and he gives a confession and he  
18 confesses to killing nineteen women, confesses  
19 to kidnapping them, sexually molesting them,  
20 and choking and killing them.

21                   He goes on trial, and when he goes on  
22 trial, you find out later he has done this on  
23 two different occasions, aside and apart from  
24 these other nineteen times, and he's been convicted  
25 on these two other occasions.

1                   You can see in that hypothetical  
2 situation a jury, if they believe beyond a  
3 reasonable doubt, should find him guilty, and  
4 you can also see where a jury, in that hypothetical  
5 situation, if they believe beyond a reasonable  
6 doubt that his conduct was committed deliberately  
7 and with the reasonable expectation that death  
8 would result, you can see that a juror in that  
9 hypothetical situation would answer the question  
10 yes, and you can also see where a juror in that  
11 hypothetical would answer Question 2 yes, because  
12 by that time, the juror in that hypothetical  
13 would have found out he had done this on two  
14 different occasions, aside and apart from the  
15 nineteen. He's done this on two other occasions,  
16 and the jury in that hypothetical would probably  
17 see there was a probability he would commit  
18 criminal acts of violence in the future because  
19 of the crimes he has committed in the past.

20                   Would you agree with that?

21   A.   Yes.

22   Q.   Let me give you another hypothetical. A school  
23 bus full of children gets kidnapped. They all  
24 get kidnapped by the kidnapper out here in the  
25 Sharpstown Mall, and they call the Houston Police

1 station and say, "I need a million dollars in  
2 ransom, or I will kill all these thirty children."

3 The parents get their money together  
4 and scrounge it up, somehow get the money together  
5 within twelve hours, and the kidnapper puts money  
6 in his pocket, gets a machine gun and blows those  
7 thirty children away. He gets caught. He gives  
8 a confession, and you find out he has done this  
9 on two other occasions.

10 You can see in that hypothetical where  
11 a juror would probably answer --

12 MR. BAX: Your Honor, I object to what  
13 a juror would or would not do in those situations.

14 MR. ELIZONDO: I am just giving a  
15 hypothetical situation.

16 THE COURT: I will allow you to do the  
17 hypothetical.

18 Sustained on the form of the question.

19 Q. (By Mr. Elizondo) You can see in that hypothetical  
20 situation if the juror believed beyond a reasonable  
21 doubt he killed those thirty children, you can see  
22 where a juror in that hypothetical would answer  
23 the question yes -- excuse me -- guilty?

24 MR. BAX: I object to his saying what  
25 a juror would or would not do. The question is

1           whether she could do it herself.

2                   THE COURT: Sustained as to the form.

3                   MR. ELIZONDO: Thank you, Your Honor.

4           Q.    (By Mr. Elizondo) You can see where the jury in  
5           that hypothetical situation would get to the  
6           punishment phase, and would say to themselves,  
7           "The conduct he committed was committed  
8           deliberately."

9                   You can see where they could answer  
10          Question 2 yes. You can see where they could  
11          say, go in the jury deliberation room and --

12                  MR. BAX: This is the third time I  
13          have objected to the same thing.

14                  THE COURT: Sustained as to the form.

15          A.    I know what you are getting at. I can see they  
16          can do it. I don't want to do it.

17          Q.    (By Mr. Elizondo) Are you saying that you would  
18          automatically vote against the death penalty in  
19          any fact situation?

20          A.    I don't know what I would do. I really don't know  
21          what I would do. I don't want to be put in that  
22          position, and I am sorry.

23          Q.    Well, I am just trying -- just trying --

24          A.    I know I would feel strongly about some things,  
25          like you are trying to bring out these cases. I

1 know I would feel strongly about them, and hope  
2 somebody else did it. Okay?

3 But I hope I don't ever have to do it.  
4 Please don't pick me.

5 Q Okay. I've got to ask you this question one more  
6 time.

7 Would you automatically vote against  
8 the death penalty in any fact situation?

9 A Yes.

10 MR. ELIZONDO: We pass her, Your Honor.

11 THE COURT: Do y'all want to agree?

12 MR. HERNANDEZ: Yes.

13 MR. BAX: Yes, Judge, on the last  
14 response when asked if she would vote against the  
15 death penalty regardless of the facts, and a  
16 very definite yes answer.

17 THE COURT: You want to agree?

18 MR. ELIZONDO: I object to it as a  
19 violation of Witherspoon.

20 THE COURT: I accept the State's  
21 challenge.

22

23

24

25

1 CHARLES R. GOUGENHEIM, II,  
2 was called as a prospective juror and responded to  
3 questions propounded as follows:  
4

5 EXAMINATION  
6

7 QUESTIONS BY MR. MOEN:

8 THE COURT: Are you ready?

9 MR. MOEN: May I proceed, Judge?

10 THE COURT: Yes, sir.

11 Q (By Mr. Moen) Is it Gougenheim? Is that how you  
12 pronounce your last name?

13 A Yes, sir.

14 Q Mr. Gougenheim, my name is Bob Moen. I am with  
15 the District Attorney's Office here in town.

16 Seated behind me is Dick Bax, also with  
17 the District Attorney's Office, and it will be the  
18 duty of Mr. Bax and myself to represent the  
19 District Attorney's Office and the family of J.  
20 D. Harris who was killed back on July 13th of  
21 1982. Mr. Bax and myself will represent those  
22 people in the prosecution of the individual who  
23 is charged with having committed the crime, and  
24 that will be our function in the case, to  
25 represent not only the District Attorney's Office



1 but the family of Officer Harris.

2 The judge asked earlier if you had  
3 read anything about the case and you indicated  
4 you were familiar with it, perhaps from something  
5 on television or something heard on the radio.

6 A. Yes, sir. That is all.

7 Q. The reason we ask, there is absolutely nothing  
8 wrong with having gained information of about a  
9 case from television or newspapers, a case in which  
10 you may ultimately serve as a juror, but the only  
11 reason we ask is to make sure jurors haven't formed  
12 conclusions or opinions based on what they have  
13 read or heard, and I think the judge may have  
14 asked you whether or not you formed conclusions  
15 or opinions about the guilt or innocence of anyone  
16 and I think you indicated you have not?

17 A. Yes, sir. That is right.

18 Q. What I want to do is ask you some questions in  
19 the next thirty minutes, and also, I want to  
20 explain some things to you.

21 The reason, I guess, we bring jurors in  
22 individually, like yourself, rather than do it all  
23 at once like we do in most of the cases in the  
24 courthouse is because of how serious a case of  
25 this nature is.

1 No jurors are required to serve on  
2 this type of case, a capital murder case, unless  
3 he or she knows what would be required of them,  
4 and then he or she voluntarily agrees to be a  
5 juror. Basically, you agree to be a juror by  
6 answering the questions we ask, and if serving  
7 on such a jury would not violate any of your  
8 opinions, beliefs, or scruples you have held dear  
9 to yourself all of your life, you can be qualified  
10 to serve.

11 The only way we know that, obviously,  
12 is by getting feedback from you and asking the  
13 questions in the first place. There are absolutely  
14 no right or wrong answers.

15 The only thing we ask is for the juror  
16 to give us those answers that most accurately  
17 and truthfully reflect his or her particular  
18 feelings on the questions that we ask. Okay --  
19 and topics that we cover.

20 A. Okay.

21 Q. Keeping that in mind, can you tell me what your  
22 feelings or opinions are concerning the death  
23 penalty for someone who has committed a particular  
24 type of murder?

25 A. Well, I do believe there are times when it is

1 indicated.

2 Q. Okay. Would your feelings concerning the death  
3 penalty allow you to be a juror on such a case,  
4 a capital murder case, and would your feelings  
5 allow you to return a verdict that you know would  
6 result in someone receiving the death penalty?  
7 Would your feelings and opinions allow you to  
8 serve on this type of case?

9 A. Yes, sir.

10 Q. Okay. Some people tell us that they are believers  
11 in the death penalty, but when it came right down  
12 to them returning a verdict and actually serving  
13 on a jury where someone would receive the death  
14 penalty, they actually couldn't do it and would  
15 rather that responsibility be passed on to, you  
16 know, some other member of the community, and  
17 I don't mean that to slight people who feel like  
18 that. I just want to check with you to see if  
19 your opinions or feelings or religious scruples  
20 that you might have would be violated by your  
21 jury service.

22 I take it from what you are telling me,  
23 they won't be?

24 A. That's correct.

25 Q. Is that pretty much the way you have felt all

1 your life about the death penalty, or have you  
2 ever been opposed to the death penalty, and because  
3 of some event in your life or conversations or  
4 things that you have read, reached the opposite  
5 conclusion?

6 A. No, sir. I would say I have pretty much always  
7 felt that way.

8 Q. Okay.

9 A. As far back as I can remember.

10 Q. Okay. Is that pretty much the product of your  
11 own thought processes as an adult, or perhaps  
12 not only that being part of the process, but  
13 perhaps the way you were brought up by your  
14 mother and father that has brought you to the  
15 frame of mind that you are in today concerning  
16 the death penalty?

17 A. I would say it is pretty much the way I have been  
18 raised, and also believe on my own as an  
19 individual.

20 Q. Okay. I am going to ask you to put yourself in  
21 some categories, if you would, as best you can.

22 If you can't fit yourself into one of  
23 the three categories, describe yourself to me as  
24 best you can, your feelings concerning the death  
25 penalty.

1                   Would you say you were strongly,  
2 moderately, or reluctantly in favor of the death  
3 penalty for the commission of certain crimes?  
4 Can you put yourself in one of those three  
5 categories? And we are just talking about the  
6 death penalty in general terms, not talking about  
7 a specific case or specific evidence you might  
8 hear.

9                   Just given your feelings concerning  
10 the death penalty, can you put yourself in one  
11 of those three categories?

12 A. I can easily say I would be moderately.

13 Q. Okay. Now, I want you to categorize your  
14 political leanings for me, if you would.

15                   How would you categorize yourself  
16 politically speaking, as either conservative,  
17 moderate, or liberal? Fit yourself into one of  
18 those, or if you can't, describe your political  
19 leanings, if you can.

20 A. Well, basically, I don't have any leanings one  
21 way or the other.

22 Q. Pretty much independent in your voting process?

23 A. Best man gets your vote. That's the way I feel.

24 Q. Okay. Is your dad still actively employed, or  
25 is he retired?

1 A No, he is deceased.

2 Q What was his occupation during the course of his  
3 lifetime? What type of job did he do?

4 A He worked for Humble Oil and Refining and also  
5 was a captain in the auxiliary police department  
6 here in the city of Houston.

7 Q I see that on the back. I didn't know that back  
8 in the forties and fifties that they had an  
9 auxiliary police department here in the city of  
10 Houston.

11 A Yes, sir.

12 Q That is kind of interesting. I didn't realize  
13 how that worked.

14 How about your mom? Did she ever  
15 work outside the home, or would she be pretty  
16 much a housewife and mother all her life?

17 A I would say pretty much eighty percent of the time  
18 she was a housewife.

19 Q Not to slight that. That is a full-time job,  
20 obviously, particularly if you have a large  
21 family.

22 Do you have brothers and sisters in  
23 your family?

24 A I have a half sister.

25 Q What is her occupation, if you know?

1 A. She is a sales clerk.

2 Q. And is she married or single?

3 A. Married.

4 Q. Do you know what her husband does for a living?

5 A. He is self-employed.

6 Q. What type of job or occupation?

7 A. Mainly machining.

8 Q. Machinist?

9 A. Yes.

10 Q. Now, you are the technical director of the

11 Pulmonary Disease Section of the Veterans

12 Administration Hospital?

13 A. Yes, sir.

14 Q. What type of training or education have you had

15 to have to get you into that line of work?

16 A. A lot of it has been basically on-the-job, also

17 some college background into the scientific,

18 biological aspects of the field.

19 Q. Okay. What was your branch of study when you were

20 in college?

21 A. Science. Biology.

22 Q. Now, I know you were in the Army for three years

23 from '70 to '72. What was your highest rank

24 and where were you stationed, sir?

25 A. My highest rank was Specialist 5, and I was

1 stationed at Fort Polk in San Antonio, spent a  
2 year in Vietnam, and got reassigned to the  
3 Pentagon for two months, and the last year, they  
4 released me to go to another reserve unit.

5 Q. Where were you stationed in Vietnam?

6 A. Bien Hoa and also Ty Ninh.

7 Q. When were you with the service? What was your  
8 specialty when you were with the service? What  
9 branch of the Army were you in?

10 A. I was originally trained as a combat medic, also  
11 was an operations N.C.O.

12 Q. Did you see any combat or service in Vietnam?

13 A. Not directly, no. We were assigned as an advisory  
14 group to the Vietnamese Army, and our advisory  
15 group went to Cambodia, so we had to remain in  
16 Vietnam.

17 Q. I noticed just recently your house was burglarized.  
18 Were there any suspects apprehended in that and  
19 any property returned to you as a result of the  
20 burglary?

21 A. No.

22 Q. Is there anything about the way the police handled  
23 the case that left a bad taste in your mouth or  
24 the District Attorney's Office, if they gave you  
25 assistance on the case at all?



1 A. No.

2 Q. Okay. Now, back here it says 1955, something,  
3 and I can't make out your handwriting.

4 A. That was the year my father was murdered.

5 Q. I am sorry. I can't make that out.

6 I know earlier you said your father was  
7 deceased. What happened in 1955?

8 A. He was an auxiliary police officer and was killed  
9 in the line of duty.

10 Q. I am sorry to bring it up. I wouldn't have asked  
11 you earlier what your father did if I had known  
12 that.

13 A. That's okay.

14 Q. What happened to the man that killed your father?  
15 Was he apprehended? Do you know?

16 A. He was killed by my father.

17 Q. What were the circumstances of that? Did your  
18 father catch him in the act of committing  
19 some crime? What happened in that?

20 A. From what I have been told and in the clippings,  
21 my father and the regular officer he was riding  
22 with that night had picked up some guy on a drunk  
23 and intoxicated charge, and when they were going  
24 in, they were also required to stop at some of  
25 the local bars and check to make sure they had a

1 valid license. My father stayed in the patrol  
2 car with the prisoner, and another officer went  
3 in and was bent down checking the license behind  
4 the bar, and the gentleman in the bar reached  
5 over and shot the officer in the head and ran  
6 out the door, and my father responded to the gun-  
7 shots and jumped out of the car and there was an  
8 exchange of gunfire and they both went down.

9 Q Now, I see that you are a member -- I see one of  
10 your hobbies -- it looks like flying remote  
11 control aircraft?

12 A No, sir. Regular experimental home-built aircraft.

13 Q Actually flying your own home-built airplane  
14 then?

15 A Yes.

16 Q I give you credit for having a lot more nerve than  
17 I would ever have, for flying anything I built in  
18 my house.

19 A I would say the standards we have to go by are  
20 probably a little bit better than the planes you  
21 ride in every day.

22 Q I've got a friend of mine who flies small aircraft,  
23 and it's a real learning experience to get up  
24 in one of those things, if you have never been up  
25 before.

1 A I agree with you on that.

2 Q What type of hunting do you like to do? Bird  
3 hunting or deer?

4 A Mainly deer, turkey.

5 Q Okay. Let me talk to you, Mr. Gougenheim, a  
6 little more about the procedure involved in the  
7 case, the way that --

8 First of all, there are ten categories  
9 of murders that our legislature has said that if  
10 a person commits one of these ten types of  
11 murders, he can be punished by the jury for the  
12 offense of capital murder and will receive, if  
13 found guilty, only the life sentence or the death  
14 sentence, depending on the jurors' answers to these  
15 questions that appear to my left.

16 The legislature has said to kill a police  
17 officer or fireman during the course of their  
18 official duties, to murder the employee of a  
19 penal institution, someone we ask to run the  
20 penal institution, if a convict kills one of those  
21 individuals, that is capital murder.

22 If a convict kills any person while  
23 trying to escape, in the course of escaping or  
24 trying to escape, if he kills a person, that is  
25 capital murder, and then murder for hire.

1           Then our legislature has said if a  
2 murder takes place during the course of committing  
3 one of five particular felonies, that is going  
4 to be capital murder as well. For instance, to  
5 break into another man's home and kill the man  
6 or woman or anyone else in the course of breaking  
7 into their home, robbery-murder; rape-murder;  
8 kidnapping-murder; and arson-murder.

9           Those are all examples of murders that  
10 take place during the course of those felonies,  
11 and because the murders occur during the course  
12 of those crimes, the murders then become defined  
13 as capital murder.

14           The range of punishment, as the judge  
15 mentioned earlier, for the offense of murder is  
16 five to ninety-nine years or life, but if a  
17 person is guilty of capital murder, they can only  
18 receive life in the Texas Department of  
19 Corrections or the death penalty.

20           Now, at the first stage of the trial,  
21 capital trial, it doesn't differ from any  
22 misdemeanor or felony trial, but all you hear in  
23 the first part is testimony about whether the man  
24 is guilty or not guilty of the crime, and you  
25 retire with the other jurors and decide whether

1 the man is guilty or not guilty.

2 If you find the man guilty, you come  
3 back out and the foreman will hand a verdict to  
4 the clerk and the clerk will read the verdict,  
5 and if it is a guilty verdict, we will proceed  
6 to the second phase of the trial and the jurors  
7 will take their seats and we will hear evidence  
8 again to help them answer these questions on my  
9 left, because depending on the answers to those  
10 questions, the man on trial will receive either  
11 the death sentence or the life sentence in the  
12 Texas Department of Corrections.

13 No one tries to hide anything from  
14 you. You know, when you are going in to  
15 deliberate on those questions, what your answers  
16 will be doing. If both questions are answered  
17 yes, the Defendant receives the death penalty.  
18 If a no answer appears to either one, the man  
19 receives life rather than the death penalty.

20 It takes all twelve jurors, unanimously  
21 in agreement, before a question can be answered  
22 yes; however, only ten before the jurors can  
23 agree to unanimously answer no. There is a  
24 slight distinction: twelve for a yes answer,  
25 ten for a no answer.

1 I want to go over the language or some  
2 of the words we've got underlined in some of these  
3 questions with you, but before we do that, have  
4 you had a chance to read these to yourself?

5 A. Yes.

6 Q Let me direct your attention to this first question  
7 here. Question 1 asks you to make a determination  
8 about the man on trial, asks you to make a  
9 determination, based on the evidence you have  
10 heard which leads you to the conclusion that the  
11 man was guilty of murder; based on that evidence  
12 at the trial, you make a determination about the  
13 conduct of the man in the trial and the part  
14 he played: Was that conduct that caused the  
15 death of the deceased, was it committed  
16 deliberately and was it done with the reasonable  
17 expectation the deceased or another would die?

18 Now, let me give you an example or  
19 hypothetical example as to how the first question  
20 comes into play. Imagine a robbery-murder, which  
21 would be capital murder, where a man goes into a  
22 convenience store in the early morning hours,  
23 confronts the lady working behind the counter,  
24 points a loaded gun at her and demands the money,  
25 and, of course, she is frightened as anyone

1 would be. He snatches the money up, fires two  
2 bullets in her body, and she dies.

3 Unbeknownst to him, she steps on some  
4 type of alarm that notifies the police and they  
5 are waiting for him outside as he flees, and  
6 they arrest him.

7 At that man's trial, after they have  
8 found him guilty of capital murder -- that is  
9 what he has done, robbery-murder -- they will  
10 decide this question: Was the conduct of that  
11 man that caused his death, was the firing of the  
12 gun that he brought into the store, the firing  
13 of the bullets into her body, in the portion he  
14 struck, the head and chest area, was that  
15 deliberate conduct on his part and done with  
16 the reasonable expectation she would die?

17 Is it reasonable to expect, when you  
18 take a loaded pistol and fire it into another's  
19 body that she would die as a result of those  
20 wounds?

21 Do you see how that question is a  
22 common sense question based on the facts you  
23 heard that led you to believe the man was guilty  
24 of capital murder? It is a pretty straightforward  
25 common sense question based on the evidence.

1 I think you will agree with that.

2 A Yes, sir.

3 Q You will have to use your definition for the  
4 word "deliberately" that appears, and your own  
5 definition for the word "reasonable," and the  
6 reason for that is because the legislature drew  
7 these up for jurors to use on capital murder  
8 cases, and if you are selected to serve as a  
9 juror in this case, you will be doing the same  
10 thing other jurors have done -- we have some  
11 two hundred men on death row -- what jurors have  
12 done, they have had to answer these questions  
13 based on the evidence presented in the case.  
14 You will have to use your own definitions for  
15 the words in Question 1.

16 Question 2 is a different question.  
17 It asks you to make a determination about the  
18 man on trial. Is the man the type of person  
19 where there exists the probability that that man  
20 would commit criminal acts of violence that would  
21 constitute a continuing threat to society? In  
22 other words, is he that kind of person that would  
23 do these kinds of acts that would be a continuing  
24 threat to society?

25 Now, the word or the first part of the



1 question, and the first word we have underlined  
2 is the word "probability." You will have to use  
3 your own common sense working definition for  
4 that word, but I think you realize the word is  
5 probability and not certainty, and the reason  
6 it is not, whether there is a certainty the man  
7 is that type of person, as you realize, the only  
8 person in the entire universe that can tell us  
9 to a certainty what he will do is God Almighty  
10 himself, and he is not going to testify in this  
11 case, and the jurors are not expected to play  
12 God. They make the best judgment they can based  
13 on what they have heard.

14 What does the crime tell us about the  
15 man in front of us? Is there a probability he  
16 is the type of man that would do these acts,  
17 criminal acts of violence?

18 Now, the phrase criminal acts of  
19 violence is all-inclusive and includes all types  
20 of criminal violence. You don't have to believe  
21 the man would commit certain types, but all types,  
22 whether burglaries, robberies, rapes, or assaults,  
23 or any other type of criminal violence we can  
24 think of. Only is there a probability he can do  
25 those kinds of acts, and would those acts, once

1 done, constitute a continuing threat to society,  
2 and that brings me to the last word, "society,"  
3 and the reason I direct your attention to that  
4 word is, once again, for that word, you will have  
5 to use your own definition. But I think you  
6 realize from the discussion we have had so far,  
7 just using your common sense, that the portion  
8 of society this man would find himself in if he  
9 were convicted of capital murder is going to be  
10 the prison society.

11 The only thing I wanted you to agree  
12 or disagree with me on, and I encourage you to  
13 do either one, would you agree or disagree there  
14 are people in the penitentiary that we ask to  
15 work in the penitentiary to keep the place running  
16 for us and to keep the people sent by jurors to  
17 the penitentiary away from the general members  
18 of society who aren't in the penitentiary, law-  
19 abiding members of our community, that we ask  
20 these people to work in the penitentiary for us,  
21 and they have a right to expect to go to their  
22 jobs and be free of danger, to be free of threats  
23 and to be basically safe from individuals who are  
24 sent to the penitentiary?

25 Would you agree or disagree with me

1       those people have the right to expect that,  
2       when sent to the penitentiary?

3       A.    I agree.

4       Q    Would you agree or disagree with me there are  
5       even convicts in the penitentiary who are serving  
6       out there debt to society who have a right to  
7       be free of fear and danger from other convicts  
8       who may be sent to the penitentiary?

9       A.    I would agree also.

10      Q    Okay.  So, that is basically what that question  
11      will be asking you to do, is to make the best  
12      judgment call you can based on all the facts and  
13      evidence you have heard about what kind of person  
14      is on trial.

15                Do you feel like, since we have had  
16      a chance to go over Questions 1 and 2, those are  
17      the type of questions you could answer?  Not  
18      whether you would answer them yes or no, that  
19      will be for you to decide based on the evidence,  
20      but is there anything about the wording that  
21      makes you feel you could not answer them based  
22      on the wording, or do you feel you could, based  
23      on the evidence you will hear?

24      A.    I feel I could.

25      Q    I wanted to point something out to you about the

1 second phase of the trial in regards to these  
2 questions. The law says that the jury can  
3 answer both of these questions yes in a proper  
4 case just based on the crime that the jurors  
5 heard about itself. The crime itself can be  
6 enough evidence for the jury in a proper case  
7 to answer both questions yes, but in the second  
8 phase of the trial, the jury is entitled to hear  
9 evidence about what type of man is on trial,  
10 what type of past record, if any, he has.

11 Also, the jury is entitled to hear  
12 about whether the man has committed other crimes  
13 that might be relevant to these questions, even  
14 crimes he's not yet been tried for or convicted  
15 of. That is a peculiar aspect of our law that  
16 applies only to capital murder cases, that they  
17 allow those to come in.

18 Normally, in a felony case, you wouldn't  
19 be able to hear about other crimes he hasn't been  
20 tried and convicted of. Only in capital murder  
21 cases can you hear that type of evidence.

22 So basically, you will have all the  
23 evidence with you. You may hear of only the  
24 crime itself, but there may be other evidence  
25 that is known, and you will go back and answer

1       these questions as best you can.

2               Do you follow me on how that portion  
3       of the trial works?

4       A.   Yes.

5       Q.   I want to point this out to you, because jurors  
6       cannot do this:  The judge will tell you that  
7       the jurors are not to discuss among themselves  
8       or consider how long a man would have to serve  
9       in the penitentiary if he received a life sentence  
10       rather than the death penalty.  That is left  
11       within the discretion of the Board of Pardons  
12       and Paroles.

13               If any of the jurors were to ask you  
14       that before they reached their answers, whatever  
15       they were, we would have to do the whole trial  
16       all over again, all five weeks we have worked so  
17       far to get a jury for the trial, all of those  
18       five or six weeks would be wasted, and we would  
19       have to start all over again.

20               So I ask you, if you are selected --  
21       and I know you will do what the judge tells you  
22       to -- but if anyone brings it up, tell them to  
23       shut up and do what the judge tells you on that.  
24       Okay?

25       A.   Yes, sir.

1 Q Let me tell you about some of the things the  
2 judge is going to tell you you have to do as  
3 a juror on a capital murder case.

4 He will tell you as a juror, you will  
5 have to presume the Defendant to be innocent.  
6 That is a legal presumption. That is not to  
7 insult your intelligence.

8 I think you realize in a hypothetical  
9 case we are talking about, any criminals who  
10 commit crimes, they are just as guilty the day  
11 they are caught as when they come to the  
12 courthouse to answer for that crime, but  
13 nonetheless, the law asks jurors who don't know  
14 anything about the case to go ahead and presume  
15 him innocent, to wait until the evidence comes  
16 in and then to make their decision, reach their  
17 verdict, on what comes in from the witness stand.

18 Don't, because he has been indicted  
19 by a Grand Jury, is represented by attorneys, and  
20 is inside a courtroom, but instead, base your  
21 verdict on what the witnesses tell you about what  
22 happened from the witness stand.

23 Do you feel you could do that?

24 A. Yes.

25 Q. Okay. Now, the judge will also tell you that the

1 Defendant does not have to testify if he doesn't  
2 want to in a criminal case. A Defendant, if he  
3 chooses, can remain totally silent at his trial.  
4 That is his right, to either get on the stand and  
5 testify or sit at the counsel table and not  
6 testify. He can do that.

7 The only thing the judge will tell you  
8 in that regard is this: You are not to hold  
9 the Defendant's failure to testify as any evidence  
10 of his guilt. In other words, silence is not  
11 evidence. You base your verdict based on what  
12 you have been told about the offense from the  
13 witness stand, not on what you have not heard.

14 That doesn't mean you can't wonder  
15 what the Defendant would have said or would not  
16 have testified to. That is a natural reaction.  
17 All of us, as business people, as parents, want  
18 to hear both sides of the story before we make  
19 a type of decision.

20 However, in a criminal court, sometimes  
21 we or you hear one side of the story, and you  
22 don't hear from the Defendant.

23 If, for some reason, he doesn't get  
24 on the stand and testify, that is his right.

25 Do you follow me on that failure to

1       testify?

2       A.    Yes.

3       Q    The judge will tell you the Grand Jury indictment  
4           is no evidence of anything. The analogy I draw  
5           is the Grand Jury indictment is kind of like a  
6           starter's pistol in a footrace. Until the pistol  
7           goes off and we have an indictment from a Grand  
8           Jury, you can't have the trial, and the trial  
9           can't start.

10                 That is not evidence of anything.  
11                 That is the only significance.

12                 The judge will also tell you the  
13           burden of proof in a criminal case always rests  
14           with Mr. Bax and myself, and the burden of proof  
15           means before you can say by your verdict any  
16           man is guilty of a crime, lawyers like Mr. Bax  
17           and myself have to prove it to you.

18                 A trial is a wide-open proceeding,  
19           however. In a criminal trial, both sides have  
20           an opportunity to put on whatever witnesses they  
21           want, call whatever witnesses down here to the  
22           courthouse they want, at no expense. It doesn't  
23           cost anything to get people to the courthouse  
24           except the taxpayers. He can give a subpoena  
25           to the clerk who forwards that to the Sheriff's



1 Department, and they mail that request to the  
2 witness, and if the witness doesn't show, the  
3 Sheriff's Office will come and pick up the witness  
4 and bring him down here.

5 The only person who bears that expense  
6 is the taxpayers. You make a request, then come  
7 down here. That is why I say both sides have  
8 an opportunity to do that, prove or disprove what  
9 they want.

10 Only one side has the burden of proving  
11 anything, and that is Mr. Bax and myself. We have  
12 to prove to you and the jurors the man, in fact,  
13 is guilty, and your answers to both questions  
14 should be yes.

15 That burden is to proof beyond a  
16 reasonable doubt. So often on the lawyer shows,  
17 we hear "beyond all doubt," "any doubt," or "a  
18 shadow of a doubt," and you can leave those  
19 phrases where they belong, on the lawyer shows.

20 The test is beyond a reasonable doubt,  
21 not all doubt, or a shadow of a doubt.

22 I particularly draw your attention to  
23 Question 2, because I think you realize the only  
24 person that I know of that could convince you  
25 beyond all doubt, a shadow of a doubt, as to

1 Question No. 2, is God Almighty himself. Jurors  
2 are not asked to play God, but make their decisions  
3 beyond a reasonable doubt, not any, all, or a  
4 shadow of a doubt.

5 Do you follow me on that?

6 A. Yes.

7 Q. Finally, the judge will tell you when you are  
8 judging the credibility of a witness, you are not  
9 to give a witness more belief or less belief  
10 just because of a witness' job. That is before  
11 a witness testifies.

12 Once a witness gets on the stand, if  
13 his job enters into his testimony, it is perfectly  
14 permissible for a juror to consider a witness'  
15 occupation, such a doctor testifying about medical  
16 evidence, experiences. He would be crazy not to  
17 consider his training and medical experience in  
18 considering what he is telling the jury. He  
19 would be nuts not to consider his job and the  
20 experience he might have, or a police officer  
21 who might have twenty-one or twenty-two years of  
22 experience investigating some particular type of  
23 crime telling you what he's found as a result of  
24 his investigation. He would be crazy to tell you  
25 not to consider that.

1 All the law asks you to do is not give  
2 a witness more or less belief before they get on  
3 the stand to testify, because of his or her job.  
4 After they testify, if the job enters into it,  
5 it is perfectly all right to consider the job.

6 Do you follow me on how that works?

7 A. Yes.

8 Q. Finally -- the judge won't tell you this -- but  
9 I tell the jurors this that haven't been on a jury  
10 before. As a juror, you will be the decider of  
11 the facts along with other members of the jury  
12 panel. You will decide what took place on July  
13 13th, 1982. Jurors do that from the testimony or  
14 make that decision from the testimony they hear  
15 from the witness stand, and when you are listening  
16 to someone who is testifying, you have the ability  
17 and other jurors do, too, to believe or disbelieve  
18 everything a witness tells you, even though the  
19 witness is saying what they are saying under  
20 oath.

21 Now, it sounds crazy, doesn't it, to  
22 think you might disbelieve what someone told  
23 you on the witness stand under oath? I think  
24 you realize from common sense, Mr. Gougenheim,  
25 like everybody else does, we don't live in a

1 perfect society. There are people who live in  
2 our community, who live in our state, who live  
3 in our world, who will, even though they have  
4 taken an oath to God, walk right up to the  
5 witness stand and tell lies. That is why the  
6 obligation falls on jurors to decide how much of  
7 a witness' testimony they are going to believe and  
8 how much they are going to disbelieve, and when  
9 they are making that decision, they can consider  
10 and discuss among themselves what biases, motive,  
11 or prejudices a witness might have for testifying  
12 the way they are. What does a witness have to  
13 gain; what does a witness have to lose, et cetera.  
14 Those are questions you can ask yourselves  
15 and probably will ask yourselves when judging  
16 the believability or credibility of a witness.

17 Do you follow me on that?

18 A. Yes.

19 Q. Now, one final thing I want to talk to you about  
20 and that is the range of punishment for murder.  
21 We mentioned that was five to ninety-nine years  
22 or life.

23 The reason I talk about the range of  
24 punishment for murder is because murder is what  
25 is defined as a lesser included offense of

1 capital murder. Now, what that means is basically  
2 this: Let's use the hypothetical we talked about  
3 earlier where the man goes into the convenience  
4 store and shot the teller.

5 Let's say there were witnesses present  
6 who thought the man was robbing the woman and  
7 reported that information to the police after he  
8 ran outside and was caught, and the police did  
9 a shaky investigation and didn't check to see if  
10 money was missing, and the man gets indicted for  
11 capital murder.

12 This is a hypothetical case, and you  
13 are a juror on the case, and you find what really  
14 happened was this was a girl friend-boyfriend  
15 dispute. The man that killed the cashier had  
16 been living with her for a couple of years and  
17 she was ready to move out and he was extremely  
18 angry about it, and they had had an argument.  
19 He followed her to the store with a pistol,  
20 argued about the same thing again, and he took  
21 the gun and killed her.

22 You see, under the facts of that  
23 hypothetical, he was not guilty of capital murder.  
24 We don't have another felony. But he is guilty  
25 of murder, and the jury in that case should say

1 not guilty of capital murder, but guilty of the  
2 offense of murder, and the jury would decide  
3 where that murder fits within the range of  
4 punishment of five to ninety-nine years or life.

5 Even that man would have a right,  
6 if he is proven he's never been convicted before  
7 of a felony in this state or any other state or  
8 the United States, and never been granted  
9 probation, he would have the right to ask the  
10 jury to give him probation, even though he had  
11 killed that woman, and the jury could consider  
12 and discuss among themselves whether they could  
13 give him probation, and they could either reject  
14 the idea or give him probation instead of sending  
15 him to the penitentiary.

16 Have you heard of probation before?

17 A. Yes.

18 Q. Let me explain a little bit technically about how  
19 it works at the courthouse. If a man hasn't been  
20 convicted in a state before, if he hasn't gotten  
21 probation for a felony, he can ask the jury for  
22 probation.

23 Now, the way a jury gives probation  
24 is this: If the jury finds a man guilty of a  
25 felony, even the crime of murder, if they decide

1 that the range of punishment should be ten years  
2 or less.

3 If the jury feels like it is a crime  
4 where the man deserves twenty, thirty, forty  
5 years in the penitentiary, they don't consider  
6 probation. It is only in those cases where the  
7 jury unanimously agrees the punishment should be  
8 ten years or less; the jury should consider if it  
9 is a proper case for probation, and if the man  
10 is a proper candidate for probation, if they feel  
11 he is and it fits that type of case, they can  
12 recommend it to the judge, and if the jury does  
13 recommend it, the man can, in fact, receive  
14 probation.

15 I am not trying to imply to you in  
16 any capital murder case or any type of murder  
17 case is one where the man receives probation.  
18 I am trying to explain to you general aspects  
19 and principles of law.

20 What I wanted to ask you ultimately  
21 is this: Can you conceive, in your own mind,  
22 where you might be a juror on a case and return  
23 a verdict and find someone guilty of the offense  
24 of murder where you would be able to consider  
25 if you felt like it was a proper case, would

1 be able to consider the question of probation  
2 as a possible form or range of punishment, even  
3 though the person had been found guilty of the  
4 offense of murder?

5 Can you conceive of some facts in  
6 your mind where probation might be proper, even  
7 though a person has been found guilty of murder?

8 A. Yes.

9 Q. I was going to give you some examples, but I  
10 think from what you have read in the paper, battered  
11 wife syndrome, I think from those, like the man  
12 in Amarillo who shot his brother three or four  
13 times, was dying, I believe, and he was a vegetable,  
14 and there was conversation about the brother  
15 asking him to do that, and he went in the car and  
16 got his gun and shot his brother, no financial  
17 gain or anything else involved, basically put him  
18 out of his misery --

19 There are other things in the paper, but  
20 I think from things you have read and heard, you  
21 can conceive of cases where probation would be  
22 proper for someone convicted of murder.

23 I want to point something out, and I  
24 swear this will be the last thing I will talk  
25 about.



1                   In answer to these questions, your  
2 answers should not be automatically yes or no  
3 just because you have found someone guilty of  
4 capital murder. You should base your answers to  
5 these questions on what the evidence tells you  
6 your answers should be.

7                   At first blush, it seems kind of funny,  
8 if I found someone guilty of intentionally and  
9 knowingly killing someone, a police officer, if I  
10 find someone guilty of committing capital murder,  
11 that seems to indicate to me his conduct was  
12 deliberate. At first blush it does.

13                   But what I am getting at is this: There  
14 are fact situations where someone is found guilty  
15 of capital murder where the jurors' answer to the  
16 first question would probably be no.

17                   Let me give you an example of what  
18 we are talking about. Take the hypothetical  
19 we used where a man goes into a convenience store  
20 and kills a cashier. Let's say he's thirty or  
21 thirty-five years old, been in the penitentiary  
22 before, and he recruits a seventeen-year-old --  
23 he has to be seventeen or older under our law  
24 -- and he recruits him to go with him, and it  
25 can be shown by the testimony he has fallen under

1 the influence of this fellow, and he puts a gun  
2 in his hand and tells him, "I want you to be a  
3 lookout."

4 The boy goes over knowing a robbery  
5 is going to take place and participates to that  
6 extent. The seventeen-year-old doesn't know  
7 what has happened when the woman is shot, and he  
8 flees. He is arrested along with the thirty-five-  
9 year-old, and under our law of parties, even  
10 though the seventeen-year-old was outside as a  
11 lookout, he would be held equally responsible for  
12 the death inside, because under our law of  
13 parties, the persons acting together can be  
14 equally held guilty of the offense. You can't  
15 claim surprise, the law says. If you are going  
16 to do an aggravated robbery and take pistols, you  
17 can't claim surprise in the shooting of someone.

18 I think in that case when it came to  
19 the question of answering the question on the  
20 seventeen-year-old, you can see how the answer  
21 in this case should be no.

22 A. That is correct.

23 Q. Because there was no conduct on his part -- sure,  
24 he assisted in the aggravated robbery -- but  
25 there was no conduct on his part, and if there

1 was conduct, it wasn't done with the reasonable  
2 expectation someone would die.

3 I think what I am trying to point out  
4 is, based on the evidence, that question can be  
5 answered yes or no, even though that person has  
6 been found guilty of capital murder.

7 Do you follow me on how these questions  
8 can be based on evidence? Do you follow me on  
9 that?

10 A. Yes.

11 Q. Do you have any questions of me at all so far?

12 A. No. You have covered everything pretty well.

13 Q. I appreciate your saying that. I know we have to  
14 go over it kind of quick, and the last thing I  
15 want to do is leave you with any questions in your  
16 mind or leave you with anything we have talked  
17 about that might confuse you.

18 Do you feel like there is any reason,  
19 now that we have had a chance to talk, you would  
20 not be impartial to both sides in the case, both  
21 the family and Officer Harris?

22 A. No. I think I could be very fair.

23 Q. I lied. I said that was the last thing. There  
24 will be one other thing.

25 I think the evidence will show the

1 Defendant is an illegal alien. The only thing  
2 I would like to point out in that regard -- if  
3 you disagree, that is fine, too -- the Defendant  
4 should not be found guilty or not guilty just  
5 because he is an illegal alien.

6 Do you agree or disagree?

7 A. I agree.

8 Q. You could consider that evidence as to what type  
9 of person the Defendant is when you answer Question  
10 No. 2, but as far as the guilt or innocence is  
11 concerned, any Defendant should not be found guilty  
12 of a crime just because he is not lawfully in our  
13 country, and I take it you have told me you believe  
14 that?

15 A. I do.

16 Q. I appreciate your visiting with us, and I will  
17 pass you to the Defense, and they will have  
18 questions.

19  
20 EXAMINATION

21  
22 QUESTIONS BY MR. HERNANDEZ:

23 Q. Good morning, Mr. Gougenheim.

24 A. Hi.

25 Q. I guess it is my time to ask you more questions,

1           like Mr. Moen asked you.

2                       Before I do that, let me say we ask  
3           you these questions, basically, in good faith.  
4           We ask you in good faith in order that we might  
5           be able to select or give you some indication  
6           we would be able to select the best possible  
7           twelve jurors that could be fair and impartial  
8           and honest.

9                       That is why we ask the questions. It  
10          is not to embarrass you or humiliate you in any  
11          way. These questions don't have right or wrong  
12          answers.

13                      It is how you feel. How you yourself  
14          feel about it today, how you feel about this man  
15          and how you feel about the death penalty. That  
16          is the most important thing.

17       A.    Okay.

18       Q.    So what I am seeking is not an answer that right  
19              satisfy me, but I am seeking an answer that might  
20              satisfy yourself, whether you can, in all honesty,  
21              judge this man, once you are over here, because  
22              once you are over here, we can't ask you any  
23              questions. We can't talk to you.

24                      So bear with me. It is not that I want  
25          to get into your personal life, but bear with me

1 and you will understand why I have to ask you  
2 some questions.

3 A. Okay.

4 Q. You know how leery Mr. Elizondo and I are, the  
5 simple fact that it happened to your father.

6 This is a capital case. My client has  
7 been indicted by the Grand Jury for intentionally  
8 and knowingly causing the death of a police  
9 officer while the police officer was in the  
10 line of duty, as your father was, so you can  
11 understand how leery we are, and you can understand  
12 why I have to ask you these questions, because  
13 what I am doing, I want to search or have you  
14 search into yourself, deep down, and tell yourself  
15 and ask yourself, "Can I judge this man? Will I  
16 be able to do that," and, of course, it is all  
17 relating back to your background. "Can I go home  
18 and tell my wife, or can I go home and tell my  
19 mother that I placed myself here?" And, let's  
20 take it a step further. "Can I go home and tell  
21 my mother that I found somebody" -- whoever it  
22 might be -- "not guilty of intentionally and  
23 knowingly causing the death of a police officer?"

24 That is why I am asking you these  
25 questions, because it is important to us, and,

1 of course, you know it is very important to  
2 him, literally life or death.

3 So I am asking you, can you judge this  
4 man with feelings or inner feelings set aside,  
5 and if you cannot, like I said, there is no right  
6 or wrong answers. Nobody's going to harp on you.  
7 We live in the type of society where nobody is  
8 going to require you to be a juror because of your  
9 feelings or religious beliefs. You might be  
10 able to -- although you might not be able to serve  
11 on this jury or this particular case, that  
12 doesn't detract from the fact you are a good  
13 citizen.

14 You can serve on other juries and be a  
15 good juror and a good citizen, but it doesn't  
16 detract or take away from anything if you say,  
17 "No, I don't think I can," or maybe you can. I  
18 don't know.

19 What is your feeling?

20 A. Well, I feel like I can be very objective about  
21 the whole case. I agree from my past, I can see  
22 where y'all would be very hesitant to accept me.  
23 However, his case and my father's case are two  
24 completely separate things, where I see there is  
25 no feeling or bearing on what happened in the

1 past in my life with his particular case.

2 Q Well, you know, you understand that this case  
3 will probably be very emotional. You know that  
4 the wife of Officer J. D. Harris will probably  
5 testify, and I don't know if the children will  
6 testify. We are very hesitant. We are very  
7 leery of the fact that you may sit here and listen  
8 to the trial, and in listening to the emotions  
9 that might come out of this trial, you may  
10 sympathize subconsciously with that family and  
11 say, "I grew up without a father, and she will  
12 grow up without a father." So, that is why I am  
13 asking if in any way, whether that would affect  
14 you in any way, shape, form, or fashion, and you  
15 can understand my reasoning, or Mr. Elizondo --  
16 our reasoning?

17 A. Yes.

18 Q What I am trying to get at --

19 A. I believe I do, and in that regard, growing up  
20 with or without a father, in my particular case,  
21 I feel like I have to try to extrapolate any  
22 other type of case from my own beliefs and  
23 happenings. It wouldn't have any bearing on it.  
24 I have had a stepfather. I feel like he did a good  
25 job of raising me just as my real father would have



1 done.

2 Q How old were you when your father died?

3 A I was about four and a half.

4 Q Let me go one step further and ask you whether,  
5 listening to the evidence and finding out in your  
6 own heart that he was not guilty, and hypothetically  
7 speaking, you presented or you with the other  
8 eleven jurors presented a verdict of not guilty,  
9 would you be able to face your family and your  
10 mother? Would it be a hardship or would it  
11 affect you in any way being over here and saying,  
12 "I don't think I could look at my mother in the  
13 face and tell her that after what's happened"?

14 A I feel I could separate the two, the main reason  
15 being having been in the medical field, oh, for,  
16 well, since I have been in the service, I feel  
17 very adequately -- I get my subjective feelings  
18 out of anything from just listening to the bare,  
19 basic facts and formulate my answers and opinions  
20 from fact and not from my personal feelings.

21 Q Were you in a Medivac Unit in Vietnam?

22 A No, I was in the advisory unit.

23 Q Where were you stationed?

24 A Bien Hoa.

25 Q That was an I-Corps?

1 A. Yes.

2 Q I was I-Corps, and we had to pick up an Evac.

3 Y'all went into Cambodia?

4 A. Ourself Vietnamese counterparts did, but that was  
5 after they had prevented me from going across  
6 the border.

7 Q Let me then go ahead and be more specific on  
8 what Mr. Moen would explain to you of what would  
9 be required of you as a juror.

10 There are three basic concepts: the  
11 presumption of innocence, the burden of proof,  
12 and reasonable doubt, and let me go and be more  
13 specific on each one of them.

14 Excuse me.

15 The law requires that any citizen, any  
16 Defendant brought before a criminal trial is  
17 presumed to be innocent until that presumption of  
18 innocence can be overcome beyond a reasonable  
19 doubt by the State.

20 Can you give, or would you agree with  
21 me that that presumption of innocence will stay  
22 with this Defendant in this trial?

23 Could you give my client that presumption  
24 of innocence as he sits here today?

25 A. Yes.

Of course, you know that he has been indicted by the Harris County Grand Jury for intentionally and knowingly causing the death of a police officer, J. D. Harris, while in the line of duty.

That indictment itself and Mr. Guerra's sitting here represented by Mr. Elizondo and I, would that be a strike against him as he sits here today?

No, it would not be.

So you can grant him that benefit?

Yes, I can.

And that presumption?

is correct.

The other concept is the burden of proof. The law clearly states that a Defendant or any Defendant or any citizen that charges have been filed against him, does not have the burden to prove his innocence. The burden is always on the State. They have brought the charges. They have the burden to prove the charges to you.

Can you follow that rule? Can you follow that law?

Yes, sir.

My client have to prove his innocence to

fore you could return a verdict?

Understand that the burden never shifts  
about the whole trial?

Correct.

In both stages, the guilt-and-innocence  
and in the punishment stage.

n never shifts.

also does not compel a Defendant or any  
in this country to testify. It does  
t gives him the right either to testify  
testify.

He does not have to present any evidence.  
not have to get up on the witness stand.  
sit there and let the State prove the case  
beyond a reasonable doubt. That burden  
has to be with the State.

Would the mere fact that my client does  
y, would you hold that against him?  
uld not.

fact that we might not present evidence,  
c trary of what the State has presented,  
d that against him?

A. No.

Q Now, the burden that is placed upon the State is the burden of beyond a reasonable doubt.

Now, in the civil system or in the civil courtroom across the street, it is by a preponderance of evidence. That is the burden. In other words, the greater weight of the credible evidence, however slight the scale tips, that side wins.

Do you agree with me there?

A. Okay.

Q Now, the burden becomes much heavier in the criminal system. Beyond a reasonable doubt.

It tilts much, much more to the other side.

Reasonable doubt will not be defined for you. That definition has to come from you. The judge cannot define it for you, and we cannot define reasonable doubt for you. Mr. Moen cannot define reasonable doubt for you.

Simply put, it is doubt founded within reason, or whatever your definition might be, but it is not beyond any doubt or all doubt, but a reasonable doubt.

Do you follow me there? Do you agree

with me?

Yes.

Do you think that that would be a heavy burden for the State?

I would say it would be a fairly heavy one.

Would you be able to follow it, that law?

Yes, I believe I could.

So, do you agree or disagree with it?

I agree.

All right. Now, there is no doubt you will be in a position where you would have to judge the credibility of the witnesses. There will be witnesses for the State's side saying one thing, of course, there will be our witnesses saying completely the other.

You are the judge of the facts. You are the judge to unscramble all the conflict. There will be police officers testifying.

Would the mere fact that a police officer is a police officer, that per se, without testifying, would you give him more credibility than any citizen testifying before you?

No. I would consider it the same.

Do you will agree with me, then, that a police officer can make mistakes just like any other

1 human being?

2 A. That is correct.

3 Q. And he is subject to the same human frailties as  
4 any other citizen? Would you agree with me  
5 there?

6 A. Yes.

7 Q. So you wouldn't give, say, one class of people  
8 more credibility because of whatever reasons,  
9 say, because they were police officers?

10 A. No.

11 Q. Or a doctor more credibility than a normal  
12 citizen?

13 A. I feel like their word would be just as good as  
14 mine.

15 Q. All right, then. I go back to the situation where  
16 in the witness before you, or witnesses, they  
17 might be emotional. For example, Ms. J. D. Harris.  
18 Can you separate the emotions from the facts of  
19 what happened July 13th, 1982?

20 A. Yes. I believe I could.

21 Q. And separate that and take that, take only the  
22 facts, and judge it by the facts and the facts  
23 alone?

24 A. Yes, sir.

25 Q. All right. Now, as Mr. Moen mentioned earlier,

1 it will be known in the trial that my client,  
2 Mr. Guerra, is an illegal alien.

3 His being part of a class, say, of  
4 illegal aliens, how would that affect you in this  
5 case?

6 A. Not at all. I feel like anybody here has the same  
7 rights that we all do.

8 Q. So the fact he is here illegally in this country  
9 would not affect your judgment in this case  
10 whatsoever?

11 A. No, sir.

12 Q. So, are you saying that he is entitled to the same  
13 rights that any citizen has?

14 A. Yes.

15 Q. Well, let me go one step further on that.

16 Several months ago, the U. S. Supreme  
17 Court came out with a decision saying the children  
18 of illegal aliens were entitled to a free  
19 education.

20 Did you hear about that?

21 A. Yes, I did.

22 Q. What was your initial reaction?

23 A. Well, I guess, like a lot of people, I thought,  
24 gosh, where are we going to come up with the money  
25 to provide for all of these educations.



1           After sitting back and thinking about  
2 it, basically where was our country -- the people  
3 that founded our country, where did they come  
4 from? The other countries.

5           So I feel like there is nothing basically  
6 wrong at all with it, that they could provide and  
7 help build an even better and stronger United  
8 States in the future.

9           You know, initially, yes, we might have  
10 some funding problems.

11 Q. Now, there will be two stages of this trial:  
12 the guilt-and-innocence stage and, of course, the  
13 punishment stage, and in each one, the same  
14 concept continues. It doesn't stop. Say, for  
15 example, if you found my client guilty, it still  
16 continues in those two questions.

17           Would you make the State prove to you  
18 beyond a reasonable doubt -- because, believe me,  
19 they will be asking you to answer these two  
20 questions yes -- would you make them prove it to  
21 you beyond a reasonable doubt before you would  
22 make a decision?

23 A. Yes.

24 Q. Would you make them prove it to you beyond a  
25 reasonable doubt?

1 A Yes.

2 Q Can you promise me that you can keep an open  
3 mind until you have heard all the evidence?

4 A Yes, I can.

5 Q And give that presumption to Mr. Guerra throughout  
6 the whole trial?

7 A Yes, I could.

8 Q And place the burden on the State and demand  
9 that they prove it to you beyond a reasonable  
10 doubt?

11 A Yes. I could.

12 Q Mr. Elizondo noticed that you went to Stephen  
13 F. Austin.

14 A Yes, sir.

15 Q And I don't know if you are aware that the  
16 incident took place close to Stephen F. Austin,  
17 and as a matter of fact, it took place maybe less  
18 than eight blocks from Stephen F. Austin.

19 Are you familiar with that area?

20 A Yes.

21 Q Did you grow up in that area?

22 A Yes. I still live in the same zip code I was  
23 born in.

24 Q Is that Glenmore?

25 A Glenmore.

1 A Is that off of Harrisburg?

2 A No, sir. It is off back on the other side of the  
3 freeway.

4 Q Off Polk?

5 A Off of Wayside on the freeway. Originally, I  
6 grew up off Lawndale and near Wayside. Villa De  
7 Matel, just right next to that convent.

8 Q I guess you could understand why we are very  
9 leery, although you promised to us that you can  
10 be fair.

11 MR. MOEN: Repetitious. That's been  
12 asked and answered three times, Judge.

13 THE COURT: Overruled.

14 Q (By Mr. Hernandez) Let me ask you this question:  
15 Say you go into the deliberation room and scratch  
16 your head and say, "Damn. I think he is guilty.  
17 I think he did it, but the State didn't prove it  
18 beyond a reasonable doubt, and that is the law,"  
19 and, for example, if he didn't testify, and you  
20 say to yourself, "Well, he didn't testify," and  
21 then subconsciously, because of what happened  
22 to your father, would you give the State that  
23 extra help to get them over the hump and find  
24 him guilty?

5 A No, I wouldn't.

1 Q Let's go a step further.

2 Say you get in there and scratch your  
3 head and say, "Damn. I think he did it. He  
4 might have done it. He could have done it. It  
5 is possible, but they didn't prove it to me,  
6 didn't prove it to me beyond a reasonable doubt."

7 What would your answer be?

8 A Well, I would be actually having to say they  
9 didn't do their job. He would be innocent. Unless  
10 I could be sure in my own mind that if I was in  
11 the same position I could convict myself, I wouldn't  
12 be able to convict anybody else. Unless I am  
13 sure enough I would be willing to put myself on  
14 the line, I am not going to put anybody else on  
15 the line.

16 I know in my case, like I said earlier,  
17 I agree, and I would be very hesitant to accept  
18 myself, but being myself, I would say I would try  
19 a lot harder to be very objective about it.

20 Q You know, Mr. Gougenheim, you don't have to put  
21 yourself in his position, and we are going to ask  
22 you, or I will ask you one more time: Can you be  
23 fair to us as well as the State?

24 A Yes, I can.

25 Q And set aside any ill feelings of past history?

1 A. Yes, I can.

2 Q. This is a very, very, very serious case. It is  
3 a life-or-death case literally.

4 It wouldn't affect you one iota to come  
5 out with a not guilty verdict, having to face your  
6 family members?

7 A. Not at all.

8 Q. Your uncles?

9 A. That is one thing my mother has always said:  
10 Never worry about what happened at that time.  
11 It's the future. That has come and it has gone.

12 Q. Thank you. All we ask is a fair trial. Thank  
13 you for your honesty.

14 MR. HERNANDEZ: That is all we have.

15 MR. MOEN: We will accept Mr.  
16 Gougenheim, Judge.

17 MR. HERNANDEZ: May we have a moment,  
18 Your Honor?

19 THE COURT: Yes.

20 MR. ELIZONDO: Your Honor, prior to  
21 excusing Mr. Gougenheim, we re-urge our motion  
22 to inspect the entire venire so we can  
23 intelligently use our peremptory challenges.

24 THE COURT: Your motion to examine the  
25 entire venire is denied.

1 MR. ELIZONDO: We will excuse him,  
2 Your Honor.

3 THE COURT: Mr. Gougenheim, thank you  
4 very much. You will be excused.

5  
6  
7  
8 TOMMY RAY SMITH,  
9 was called as a prospective juror and responded to  
10 questions propounded as follows:

11  
12 EXAMINATION

13  
14 QUESTIONS BY MR. BAX:

15 THE COURT: You may proceed, Mr. Bax.

16 MR. BAX: Thank you.

17 Q (By Mr. Bax) Good afternoon, Mr. Smith.

18 A Hello.

19 Q How are you doing today?

20 A Fine.

21 Q Did you stick around here all morning long and  
22 everything?

23 A Uh-huh.

24 Q We are in the process of selecting twelve people  
25 to sit on a jury. It is a capital murder jury.

1                   Usually, we can pick a jury in two  
2                   to three hours and start testimony the same day  
3                   we select a jury. We started selecting this  
4                   jury back on August 30th. This is the middle  
5                   of our fifth week, I guess.

6                   We need two more jurors, but you can  
7                   see it is a long and drawn-out process, as you  
8                   can see. You had to wait around all morning  
9                   until we reached you.

10                  We do this primarily because of the  
11                  punishment involved in a capital murder case.  
12                  The law requires we do it individually, and,  
13                  quite frankly, that is the only way to do it.

14                  If a person is convicted of capital  
15                  murder, he receives one of two sentences, the  
16                  life sentence or the death penalty. That is all.  
17                  There is nothing in between, nothing less than  
18                  that.

19                  Because there are so many different  
20                  viewpoints in our community on the death penalty,  
21                  the law allows us to talk to you individually so  
22                  you are not influenced by what other people might  
23                  think, and, hopefully, you will feel more  
24                  comfortable about the way you feel.

25                  You are number eighty-seven, the

1 eighty-seventh person we have talked to, and  
2 probably eighty-seven opinions have been before  
3 us.

4 : Some people come before us and say,  
5 "Yes, I believe in the death penalty, and I believe  
6 in the proper case, I could carry through with  
7 a verdict that would result in the death penalty."

8 Others say, "I couldn't do it because  
9 of my personal beliefs, religious background,  
10 et cetera. I could never partake in the taking of  
11 a life, no matter what the evidence was."

12 Either side is fine. We are not going  
13 to have a debate on the pros and cons of capital  
14 punishment.

15 I am trying to find out what your  
16 beliefs are, and certainly no one is going to  
17 try to change your opinions. Okay?

18 A. Okay.

19 Q. There are no right or wrong answers. Okay?

20 A. Okay.

21 Q. The only answers that would be wrong would be  
22 answers not true to yourself. Our law does not  
23 require someone to become a juror where that  
24 jury service would violate their conscientious,  
25 religious, or moral scruples. No one is going



1 to take you by the scruff of the neck and put  
2 you on the jury. Okay?

3 A. Okay.

4 Q. Can you tell us about your feelings about the  
5 death penalty, whether you believe in it, and  
6 whether you would be able to participate in that  
7 type of trial, or because of your religious  
8 beliefs, personal beliefs, it would preclude you  
9 from being in such a case?

10 A. I do believe in it. I believe I could participate  
11 in it.

12 Q. Have you been of that opinion all of your adult  
13 life?

14 A. Yes, sir.

15 Q. There is nothing of personal experience that came  
16 along and changed your opinion?

17 A. No, sir.

18 Q. Let me go over with you, if I could, the certain  
19 types of cases where the death penalty is a  
20 possible punishment.

21 First of all, there always has to be  
22 an intentional or knowing taking of a life, which  
23 is a murder.

24 A murder, in and of itself, does not  
25 become a capital murder. There has to be something

1 coupled with the murder to make it capital murder.

2 If you kill a person during the course  
3 of a robbery, if you go into a Utotem and you  
4 are robbing the clerk in the Utotem and during  
5 the course of that robbery, you shoot and kill  
6 the clerk or another customer, that is elevated  
7 to capital murder.

8 If you kill someone during the  
9 break-in of their home or business, that is  
10 capital murder.

11 For the rapist to kill the rape victim;  
12 for the kidnapper to kill the kidnap victim, that  
13 is capital murder.

14 If you kill someone during the course  
15 of arson, that is capital murder.

16 If you commit a felony offense plus a  
17 murder, one of those felony offenses plus a  
18 murder, that is capital murder.

19 Our law also protects certain  
20 individuals, policemen and firemen and people  
21 employed by our prison system. If you kill a  
22 fireman or policeman knowing they are such a  
23 person and they are carrying out their lawful  
24 duties, that is elevated then to capital murder.

25 If you kill an employee of the prison

1 system and you are an inmate, or if you kill  
2 anyone in an attempt to escape from a penal  
3 institution, that is raised to capital murder.

4 Finally, the last area is where a  
5 person either hires someone to kill for him or  
6 a person is hired to kill by another person and  
7 the murder actually takes place.

8 Those are the only ten areas where the  
9 death penalty becomes a possible punishment.

10 Do you feel those are the proper  
11 types of cases for the death penalty?

12 A Yes, sir.

13 Q Where it can be an appropriate punishment if the  
14 facts call for it?

15 A Yes, sir.

16 Q Up until around 1967 in Texas, a person could get  
17 the death penalty for any number of cases, any  
18 type of murder case where a death resulted, or  
19 you could get it where there was a rape with  
20 no death, or a robbery where no death resulted or  
21 came about as a result of that criminal conduct.

22 But that law was struck down by the  
23 Supreme Court of the United States. You see,  
24 what happened back in 1967, a jury heard all the  
25 facts of a case and went in the back and

1 deliberated, and if they found a Defendant guilty,  
2 they continued to deliberate as to punishment  
3 and the punishment range would be anywhere from  
4 two years to a maximum of life or death, so a  
5 jury basically decided should this man get  
6 death.

7 Because of that basic reasoning where  
8 the jury was allowed to give the death penalty,  
9 the Supreme Court struck that down. In 1974, our  
10 Supreme Court came up with a different method of  
11 determining whether a person should get the death  
12 penalty. First of all, they had to be convicted  
13 of one of those offenses, and if he is found  
14 guilty, these questions are submitted to the  
15 jury. If the jury answered Questions 1 and 2  
16 yes, the judge would give the death penalty. If  
17 Question 1 or 2 is answered no, the judge assesses  
18 life imprisonment.

19 The jury doesn't say, "Does he deserve  
20 it," but they base their answers on the evidence,  
21 and it attempts to be more clinical, to make it  
22 more objective when the jury is deciding on the  
23 punishment. Okay?

24 A. Okay.

25 Q. These two questions are not particular to this

1 case. As I said, the legislature created them  
back in 1974. Every death penalty case that has  
reached the punishment stage since that time,  
4 these two questions have had to be answered by  
the jury.

Just taking the two questions and  
7 looking at the first one, have you had a chance  
to read these over?

A. This morning I haven't.

10 Q. Take a few seconds and read them over and we will  
go through them.

Okay. There are a few words in both  
13 of these questions that are underlined, and the  
reason these words are underlined -- they won't  
14 be underlined at the end of the trial -- they are  
there for your discussion purposes. Those terms  
16 won't be defined for you by the judge. The jury  
will have to use their everyday common meaning  
18 for those terms and phrases when deciding what their  
answers should be.

1 Question No. 1, though, calls for a  
yes or no answer and is really two questions in  
2 one. Two parts.

4 Number one, was the conduct of the  
Defendant deliberate, and, number two, was that  
5

1 conduct done with a reasonable expectation  
2 someone would die as a result of that conduct.

3 Question No. 1 calls upon the jury to  
4 really reevaluate the evidence they have already  
5 heard in deciding if a person is guilty. Okay?  
6 Assuming you are on a jury where a person is found  
7 guilty at the punishment stage.

8 Do you follow me so far?

9 A. Yes.

10 Q. You are asked this question --

11 To get to the punishment stage, you have  
12 had to find that a person intentionally caused  
13 the death of another person. All right? To some  
14 people, the word "deliberately" means the same  
15 as the word "intentionally." I don't know if it  
16 does to you or doesn't.

17 To me, deliberately means on purpose  
18 or willfully. Okay?

19 A. Okay.

20 Q. You may, after you have heard the evidence and  
21 found the person guilty, based on that same  
22 evidence, you may have already answered this  
23 question in your mind.

24 Do you follow me?

25 A. Yes.

1 Q. Simply because you have found a person guilty  
of intentionally causing the death of someone  
4 doesn't mean this question is automatically  
answered yes at the punishment stage.

A. Right.

Q. You see, if that were the case, we wouldn't need  
7 to submit this question to the jury.

Let me give you an example of where  
you could have found a person guilty of  
10 intentionally taking the life of another person  
11 but you could have a no answer to these two  
parts.

13 Suppose two people get together and  
14 decide they are going to do a robbery. There is  
a thirty-five-year-old man who is an ex-convict,  
16 and he enlists and solicits a seventeen-year-old  
17 boy to go along as a lookout. He has an influence  
on the boy and he gives him a pistol and tells  
19 him, "Your job in the robbery is going to be to  
20 stand out in the front and keep watch and run  
the car." The seventeen-year-old says, "Fine."

23 The thirty-five-year-old says, "I will  
go inside and get the money," and the thirty-five-  
year-old goes inside and sees the only person  
in the store is the clerk, and in an effort, so

1 his crime will never be detected, he shoots and  
2 kills the clerk.

3 There is no question that the thirty-five-  
4 year-old man has committed capital murder. He has  
5 killed an employee of the store during the course  
6 of a robbery.

7 Okay. Under our law, if two people  
8 conspire to commit a felony, two people commit  
9 the felony of robbery, if one of the coconspirators,  
10 one of the people commits another felony during  
11 the course of that murder, both people are guilty  
12 of murder if the murder should have been  
13 anticipated as a possibility of their actions  
14 together. I think you will understand that  
15 anytime two people plan on doing a robbery and  
16 they both have loaded weapons, it should be  
17 anticipated if something goes wrong, someone may  
18 get shot.

19 Under the law, someone is guilty of  
20 murder even though he didn't pull the trigger.  
21 All right?

22 As to answering the question, 1, on  
23 the thirty-five-year-old, you may say, "Yes, his  
24 conduct was deliberate, and he acted with a  
25 reasonable expectation someone would die," but



1 in answering the question of the seventeen-year-  
2 old out front, you might say he didn't have a  
3 reasonable expectation someone would die.

4 You can see, depending on the facts,  
5 this person, though you found this person guilty,  
6 the answer could be yes or no, but the seventeen-  
7 year-old, let's say that the evidence showed  
8 that the seventeen-year-old agreed with the  
9 thirty-five-year-old that, "Yes, we will kill  
10 anyone around," in that case, your answer may be  
11 different to the seventeen-year-old.

12 What I am trying to get across, there  
13 is no automatic answers to the questions simply  
14 because you found someone caused the death. Wait  
15 and make your answers based on the evidence and  
16 not on the guilty finding.

17 Is there anything about the first  
18 question, the way it is phrased or written, that  
19 you feel would cause you difficulty in answering  
20 it? I am not saying how you would answer it, but  
21 could you answer it yes or no based on the  
22 evidence?

23 A. Yes.

24 Q. The second question is a little bit different.

25 It is asking about the person on trial, what type

1 of person is on trial. Is he the type of person  
2 who is probably going to commit criminal acts  
3 of violence in the future that will be a threat  
4 to society. Okay?

5 The term probability will not be defined.  
6 To me, it means more likely than not, chances  
7 are, something more than fifty percent, more than  
8 a possibility. Anything is possible, but less,  
9 would you agree, than a certainty?

10 You see, the law doesn't require I  
11 prove to you something is certain in the future  
12 but likely to happen.

13 A. Less than a certainty.

14 Q. Less than a certainty and more than a  
15 possibility.

16 There is no way I can prove beyond a  
17 reasonable doubt that something is certain.

18 A. Right. Nothing is certain.

19 Q. And the law doesn't require me to prove something  
20 to a certainty. That is physically impossible  
21 to do. The law requires me to prove it to a  
22 probability.

23 Criminal acts of violence include  
24 other capital murders, other murders, but are  
25 not just limited to murders or capital murders.

1 Criminal acts of violence include burglaries,  
2 robberies, rapes, beating up on people, assault-  
3 type cases. I don't have to prove he will go out  
4 and kill another policeman or kill someone during  
5 the course of a robbery, but just commit criminal  
6 acts of violence or that he is likely to commit  
7 those acts.

8 Likewise, there is no way I can predict  
9 he is likely to commit certain crimes, but just  
10 that he is a continuing threat to society,  
11 whichever society he finds himself in, be it back  
12 on our street someday or even within the  
13 penitentiary where there is society, not only of  
14 the inmates but also of wardens, guards,  
15 librarians, medical people there to aid the  
16 prisoners.

17 Are there any questions about this  
18 Question No. 2? Do you feel you would be able  
19 to answer that based on the evidence?

20 A. Based on the evidence, yes, if it is proved.

21 Q. At the punishment stage, the first question can  
22 be answered by just the evidence in the case  
23 itself, but other evidence can be introduced as  
24 to Question 2, aside from the crime the person  
25 is on trial for, to aid the jury in answering

1 that question. It is not required that additional  
2 evidence be offered. If it is available, it would  
3 be offered to the jury to help you in answering  
4 that question.

5 The law, however, says if the jury is  
6 satisfied that the evidence in a particular case  
7 is so cold-blooded or what not, it may be able to  
8 satisfy the jury just on the facts alone.

9 Do you follow me there?

10 A. Yes, sir.

11 Q. Is there anything up to this point, any questions  
12 about anything we have gone over?

13 A. No.

14 Q. You will not have to remember any of this. If  
15 you are selected on the jury, it will be next  
16 week before you hear the case, and then if the  
17 jury found the Defendant guilty, it would be at  
18 least the end of the next week before these  
19 questions come up. The judge will give you this  
20 in your instructions prior to deliberations.

21 Okay?

22 A. Okay.

23 Q. Let me go over some of your obligations as a  
24 juror, and they would be the same instructions  
25 that the judge would give you and the eleven

1 other jurors. This would be true whether it  
2 was a driving while intoxicated case or capital  
3 case. These rights belong to all Defendants.

4 First of all, a Defendant is by law  
5 believed to be innocent until proven he is  
6 guilty beyond a reasonable doubt.

7 The fact a Grand Jury has indicted him,  
8 the fact he is represented by attorneys and finds  
9 himself here today, the judge will tell you gives  
10 rise to no inference of guilt.

11 Can you afford this Defendant the  
12 presumption of innocence at this time?

13 A. Yes.

14 Q. And simply, that means, you know, the jury has  
15 to take the box with an open mind. It would be  
16 wrong for someone to go and say he is indicted,  
17 and where there is smoke, there is fire. He  
18 must have done something.

19 I am not going to insult your  
20 intelligence and say we picked him up off the  
21 street. The law requires there be something  
22 there, but the law requires you give no  
23 significance to that and make the State prove its  
24 case to you beyond a reasonable doubt.

25 Can you do that?

A. Yes.

Q. Of course, if he was guilty back on the date this happened, he is guilty today and he will be guilty until the day he dies, but say you are of the right frame of mind, you must assume he is innocent, and if I prove he is guilty, fine. If I don't, you will have to acquit him. Okay?

A. Okay.

Q. A Defendant in a criminal trial does not have to give testimony, does not have to testify himself. He does not have to call witnesses in his behalf.

The burden in a criminal trial is always on the State. We have the burden of proving to the jury a person is guilty. The Defense has no burden. They do not have to prove their client is innocent. They do not have to ask one question throughout the whole trial, and if they choose to do that, choose not to ask questions, choose not to put the witness on the stand, that cannot be considered as any type of evidence by the jury.

The jury can only consider evidence from the witness stand where you are seated now and must base their verdict of guilty or not guilty based on what they have heard and not what they don't hear, and I guess the best

1 illustration is we put on our case, and Mr.  
2 Hernandez and Mr. Elizondo rest after our  
3 testimony. Y'all decide, "Well, Bax and Moen did  
4 a good job. They put on a pretty good case, but,  
5 you know, they didn't convince us beyond a  
6 reasonable doubt. The Defendant didn't testify,  
7 though, so we just add that as evidence and get  
8 the State over the hump and find the man guilty."

9 You can see that would be wrong, and  
10 I don't think you would do that.

11 A. No.

12 Q. So if the Defendant does not testify, you will  
13 not hold that against him?

14 A. No. No.

15 Q. If he did testify, and I assume in this trial he  
16 will testify, he is like any other witness, and  
17 as a juror, your main function will be to decide  
18 the credibility of the witnesses.

19 When a witness testifies, they will  
20 take an oath to tell the truth. They don't  
21 always do that. If they did, I guess I would be  
22 out of a job and the judge would be out of a job  
23 if every witness told the truth on the stand.

24 You will have to decide who is telling  
25 the truth, to decide conflicts in testimony, if

1 one side says this happened and the other side  
2 says it didn't.

3 You will be looking at the witness,  
4 judging their demeanor, their motives, and asking  
5 yourself is it reasonable? Does it fit in with  
6 the evidence from other sources? And you will  
7 decide if you believe all, part, or nothing of  
8 what a witness says, and that goes for the  
9 Defendant or a police officer. It doesn't matter  
10 who is testifying. Everybody takes the stand  
11 with an equal footing, no believability or  
12 disbelievability, and either can gain credibility  
13 or lose it in the eyes of the jury as they  
14 testify.

15 No witness, be it a police officer,  
16 a doctor, a plumber, no matter what occupation  
17 the person has, they don't have automatic  
18 believability. The jury is required to listen  
19 to their testimony and make their decision.

20 A. Uh-huh.

21 Q. I have to -- and I am going rather quickly. I  
22 end up doing a lot of talking. Stop me if there  
23 are questions.

24 A. Okay.

25 Q. I have to prove my case to a jury by what we



1 call "reasonable doubt." I don't know what this  
2 is. I have never been on a jury. I doubt I will  
3 be, because I am a lawyer. I am sure one side  
4 or the other will cross my name off the list.

5 I guess it is something that is  
6 individual to each juror. I guess, as the judge  
7 said, you use your common sense, and after hearing  
8 the evidence if you are satisfied, if you are  
9 convinced in your own mind the person did it,  
10 it has been proven beyond a reasonable doubt.  
11 If you are not satisfied, not convinced, I am  
12 sure you would have a reasonable doubt in that  
13 case and you should find the Defendant not guilty.

14 I can tell you that proof beyond a  
15 reasonable doubt is not proof beyond all doubt.  
16 It is not proof beyond a shadow of a doubt or any  
17 doubt. The only way I could ever prove anything  
18 to twelve people beyond any doubt or beyond a  
19 shadow of a doubt would be if they all were  
20 witnesses and they all saw each and every  
21 transaction from the same and exact vantage point,  
22 and even then, those twelve people would probably  
23 have twelve different stories as to what  
24 happened.

25 A. Right.

1 Q The law doesn't require I prove a case beyond  
2 all doubt, and, of course, there won't be a  
3 videotape replay or anything to aid the jury.

4 Do you feel that is a fair burden of  
5 proof, beyond a reasonable doubt?

6 A Yes.

7 Q Do you have any question about that at all?

8 A No.

9 Q Do you feel that you will be able to listen to  
10 two sides that may be diametrically opposed and  
11 go through it, analyze it, and make a determination  
12 as to which side was correct or which side was  
13 maybe lying and incorrect?

14 A Yes, I do.

15 Q Of course, you do some umpiring and everything --  
16 I guess that is basically what a jury does -- see  
17 the evidence and make a judgment call on the  
18 evidence as they see it, and they just judge it.

19 It is not going to be a split decision  
20 like you sometimes have to do being an umpire.  
21 You have time to think about it and talk about  
22 it.

23 Have you ever umpired games -- we've  
24 got a couple of teams at the District Attorney's  
25 Office called the Indictments and Re-indictments.

1 A. No, ours is strictly called "Girls' Fast Pitch."

2 Q. "Girls' Fast Pitch"?

3 A. In South Houston.

4 Q. Do you ever do any slow pitch softball? Do you  
5 play fast pitch yourself?

6 A. Slow pitch.

7 Q. I don't think I could stand in and hit a fast  
8 pitch.

9 A. The girls can throw them and sock the guys.

10 Q. I imagine.

11 A. I don't know why they call it softball.

12 Q. I don't either.

13 A couple of more things: You can see  
14 that the Defendant has an interpreter here. He  
15 does not speak the English language, or he may have  
16 some understanding, but not enough to converse  
17 openly in English. He, I believe the evidence  
18 will show, is not in this country lawfully.

19 You can tell me whether you agree or  
20 disagree, but because a person is not here  
21 lawfully, is an illegal alien, he should not be  
22 found guilty or not guilty on that fact?

23 A. Right.

24 Q. That has nothing to do with whether or not he  
25 committed this offense.

1 Do you agree?

2 A. I agree.

3 Q. That may have something to do -- you may find  
4 that benefits you or doesn't benefit you as far  
5 as answering these questions, but as far as whether  
6 he did or didn't do it, that has nothing to do  
7 with this case. Okay?

8 A. Right.

9 Q. The judge will also instruct you that as a juror,  
10 on deciding the issues of punishment, you are not  
11 to discuss, allude to, or mention at all how long  
12 a person would have to serve on any particular  
13 sentence.

14 For example, if you are trying to decide  
15 should we answer this one yes or no based on the  
16 evidence, that is, 1 and 2, it would be wrong  
17 for someone to say, "We'd better answer it yes  
18 so he will get the death penalty. If he gets the  
19 life sentence, he will get out in twenty years."

20 MR. ELIZONDO: Objection to stressing  
21 the law of pardons and paroles, Your Honor.

22 THE COURT: Overruled.

23 Q. (By Mr. Bax) You must base your sentence on the  
24 evidence, and the judge will tell you discussing  
25 how long a person would have to serve would be

1 strictly in the discretion of the Board of Pardons  
2 and Paroles, and he will stress if someone has  
3 to talk about it, the other jurors are under an  
4 obligation to stop that immediately, and you need  
5 to knock on the door and tell the bailiff so the  
6 judge can do something about it. And the reason  
7 I mention it and say something about it is if  
8 it is discussed by a jury, it is back to square  
9 one. It is automatic reversal, and we have to  
10 start all over again selecting a new jury and  
11 going through five or six weeks of selection plus  
12 new testimony. Correct?

13 A. Right.

14 Q We talked about murder plus another element to  
15 make it capital murder. I think you can see where  
16 you would have a situation where a jury may say,  
17 after hearing the evidence, "Yes, he killed James  
18 Harris. There is no question he intentionally  
19 caused that person's death," but you may have a  
20 reasonable doubt, after hearing the evidence that  
21 the person who did the killing, the Defendant,  
22 whether he knew the fellow was a police officer.  
23 Okay?

24 Let's say it was a situation where the  
25 police officer was an undercover narcotics

1  
dressed in street clothes, you know, with  
nd long hair and everything, so he  
nd in and no evidence was presented to  
y the man ever identified himself as a  
ficer. There was no question he shot  
d the person. The jury could not return  
ct of capital murder. You would only have  
half of it, as to the intentional taking  
n life. You couldn't find him guilty of  
murder, but could find him guilty of  
the lesser included offense, included  
there is a lesser punishment range.

If a person is convicted of taking the  
other person without justification,  
e of punishment is five years to ninety-  
ears or life.

So you can see it is still a wide range  
hment, still goes up to life. The reason  
a wide range of punishment, of course  
are committed under many, many different  
uations by many, many people with different  
ounds for many, many different reasons.

You could have cold-blooded people  
people as they drive by in their cars,  
alling for punishment at the top of the

1 scale, but there are also women who have been  
the victims of abuse by their husbands over many,  
many years, and finally they shoot and kill their  
4 husbands in self-protection, or mercy killings,  
which would probably fall at the lower end of the  
range of punishment.

7 There are some in between.

The law says the jury, after hearing  
the evidence, after finding a person guilty of  
the offense of murder, if that jury believes that  
10 the punishment range for that case is somewhere  
between five years and ten years, if the jury  
feels it is proper, they can recommend probation  
13 for that offense.

Probation, of course, is the release  
16 under conditions imposed by the Court.

Can you see where there could be cases  
where you think you could consider probation if  
19 the facts called for it for the taking of a life?

20 A. This person has taken a life?

Q. Let me give you a couple of examples. It is hard  
22 -- we deal with this stuff day in and day out, and  
23 we bring you down here, and we are not trying to  
commit you to this fact situation, but are just  
trying to give you an idea of what happens.

1           Let me take you through a hypothetical  
2 capital murder, reduce it to murder, and to where  
3 a jury would consider probation.

4           Assume a man and wife have been  
5 married for fifty years, raised children, have  
6 grandchildren, and the wife becomes terminally  
7 ill. She is placed in the hospital and put on a  
8 life-support system.

9           There is no question, all the doctors  
10 agree within six months she will be dead. She's  
11 in a lot of pain and all the savings of that  
12 couple saved up over the years for their happy  
13 retirement has been expended day by day to keep  
14 her alive.

15          She discusses this with her husband  
16 and says, "Honey, pull the plug. I have lived a  
17 happy life. We have raised a family. I hurt. I  
18 want to go. I don't want to leave you with nothing  
19 but food stamps and welfare."

20          He finally reaches over and pulls the  
21 plug. He has done an intentional act to cause  
22 her death.

23          Family members on her side of the family  
24 feel that is not right, he didn't do that for that  
25 reason, but she owned property in Conroe he



1 wanted to sell to some construction man and she  
2 never wanted to sell that. They feel the only  
3 reason he pulled that plug was to get control  
4 of that property and sell it for money, and some-  
5 how the Grand Jury gets ahold of it for capital  
6 murder.

7 The case is tried and the jury hears  
8 that evidence and says, "It is B.S., just  
9 ridiculous. That man didn't kill her for that  
10 property. He killed her for an act of love."  
11 They don't find him guilty of capital murder,  
12 but follow their oath as a juror and find him  
13 guilty of murder.

14 They go back and say, "What do we do?  
15 What is the range of punishment?"

16 The jury could -- I am not saying what  
17 you would do in that situation -- but it may be  
18 the type of case where the jury thinks probation  
19 is proper.

20 Do you see there are cases, though  
21 there may be only a few, where you could  
22 envision probation? Can you see where there may  
23 be a case where probation would be proper for the  
24 taking of a life?

25 A. I do.

Q Capital murder, murder, and ultimately a probation as a result of that?

Right.

Q I think that is about everything as far as -- let me look over my list here.

Do you have any questions on any of the law or anything we have talked about up to this point in time?

A. No.

Q Let me take a look at your -- is that a lieutenant?

A. I believe he is. I am not sure if he is a lieutenant.

There is a lieutenant named Bill Edison, I think, at H.P.D. How well do you know him?

A. I know him from church. My wife knows his wife probably better than I know Bill.

Q Okay.

A. We are friends.

Q The question they always ask, and, of course, if you were on this jury and no matter what you do, people are going to ask you about your verdict when it's all over, and I don't think you are the type of person that would vote one way or the other just to satisfy someone you were going to

1 talk to later, for example, Mr. Edison.

2 Would you find it difficult or have  
3 a problem going to him if you found the Defendant  
4 not guilty, and saying, "I did what I thought I  
5 was required to do under the evidence and the  
6 law"?

7 A. No.

8 Q. Is there anything about your relationship that  
9 would cause a problem in being a juror in this  
10 case?

11 A. No.

12 Q. Did you recall anything about the facts of this  
13 case when the judge mentioned it?

14 A. Just a little bit, that, you know, maybe we saw  
15 on the news or something, but not very much.

16 Q. Okay.

17 A. Other than the fact I recognized the name when  
18 they said Officer Harris. I recognized the name.

19 Q. There is nothing wrong with having read or heard  
20 something. It would probably be impossible not  
21 to hear things like that if that happened in our  
22 community.

23 The only reason that question is asked  
24 of the jurors is to find out if they have formed  
25 an opinion or conclusion as to the Defendant's

1           guilt or innocence, and I assume by your answers  
2           to me thus far, you have not formed an opinion  
3           or conclusion thus far?

4    A.    I have not.

5    Q.    Do you have any brothers or sisters?

6    A.    I have a brother.

7    Q.    What type of work does he do?

8    A.    He is a pastor.

9    Q.    Here in Houston?

10   A.    No, in New Boston, Texas.

11   Q.    And I take it that is Baptist also, right?

12   A.    Yes.

13   Q.    Does he have a feeling, or have y'all talked about  
14           the death penalty?

15   A.    Nope.

16   Q.    How about with your wife? Have you had any  
17           discussions with her perhaps over reading a  
18           newspaper article or TV accounts?

19   A.    Yes.

20   Q.    How does she feel about it?

21   A.    She feels like I do.

22   Q.    In a proper case?

23   A.    In a proper case.

24   Q.    Of course, we are talking in this case about the  
25           killing of a policeman. A lot of people think

1 that is something more serious than a lot of  
2 other cases, even the killing of a clerk during  
3 a robbery, and I don't think people mean it is  
4 more serious because a police officer's life  
5 per se is more valuable than anybody else's life,  
6 but a person who is trying to protect us as a  
7 whole, I guess, makes it that much more serious,  
8 but even talking about the murder of a police  
9 officer, under the eyes of the law, it is the same  
10 as far as evidence is concerned as any other  
11 category of capital murder.

12 The State still must prove at the  
13 punishment stage that the answers should be yes,  
14 and they are not automatically yes because a  
15 person took the life of a police officer.

16 Do you follow me there?

17 A. Uh-huh.

18 Q. Well, if you have no questions of me, I think  
19 I have pretty much covered everything I need to  
20 talk with you about.

21 Is there anything whatsoever we need  
22 to say?

23 A. No.

24 Q. Mr. Smith, I have enjoyed talking with you, and  
25 if you are selected as a juror in this case, I

1 look forward to serving with you.

2 MR. BAX: I will pass the juror.

3

4 EXAMINATION

5

6 QUESTIONS BY MR. ELIZONDO:

7 Q Mr. Smith, how are you doing?

8 A Fine.

9 Q It has been a long day.

10 A Yes, it has.

11 Q It is already 2:30. I believe you are eighty-seven,  
12 the eighty-seventh juror we have interviewed in  
13 the last ten (sic) weeks. We've got ten jurors  
14 so far. We need two more.

15 This is a capital murder case, and as  
16 in every criminal case in Texas, it is divided  
17 into two parts, the guilt-or-innocence stage and  
18 the punishment stage.

19 Just as actively as the State is going  
20 to be seeking the death penalty in this case, we  
21 are going to be actively seeking a not guilty in  
22 this case, and that is why I want to ask you a  
23 few questions and see how you honestly feel about  
24 certain things and see if you can give this man  
25 a fair and impartial trial.

1 A Okay.

2 Q In a capital murder case, the State must prove  
3 its case to you beyond a reasonable doubt. They  
4 must prove to you that on a particular day in  
5 Harris County, Texas, this man shot and killed  
6 a police officer in the lawful discharge of an  
7 official duty knowing at the time that he was a  
8 police officer.

9 They must prove that to you beyond a  
10 reasonable doubt.

11 The term reasonable doubt will not be  
12 defined for you. The judge will not give you a  
13 definition. The prosecutor can't. I can't,  
14 because there is no legal definition of the term  
15 reasonable doubt.

16 All I can do is give you a comparison  
17 or analogy that across the street at 301 Fannin  
18 in the civil courthouse where they try lawsuits  
19 over contract disputes, over workmen's  
20 compensation cases, over property disputes,  
21 sometimes for millions of dollars, the burden of  
22 proof over there is by a preponderance of the  
23 evidence, the greater weight of the credible  
24 evidence, the greater weight.

25 Over here in the criminal courthouse,

1 the legislature said before somebody can be found  
2 guilty of a criminal case or capital murder, as  
3 in this case, the State will have a higher burden,  
4 a heavier burden, and that burden will be to  
5 prove their case to twelve jurors' satisfaction  
6 beyond a reasonable doubt. So you can see that  
7 there is a heavier burden, and rightfully so,  
8 because before you can find somebody guilty of  
9 a crime such as this and then kill him, we'd  
10 better be sure they have the right man.

11 A. Right.

12 Q. Do you agree or disagree?

13 A. I agree.

14 Q. So, basically, the way they go about their proof,  
15 they go ahead and read the indictment to the  
16 jury and the Defendant will plead not guilty,  
17 and they will present witnesses, and after they  
18 get through presenting witnesses, the Defendant  
19 can, if he chooses, he can rest his case, not put  
20 on any evidence whatsoever, because you've got to  
21 remember one thing. They brought the charges  
22 and now they've got to prove them.

23 A. Okay.

24 Q. So let's assume for one minute in a hypothetical  
25 situation that the State goes ahead and rests



1           their case and we rest our case, too, don't put  
2           on one bit of evidence.

3                    You go in the jury deliberation room  
4           and you are thinking to yourself, you are thinking,  
5           "I think he did it. He might have done it, maybe  
6           he did, but they haven't proven this case to my  
7           satisfaction beyond a reasonable doubt."

8                    In that situation, what would your  
9           verdict be?

10    A.   If I am saying to myself, "I think. I am not  
11           sure"?

12    Q.   But it hasn't been proven beyond a reasonable doubt  
13           that he did it.

14    A.   If I had doubt, like you are saying, I could not  
15           find him guilty, if I had doubt.

16    Q.   Okay.

17    A.   And in my mind, I was not sure.

18    Q.   You can see where you might get in a switch where  
19           you might say to yourself, "I think he did it. He  
20           might have done it, but it hasn't been proven  
21           beyond a reasonable doubt." Do you see where you  
22           might get put in a switch? Where it is possible?

23    A.   Yes. I think anything is possible.

24    Q.   Sure. Anything.

25                    But do you see where you could get

1       yourself in that position?

2       A.   Personally, myself, yes.   I can see where I  
3       could do it.

4       Q.   The person can, if he chooses, he can testify.  
5       He can present witnesses.   I suspect that he  
6       will in this case.

7               If the Defendant testifies, he can be  
8       impeached or discredited by proof of any prior  
9       felony convictions within the last ten years,  
10      let's say, and you can base that, base that, or  
11      the lack of any, and by using that, you can more  
12      or less judge a person's credibility.

13             You can judge their credibility by  
14      other ways, by their biases or any motives or  
15      any reason that a person may have for saying  
16      something.

17             You have been an umpire and you have  
18      seen people say two diametrically opposed things,  
19      and you have to make a decision, right?

20      A.   Yes.

21      Q.   You have been around, and it will be your job as  
22      a juror to base your verdict and base it upon  
23      what you hear what the witness stand, and I think  
24      you can do that.

25      A.   Right.

1 Q If the Defendant -- you as a juror will be the  
2 judge of the facts. There will be twelve judges  
3 of the facts and one judge of the law. He will  
4 judge on the objections and the admissibility of  
5 evidence, et cetera.

6 You, as the juror, will have the final  
7 say on the facts. You can believe some of,  
8 all of, or none of what a person testifies to.  
9 That is your prerogative.

10 You as the judge of the facts, for  
11 whatever reason, can believe none of what a  
12 witness says or all of or some of it. Okay?

13 A. Okay.

14 Q If the Defendant testifies and if we present  
15 evidence, I suspect there will be two diametrically  
16 opposed stories, and then again, it will be your  
17 job under your oath, under the law, to resolve  
18 those conflicts.

19 Do you think you can do that?

20 A. Yes, I do.

21 Q. How long have you been an umpire?

22 A. Just one year.

23 Q. How many games have you umpired?

24 A. Last year, I imagine I called about thirty  
25 games.

1 Q Okay. Did you ever have any severe disagreements  
2 with parties?

3 A Yes.

4 Q Almost all the time?

5 A No, not all the time.

6 Q But you have had -- you have had to make bad  
7 calls -- not bad calls, some tough calls?

8 A Yes.

9 Q If the Defendant is found guilty -- and I am going  
10 into this in an abundance of caution -- if he is  
11 found guilty, we will go to the punishment phase.

12 At the punishment phase, you have those  
13 two questions. At that point in time, if he is  
14 found guilty, there are only two possible  
15 punishments, life or death.

16 If he is found not guilty, we don't go  
17 to the punishment phase.

18 A Right.

19 Q At the punishment phase, then the punishment  
20 will be determined by how you answer those two  
21 questions.

22 Now, if you have found a person guilty  
23 of intentionally and knowingly killing a police  
24 officer, would you automatically, just because  
25 you have done that, would you automatically

1           assess the death penalty, or would you consider  
2           those two questions?

3       A.   Well, we would be charged to consider the two  
4           questions, right.

5       Q.   Sure.   Sure.

6       A.   I would consider the two questions.

7       Q.   Okay.   The word "deliberately" in Question 1 is  
8           underlined and is asking you whether the conduct  
9           of the Defendant that caused the death of the  
10          deceased was committed deliberately and with a  
11          reasonable expectation that the death of the  
12          deceased or another would result.

13                   The word deliberately is underlined.  
14           There is no legal definition of the word  
15           deliberately.   The judge can't give you one.   The  
16           prosecutor can't give you one.   I can't give you  
17           one.

18                   All I can do, by reason of analogy,  
19           again, is give you an example that you will go to  
20           the jury deliberation room to deliberate, first  
21           of all, on guilt or innocence.   At that point in  
22           time, you will think about with measurable  
23           consideration whether or not this person committed  
24           the offense as alleged, and if the State proved  
25           their case to you beyond a reasonable doubt.

1                   Some people say the word deliberately  
2 might mean premeditated.

3                   What do you think the word deliberately  
4 means?

5     A.     Purposefully.

6     Q.     Purposefully?

7     A.     I knew I was going to do it.

8     Q.     Question No. 2 is asking you more or less to  
9 foretell or forecast the future. It is asking  
10 you if there is a probability that the Defendant  
11 would commit criminal acts of violence that would  
12 constitute a continuing threat to society.

13                  Probability to some people means more  
14 likely than not, chances are.

15                  What do you think it means?

16     A.     I don't know.

17     Q.     The reason I am asking is because a minute ago  
18 you said anything is possible, and the reason I  
19 am going into that, would you answer anything  
20 yes because of what you said, that anything is  
21 possible?

22     A.     There is a probability -- to me, it just means,  
23 in my opinion, later on, do I think later on  
24 in his life is there any chance that he might  
25 commit another crime, is what it means to me.

1 Q Criminal acts of violence?

2 A Criminal acts of violence.

3 Q More than one crime.

4 A Okay.

5 Q Let's assume the State has now proven to you  
6 beyond a reasonable doubt that the answer to  
7 Question No. 2 should be yes. Would you then  
8 answer that question no?

9 A Would you repeat that, please?

10 Q Let's see if I can.

11 Let's assume that the State has not  
12 proven to you beyond a reasonable doubt that the  
13 answer to Question No. 2 should be yes. Would  
14 you then, or could you then answer that question  
15 no?

16 A If they hadn't proven it beyond a reasonable doubt  
17 that the answer --

18 Q That the answer to Question No. 2 should be yes.

19 Would you or could you then answer it  
20 no?

21 A Yes. I could answer it no.

22 Q Okay. Both of those questions, before they can  
23 be answered yes, the State must prove to you  
24 beyond a reasonable doubt that the answer to those  
25 two questions should be yes, and if they don't

1 prove to you beyond a reasonable doubt that the  
2 answer to those two questions should be yes,  
3 then you should -- it will be your duty under  
4 your oath -- to answer both of those questions  
5 no.

6 Do you follow me?

7 A. Yes.

8 Q. How long have you been a Sunday school director?

9 A. My first year.

10 Q. Is that right? This time?

11 A. I just started this month.

12 Q. And how often do you do that, or what do your  
13 duties entail? Is that an everyday operation?

14 A. No.

15 Q. Just on Sundays?

16 A. Just on Sundays, strictly to see that each class  
17 and each department had a teacher there for that  
18 Sunday and find substitutes and set program  
19 goals.

20 Q. And if you can't find substitutes, you go and  
21 take their place?

22 A. Yes, if I can't find anybody.

23 Q. How long did you live in Brownsville?

24 A. I was just born there. I really don't know. I  
25 think two years. I think we moved here when I



1           was two.

2       Q     You moved to Houston or South Houston?

3       A     South Houston.

4       Q     Have you always lived in that area?

5       A     Always.

6       Q     Do you think or do you believe that a police

7           officer can make a mistake?

8       A     Yes.

9       Q     Human beings like you and me?

10      A     We all make mistakes.

11      Q     Let me ask you another question.  What do you think

12           about eyewitness testimony?  I know that is a broad

13           question, but let me narrow it down a little bit

14           if I can and maybe help you a little bit.

15                   Do you think an eyewitness can make a

16           mistake?

17      A     Yes.

18      Q     Have you ever gone to a person and said, "Hey,

19           Joe.  How are you doing," and this guy turns

20           around and it is not Joe?

21      A     Yes.

22      Q     Have you ever -- I don't play baseball that much

23           -- he is telling me terminology I can't follow.

24                   Have you ever bumped somebody out?

25      A     Thrown him out in a baseball game?  No.

1 Q Have you ever called a shot and then later, after  
2 you called that shot, said, "Maybe I shouldn't  
3 have called that shot"?  
4 A I think sometimes I have been umpiring and you  
5 have maybe when it was a close call, you go home  
6 thinking about it, but I always think in my mind,  
7 I always think in my mind I called it like I saw  
8 it and made the best call.  
9 Q You know, about five or six months ago, a Supreme  
10 Court decision came down and said the children of  
11 illegal aliens had the right to a free education.  
12 Do you remember that? What was your initial  
13 reaction when you heard that?  
14 A Immediately, it was that they did not -- did not  
15 have the right to a free education.  
16 Q A free education?  
17 A Here.  
18 Q And do you still feel that way?  
19 A I am a little divided on how I feel.  
20 Q Why do you feel that way?  
21 A Well --  
22 Q Again, I am not quarreling with you. I just want  
23 to know how you feel, because it may come to your  
24 knowledge that he is an illegal alien, and I am  
25 trying to find out how you feel.

1 A. I want to ask myself a question: Who am I to  
2 decide these children could not have the right to  
3 a free education? I was a child once, and, you  
4 know, they are children, and our lives are molded  
5 as children, and if these children are denied the  
6 opportunity maybe for an education, then it may  
7 affect how they grow up and what they become later  
8 in life, and sometimes I wonder who am I to say  
9 whether or not they should or should not have the  
10 right to an education here in the United States.

11 Q. But your initial reaction was you were against  
12 it?

13 A. Yes, when I first heard it on the news, because  
14 I felt like that is my tax money.

15 Q. I guess so.

16 Did you form any kind of opinions about  
17 illegal aliens as a class of people, let's say?

18 A. No.

19 Q. Can you give Ricardo Aldape Guerra a fair and  
20 impartial trial?

21 A. Yes.

22 Q. Regardless of whether he has been indicted,  
23 represented by two lawyers, comes to you as an  
24 illegal alien, would you and could you give him  
25 a fair and impartial trial?

1 A. Yes.

2 Q. And if the evidence or lack of evidence showed  
3 that he wasn't guilty of the offense, if the  
4 State didn't prove to you he was guilty beyond  
5 a reasonable doubt, could you come back and tell  
6 anybody and everybody not guilty?

7 A. If he was not proven guilty, I could come back and  
8 say that.

9 Q. You know, this is going to be a very emotional  
10 trial. I suspect that Officer J. D. Harris'  
11 wife will testify. I suspect that some of his  
12 children will testify. I don't know.

13 Can you, in the trial of this case,  
14 separate emotion from fact and try him on the  
15 facts of the case and base your verdict and  
16 base it upon the facts and the law in this case?

17 A. Yes.

18 Q. That is a pretty powerful thing.

19 A. It is a tough question.

20 Q. It is a tough question.

21 Let me give you an example: The Hinckley  
22 case, where the guy was charged with trying to  
23 kill President Reagan.

24 Did you ever form an opinion on that  
25 case?

1 A Well, I would have to say yes; you know, I saw it  
2 on the news.

3 Q You saw it?

4 A I formed my opinion from my living room, didn't  
5 form it from the jury room.

6 Q You can see where those jurors in that case had  
7 a pretty tough decision to make, probably a lot  
8 of phone calls and letters, but they formed their  
9 decision from what they heard on the witness  
10 stand. They followed their oaths as jurors and  
11 came back with what they thought was a proper  
12 verdict. I am not going to quarrel with their  
13 verdict.

14 Do you see what I am saying?

15 A I see it.

16 Q Now, you know Lieutenant Edison?

17 A Yes.

18 Q How well do you know him?

19 A Friends.

20 Q Very good friends, or how often do you see him?

21 A I guess once a week. I see Bill once a week. I  
22 don't see Bill very often. He works evenings,  
23 and when I get off, he is gone.

24 Q Do they live in the same neighborhood as you?

25 A Two or three miles from us.

1 Q That gets me a little scared also.

2 Let's assume you come back, or you are  
3 back in the jury deliberation room and you say,  
4 "I am not sure the State has proven its case  
5 beyond a reasonable doubt. He might have done  
6 it. He said he did, but I am not convinced beyond  
7 a reasonable doubt, but if I go back and say not  
8 guilty, I am afraid to talk to Bill Edison or  
9 tell him I voted not guilty."

10 What do you think about that?

11 A I wouldn't be afraid to talk to Bill.

12 Q Or his wife?

13 A Or his wife.

14 Q Or your wife?

15 A Or my wife.

16 Q Let me backtrack a little bit. I don't recall  
17 what your answer was a little while ago when Mr.  
18 Bax asked you if your brother felt the same way  
19 about the death penalty, and I think you said you  
20 didn't know.

21 A My brother and I have never talked about that.

22 Q Have you talked to Bill about this case, by any  
23 chance?

24 A No.

25 Q You know, if you were selected as a juror, you

1 won't be allowed to talk about this case to any-  
2 body during the whole trial, and, of course,  
3 you know, you can't talk to Bill. I am sure  
4 you can follow that oath or follow that  
5 admonishment.

6 A. Yes.

7 Q. I just need to get a commitment from you, if I  
8 can, and that is all I want you to do, is base  
9 your verdict, base it upon what you hear from  
10 that witness stand.

11 A. Yes.

12 Q. And if the State has not proven the case to you  
13 beyond a reasonable doubt, will you and can you  
14 come back with a not guilty verdict?

15 A. Yes.

16 Q. Keep it in mind we don't have to prove a thing.  
17 That is the law.

18 Are you keeping that in mind?

19 A. Yes.

20 Q. One other question. If you had to put yourself in  
21 a position, would you say you are in favor of the  
22 death penalty, reluctantly, moderately, or  
23 strongly?

24 A. I would have to say strongly.

25 Q. Why do you feel that way?

1 A I feel like that the taking of a human life is  
2 wrong, and I feel like in our world we need to  
3 understand that, and until we do that, until  
4 people believe that way and people realize when  
5 you take someone else's life that yours can be  
6 taken, that our world will never improve at all.

7 Q Your answer to the last question brought up more  
8 questions.

9 A Oh.

10 Q Do you believe in an eye for an eye and a tooth  
11 for a tooth?

12 A An eye for an eye and a tooth for a tooth.

13 Q Explain that.

14 A Punishment for revenge's sake.

15 Q Revenge because he killed somebody?

16 A Uh-huh. I am not a revengeful person, if that  
17 is what you are asking. I am just saying in a  
18 case where the facts are given and a man took  
19 another man's life and it is without doubt,  
20 reasonable doubt, or whatever you call it, if he  
21 took another man's life, I believe in the death  
22 penalty.

23 Q Okay. Well, I can see where, you know, where you  
24 are coming from. I need to find out.

25 How do you feel about the State's



1 burden of proof? Let's assume that the State  
2 does not prove their case to you beyond a  
3 reasonable doubt. How do you feel about their  
4 burden of proof, moderately, or strongly, let's  
5 say?

6 A. I am not sure I understand you. Repeat that.

7 Q. I am just trying to get at how strongly --

8 THE COURT: I didn't either.

9 MR. ELIZONDO: I am not sure I got it  
10 myself. It is hard to put this particular  
11 question into words.

12 Q. (By Mr. Elizondo) Do you have a preference as  
13 punishment, life or death?

14 A. Do I have a preference?

15 Q. If you found him guilty of capital murder.

16 A. It seems like a broad question.

17 Q. I guess it is. You have two choices, life or  
18 death, as punishment in a capital case.

19 MR. BAX: Judge, objection, unless he  
20 asks regardless of the evidence would he have a  
21 preference, not in all cases what is his  
22 preference.

23 Q. (By Mr. Elizondo) Regardless of the evidence.

24 Hypothetically, do you have a preference  
25 in a capital murder case? Would you prefer life

1 as punishment or death as punishment? You told  
2 me you strongly believe in the death penalty.

3 A. I would prefer death.

4 Q. Would you consider life?

5 A. Yes.

6 Q. But not very much, huh?

7 A. I would just have to hear the, you know, sit in  
8 the jury box, sit and hear the facts, and base  
9 my decision on what I hear.

10 Q. Are you going to hold the State to its burden  
11 of proof in proving this case beyond a reasonable  
12 doubt?

13 A. Yes.

14 Q. I am going to go ahead and --

15 Hold on for a second.

16 MR. ELIZONDO: Your Honor, may the  
17 juror be excused for a second?

18 THE COURT: Please step into the jury  
19 room for a second.

20 (The prospective juror retired to the  
21 jury room, and out of his presence and hearing  
22 the following proceedings were had.)

23 MR. ELIZONDO: Your Honor, I just  
24 wanted to voice a challenge for cause outside of  
25 his presence, because I know we are going to have

1 to take him, and voice a challenge for cause based  
2 upon the fact he feels strongly for the death  
3 penalty. We are out of strikes, peremptory  
4 strikes, and the juror is unacceptable to us.

5 MR. BAX: Judge, we plead he is  
6 qualified in the same way the law doesn't preclude  
7 people simply because they are opposed to the  
8 death penalty. It doesn't preclude people simply  
9 because they are in favor of the death penalty,  
10 and the juror said although he had a preference,  
11 he would consider life, and his answer showed  
12 he would consider evidence before him, and would  
13 not automatically answer any questions.

14 MR. MOEN: We find him acceptable, too.

15 THE COURT: The challenge will be  
16 denied.

17 MR. ELIZONDO: We will ask for additional  
18 peremptory strikes, Your Honor.

19 THE COURT: That also will be denied.

20 MR. BAX: Do you want him brought back?

21 THE COURT: Do you want to ask him  
22 additional questions?

23 MR. BAX: I may just ask one or two  
24 based upon his challenge, to make sure the record  
25 is clear on that.

1 (Whereupon the prospective juror  
2 returned to the courtroom, and in his presence  
3 and hearing, the following proceedings were  
4 had.)

5 MR. ELIZONDO: Thank you, Mr. Smith.  
6 That is all the questions I have.

7  
8 EXAMINATION

9  
10 QUESTIONS BY MR. BAX:

11 MR. BAX: Your Honor, just one or two  
12 more questions.

13 Q. (By Mr. Bax) Mr. Smith, you have voiced here a  
14 preference for the death penalty if a person is  
15 found guilty of capital murder. Would that  
16 preference override the facts or would you base  
17 your answers to Questions 1 and 2 on the evidence?

18 A. I would base it -- would you repeat that?

19 Q. Would you base your answers to these questions  
20 on the evidence, or automatically answer them yes  
21 because you have a preference for the death  
22 penalty?

23 A. No, I would base my answers on the evidence.

24 Q. On the evidence?

25 A. On the evidence, deliberate.

1 Q And if Question No. 1 wasn't proved to you beyond  
2 a reasonable doubt, would you be able to answer  
3 that question no?

4 A Yes.

5 Q And if Question No. 2 was not proved to you beyond  
6 a reasonable doubt, would you answer that question  
7 no?

8 A Yes.

9 Q And that would be even though you would have a  
10 preference for the death penalty; that wouldn't  
11 sway you one way or the other? You would base  
12 your answers on the evidence?

13 A On the evidence.

14 MR. BAX: That is all I have, Your  
15 Honor.

16 THE COURT: Any further questions?

17 MR. ELIZONDO: I have no further  
18 questions, Your Honor.

19 MR. BAX: We will accept Mr. Smith.

20 THE COURT: Mr. Smith, you will be  
21 Juror No. 11 in this case.

22 Do we have the clerk around? That  
23 is all right if she is not here.

24 Stand, please, sir.

25 (Whereupon the juror was sworn.)

1           THE COURT: You may be seated just a  
2           moment, and I will give you a few instructions.

3           As I told you earlier today, it will  
4           probably be Monday or Tuesday when we start the  
5           evidence in this case. You will be allowed to  
6           go home during that interim period of time. There  
7           may or may not be any publicity in the newspaper  
8           or on the radio or TV about this case between  
9           now and then. Should there be, I will caution  
10          you and admonish you to avoid reading, watching,  
11          or listening to any publicity concerning this  
12          case.

13          Your verdict must be by evidence that  
14          you hear from the chair where you now sit and  
15          nothing else.

16          Now, during the course of the trial,  
17          I anticipate there will be media coverage in all  
18          three of these forums, and I will strongly  
19          admonish the jury at that time to scrupulously  
20          avoid reading or watching any publicity concerning  
21          this case.

22          As I told you earlier, it probably will  
23          take four or five days to try the case once we  
24          get started, and it may be necessary for you to  
25          be sequestered or locked up in a hotel room one,

1 perhaps two nights. I don't know. So please  
2 make whatever arrangements you need to with your  
3 employment and that sort of thing.

4 . . Do you have any questions of me at this  
5 time?

6 THE JUROR: No, sir.

7 THE COURT: All right. Is there anything  
8 further?

9 MR. BAX: Nothing from the State, Your  
10 Honor.

11 MR. ELIZONDO: Nothing from the Defense,  
12 Your Honor.

13 THE COURT: Mr. Smith, you may now be  
14 excused and we will notify you perhaps tomorrow  
15 as to exactly when to report, but do not report  
16 until we notify you when to come down. Okay?

17 THE JUROR: All right.

18 MR. ELIZONDO: For the record, after  
19 the selection of Tommy Ray Smith, I again voice  
20 an objection to Mr. Smith as totally unacceptable  
21 to us, and viewing it now, we probably, if we  
22 had now challenges for cause, would probably have  
23 chosen Cynthia Matthews instead of Tommy Ray  
24 Smith.

25 THE COURT: It was a challenge.

1                   Your objection is overruled.

2                   Please note that the objection is  
3 noted and denied.

4                   MR. ELIZONDO: I think I said it wrong,  
5 Judge.

6                   For clarification purposes, if we had  
7 been allowed a challenge for cause on Cynthia  
8 Matthews, we would not have used a peremptory  
9 strike on Cynthia Matthews and, therefore, had  
10 an additional peremptory challenge to strike  
11 Tommy Ray Smith.

12                  THE COURT: Are you asking for a ruling  
13 on that?

14                  MR. ELIZONDO: Yes, sir.

15                  THE COURT: Overruled.

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1 BOBBY JEAN FOREMAN,  
2 was called as a prospective juror and responded to  
3 questions propounded as follows:  
4

5 EXAMINATION  
6

7 QUESTIONS BY MR. MOEN:

8 THE COURT: Mr. Foreman, they are going  
9 to ask you questions, and please bear in mind  
10 what I told you earlier today.

11 Q (By Mr. Moen) Mr. Foreman, you have been waiting  
12 around all day, and I think you are entitled to an  
13 explanation as to why.

14 The law requires we talk to individuals  
15 individually in a capital case. We have to. It  
16 is not a case of whether we want to or not, but  
17 we have to interview the jurors individually, and  
18 it takes almost forty-five minutes to an hour,  
19 as you are aware of by now, to talk to a  
20 prospective juror on cases like this.

21 I think there are a couple of reasons.  
22 One, we have to do it by law, and, two, it's the  
23 serious nature of the case and other things we  
24 have to explain to a jury that we have to do in  
25 a criminal case, and they have to understand

1 what will be required of them by their jury  
2 service, and also a person isn't required to  
3 do anything where a person would violate his  
4 religious beliefs or moral scruples, et cetera.

5 We want to make sure or absolutely  
6 sure that a juror's convictions or beliefs will  
7 not be violated by being a juror on a case such  
8 as this.

9 I think you realize the issue of the  
10 death penalty is such an issue, many people have  
11 different ideas about it. Some people are in  
12 favor of it. Some people are opposed to it, and  
13 they tell us that, and, of course, no one grabs  
14 those jurors by the back of the neck and throws  
15 them in the jury box and says, "You don't have a  
16 choice. You've got to be a juror even though  
17 your service would violate your conscientious  
18 beliefs." That is not the type of country we  
19 live in.

20 But the only way we have to tell is  
21 to have them come up individually, explain to  
22 them individually, and see how they feel.

23 Frankly, by your answers, you will  
24 qualify yourself or excuse yourself on a jury  
25 like this, so what we are asking for are not

1           answers you think we want to hear.

2                       We don't want to hear any answers  
3           except the way you honestly feel about the  
4           questions you have to ask, and there are no right  
5           or wrong answers. Because you feel one way or  
6           the other doesn't detract one way or the other  
7           in a case like this from the fact that you are a  
8           good citizen. We don't want anyone to come over  
9           here and say they could be a juror on a case  
10          like this if their feelings would not let them  
11          or opinions would not let them. If they can,  
12          that is fine; if they couldn't be, that is fine.

13                   The only thing we ask is how you feel.

14                   Keeping that in mind, tell us what  
15          your feelings or convictions are concerning the  
16          death penalty. Would your opinions and feelings  
17          allow you to be a juror in such a case and return  
18          a verdict knowing someone might be put to death,  
19          or would your feelings or opinions keep you  
20          from being a juror on such a case?

21       A.   Well, I believe in it, but it is hard for me --  
22           it is hard for me to sit here and say I can  
23           actually do it.

24       Q.   Okay.

25       A.   It is not that I don't believe in it, because

1 I think it is, you know, the man done the crime,  
2 you know, and it is only fair, but it would be  
3 kind of hard for me to sit here and say that now  
4 without a lot of forethought.

5 Q. Okay.

6 A. And I can't really say I don't believe in it,  
7 because I do.

8 Q. We are not trying to -- obviously, at this time,  
9 I can't tell you what the facts are. The facts  
10 are what you learn from the witness stand. It  
11 wouldn't be right for me to stay here and tell you,  
12 "Mr. Foreman, here is my version of the facts.  
13 What would you do in a case like that?" And  
14 for Mr. Elizondo to say what are his versions  
15 of the facts. That is not right for us to stake  
16 you out.

17 The only set of facts that count are  
18 what you hear from the witness stand, not what  
19 the lawyers tell you they are.

20 We are speaking strictly in general  
21 terms. The only thing I want to know is, strictly  
22 speaking, would your feelings allow you to be  
23 on a capital case, and based on the evidence you  
24 hear, could you return a verdict you know would  
25 result in someone getting the death penalty?

1 A Yes, I think I could.

2 Q I take it what you are telling me is your feelings  
3 are basically one of being in favor of the death  
4 penalty for a person who commits certain crimes?  
5 Is that a correct statement as to the way you feel  
6 about the death penalty?

7 A Yes.

8 Q I want you to put yourself in a category for me,  
9 if you can, and tell me by way of explaining to  
10 me your feelings concerning the death penalty.

11 Would you say that you are strongly  
12 in favor of the death penalty, reluctantly in  
13 favor of the death penalty, or moderately in  
14 favor of the death penalty? Can you put yourself  
15 in one of those three categories for me?

16 A I would put it at reluctantly.

17 Q How would you -- and I want you to classify  
18 yourself for me -- you see, it's easier for me  
19 to ask you questions like this and have you  
20 respond than say, "Mr. Foreman, tell me about  
21 yourself in fifteen minutes or less."

22 If someone asked me that question, I  
23 would say, "Go jump in a river."

24 So, I ask you by asking you questions  
25 and having you respond. Okay?

1 Politically, how would you list  
2 yourself: conservative, moderate, liberal, or  
3 describe yourself some other way than that, or  
4 can you put yourself into one of those categories,  
5 politically speaking, talking about your  
6 political philosophies and ideologies?

7 A. Well, I am really not that much into politics  
8 as far as that goes. I vote Democrat is about  
9 all I can tell you.

10 Q. That is good. That tells me enough.

11 Let me explain a little about the  
12 procedure in a capital murder case by way of  
13 telling you what happens in a trial like this.

14 First of all, not all murders that take  
15 place in our state are punished as capital murders.  
16 Only certain murders are.

17 You see, it has nothing to do with  
18 how many people are killed or how awful they  
19 might be killed, in what horrible fashion they  
20 might be killed.

21 Our legislature has said if someone  
22 takes another human being's life in the course  
23 of breaking into someone's home or while they  
24 are robbing someone or raping someone or  
25 kidnapping someone or burning someone's

1 property, if a man commits a murder during the  
2 course of committing one of those crimes, he  
3 has committed a higher form of murder, if you  
4 will. He has committed capital murder.

5 If a man murders a police officer or  
6 fireman or someone who is employed -- if a convict  
7 murders an employee at a penal institution,  
8 someone we ask to keep our prisons running for  
9 us, or if a convict kills anyone during escape  
10 or if anyone kills for money, money for hire,  
11 those are the only instances, if a person commits  
12 one of those ten crimes, those ten murders, that  
13 person can only receive a life sentence or the  
14 death penalty from the jury once he is found  
15 guilty.

16 Now, the way that punishment is  
17 assessed is by the jury answering these two  
18 questions that appear over here on my left. No  
19 one tries to hide anything from you. If both  
20 questions are answered yes, you know what the  
21 effect of your answers will be. The man will  
22 receive the death penalty.

23 If a no answer appears to either one  
24 of the questions, then instead of the death  
25 penalty, the man will receive the life sentence.

1       These are the questions that are to be answered  
2       by the jury based on the evidence that they hear.  
3       They are to put their personal feelings aside as  
4       to any type of outcome they might want to have  
5       in a case.

6               Let me tell you how difficult your  
7       decisions might be in a capital murder case. You  
8       might hear the facts in any capital murder case  
9       and be convinced in your mind the man is guilty  
10      and say so by your verdict. You might hear the  
11      evidence, and have no question in your mind that  
12      the answer to both questions should be yes, and  
13      yet you are personally convinced this is the type  
14      of case where a man should receive a life sentence  
15      rather than the death penalty. Because of his  
16      age or status in life, you are convinced from  
17      the evidence your answers should be yes, but  
18      your personal feelings tell you the man should  
19      receive a life sentence rather than the death  
20      penalty.

21             Under those circumstances, what the  
22      jurors must do is answer the questions yes.  
23      The law would require you as a juror to answer  
24      those questions based strictly on the evidence  
25      rather than your personal like or dislike for a



1 range of punishment, for either one of the  
2 punishments, either a life sentence or the death  
3 penalty.

4 Now, I am not trying to scare you.  
5 I don't mean to do that. What I am trying to  
6 apprise Mr. Foreman of is this. We are speaking  
7 in hypothetical terms when we talk about the death  
8 penalty, but we are really past the hypothetical.  
9 We are talking about reality and practicality.

10 A. Uh-huh.

11 Q. I expect at the end of next week -- we will be  
12 starting testimony probably Monday -- to be  
13 standing in front of the jury and asking you to  
14 answer yes based on the evidence. The questions  
15 would be given them and if they do so, the man  
16 whom they have found guilty, if they answer those  
17 questions yes, he will be put to death at some  
18 point in the future.

19 We are not talking about hypotheticals,  
20 but talking about realities right now.

21 You might find yourself in the position  
22 as a juror on this case of having some personal  
23 feelings about what outcome or punishment the man  
24 might receive, that he should receive a life  
25 sentence rather than the death sentence, and yet,

1 because of the evidence, have to answer both of  
2 these questions yes.

3 The only time a juror has to be in that  
4 position is if his or her personal feelings would  
5 allow them to be on a capital murder jury, and  
6 the only way we know that is to ask each person  
7 to tell us those things and see if their feelings  
8 would allow them to do that.

9 Do you feel if you were called upon to  
10 perform that task you could voluntarily do that?

11 Some jurors say they can; some jurors  
12 say they could not. That is why we ask.

13 Q Yes. I think I could, you know.

14 Q Don't -- all I am telling you is this: Is that  
15 -- think about it. Take all the time you need to  
16 think about it, and I am not trying to say you  
17 haven't thought about it. I am trying to say it  
18 is a decision you have to live with. We are  
19 the lawyers on the case, and we have our  
20 respective sides we have to present in a trial  
21 like this. We are not the people who have to get  
22 in the jury box and make the hard decisions the  
23 jurors do.

24 We take our positions and ask the  
25 jurors to do things, but ultimately, the jurors

1 are the ones who have to live with their decisions  
2 in the case.

3 I think you would see how you would  
4 feel if, because of your feelings on the evidence,  
5 you found yourself in the position of being able  
6 to answer the questions about the man on trial.  
7 You know how bad you would feel about the family  
8 of the deceased, just as I think you know how bad  
9 you would feel if you made a mistake and answered  
10 the questions yes, sentencing a man to death,  
11 where you felt your answers should be no.

12 Those are the type of questions you  
13 will be confronted with, and I want to be sure  
14 your feelings would allow you to serve as a  
15 juror on the case.

16 A. I think they would as long as -- as long as I could  
17 be sure without a doubt.

18 Q. Okay. Well, a lot of people say that.

19 Let me explain something --

20 A. But without a doubt, I mean, that I don't have to  
21 have no kind of feelings, I guess, no personal  
22 conscience bothering or nothing like that.

23 Q. That is what you mean when you say without a  
24 doubt?

25 A. Yes.

1 Q Let me explain something to you.

2 The burden of proof in a criminal case  
3 -- the phrase "burden of proof" is a legal phrase,  
4 and what that phrase means is basically this. When  
5 a man commits a crime in Harris County, the  
6 District Attorneys have the burden of proving  
7 to other members of the community that that man,  
8 in fact, did that crime he is accused of. That  
9 burden falls on people like yourself. Citizens  
10 do that to prove to other citizens.

11 We don't snatch people off the street  
12 and bring them into the courthouse and say, "Now,  
13 you prove it. You have had no legal training.  
14 You are not a lawyer, but go ahead and prove that  
15 man is a liar. Go ahead and use the rules of  
16 procedure."

17 You don't throw people in the frying  
18 pan like that. Basically, that is performed by  
19 the District Attorney's Office. When someone is  
20 accused of a crime, they have a right to a trial  
21 by jury, and our burden is to prove to members  
22 of the jury that this man committed the crime he  
23 is accused of in this county, not some other  
24 town, but right here. That burden is to prove  
25 to the jurors beyond a reasonable doubt, not all

1           doubt -- and I'm not quarreling with you --  
2           if you say you have a doubt, a lot of jurors  
3           say that. I understand what you are saying. The  
4           burden is beyond a reasonable doubt, not all  
5           doubt, not beyond all or a shadow of a doubt.

6       A.   Yet on a capital murder case, before I could  
7           return a verdict that might result in someone's  
8           life being taken, you are going to have to convince  
9           me beyond all doubt. If I had any doubts in my  
10          mind, I would have to go ahead and answer those  
11          questions no or say not guilty by my verdict.

12                You may convince me beyond a reasonable  
13           doubt, but my personal verdict on a case like  
14           this, where a man's life is at stake, literally,  
15           you will have to convince me beyond all doubt.

16       Q.   Do you feel that way, or can you abide by the  
17           reasonable doubt proof?

18                Once again, there are no right or wrong  
19           answers, but how do you feel?

20       A.   Me personally, I think it would be all doubt.

21                My conscience --

22       Q.   Don't shake your head. You haven't done a darn  
23           thing wrong except to say how you feel. So that  
24           is not something to be ashamed of, but something  
25           to be proud of. That is why I don't want you

1 thinking I am picking at you.

2 A. I understand.

3 Q. I want to make sure how you feel so you don't  
4 wind up over here in the position of being a juror  
5 and say, "I can't do this. I wish I had told  
6 them how I felt. If they had asked me questions,  
7 I could have told them how I felt. Because of  
8 my personal tests or whatever or something wasn't  
9 explained to me."

10 Your response is not different from a  
11 lot of responses by other jurors who find  
12 themselves in your position. You see, particularly  
13 in regard to Question 2, it is the type of  
14 question where you will always have questions  
15 in your mind. That asks you about the type of  
16 person on trial, about the type of person he is  
17 and asks you to make an answer based on the  
18 evidence as to whether there was a probability  
19 that the man on trial was the type of person that  
20 would commit criminal acts of violence in the  
21 future that would constitute a continuing threat  
22 to society. That asks you to make a judgment  
23 call about the man on trial as to what type of  
24 person he is and does the probability exist  
25 that he would commit criminal acts of violence

1 in the future that would constitute a continuing  
2 threat to society.

3 So you might hear evidence, and you  
4 would always have doubts in your mind about what  
5 kind of person is on trial, but that is the type  
6 of difficult questions jurors are confronted with  
7 in a capital murder case, and they are to make  
8 the best judgment they can based on the evidence  
9 beyond a reasonable doubt, not beyond all doubt,  
10 any doubt, or a shadow of a doubt.

11 Do you feel like that second question  
12 is the type of question you could ever answer,  
13 given your feelings concerning needing to be  
14 convinced in your own mind as to where there  
15 wasn't any doubt left, or do you feel the second  
16 question is the type of question you would need  
17 to answer no, regardless of the facts that you  
18 would hear?

19 A. That would be really hard for me to answer. That  
20 is like forming a personal opinion to me.

21 Q. It really is.

22 A. It is a hard question for me to answer.

23 Q. Some people tell us they just couldn't do it  
24 because of the way the question is answered.

25 That question has caused many jurors, prospective

1 jurors, almost ninety now, caused many people  
2 problems, and over the years in a number of  
3 capital murder cases I have tried.

4 You are not alone. It has caused  
5 many people problems.

6 Some people immediately told me they  
7 couldn't answer it. That is what I am getting  
8 at. It is the type of question, I think you would  
9 agree with me, you would probably always have some  
10 doubt in your mind, no matter what the evidence  
11 was about your answer to that question.

12 I think there is a chance a person could  
13 change, and, of course, that might be a nagging  
14 type of thing you might have in your mind when  
15 you are answering that question, no matter what  
16 the evidence you heard concerning what the man  
17 had done. You might always have some question  
18 in your mind.

19 A. I would definitely have a question about it. There  
20 is no doubt about it. I would have to question  
21 myself real hard on it.

22 Q. Yes.

23 Do you feel like it is the type of  
24 question that you could ever answer or do you feel  
25 like your feelings concernig a case like this,



1 where literally a man's life is at stake, that  
2 is just an unfair question to ask a juror to make  
3 a conclusion or judgment like that?

4 A. I really don't think I could answer it.

5 Q. I appreciate your telling me that. I think you  
6 realize literally the situation you could find  
7 yourself in on Question No. 2. It is the type  
8 of question that asks you to make a judgment  
9 call.

10 You might literally find yourself in  
11 the position of hearing the evidence and believing  
12 from the evidence that your answer should be yes,  
13 but knowing if you answer the question, the man  
14 would receive the death penalty if the first question  
15 is answered yes, and given your personal feelings  
16 about the type of punishment the man would receive  
17 on the case, et cetera, I think you can see the  
18 dilemma you might find yourself in, and making a  
19 prediction about the type of person on trial and  
20 because of that prediction, the man might receive  
21 the death penalty, I think you can see the type  
22 of weight that would put on your shoulders as  
23 a juror in a case like this.

24 A. Uh-huh. That is the reason I think I will have  
25 a hard time answering that second question.

1 Q Okay.

2 A I think -- to me, I can't see me as being the  
3 judge, standing in judgment of that.

4 Q That is not an uncommon response. We have heard  
5 that from many people, and certainly you should  
6 not feel the least bit ashamed for feeling that  
7 way. I know you don't. I just want to tell you  
8 this is an informal portion of the trial.

9 Although you come and sit with a lot  
10 of strangers, we know these people, work with them  
11 on a day-to-day basis. They are not strangers  
12 to us, but you find yourself literally on the  
13 hot seat confronted with strangers.

14 That is exactly what the second  
15 question does, asks you to make a prediction, and  
16 if the prediction is yes, the man will receive  
17 the death penalty. Many people have told us  
18 they can't answer the question, and that is what  
19 I wanted to ask you.

20 Given your feelings about everything  
21 so far, the type of case it is, the death  
22 penalty being involved, the type of question  
23 No. 2 is, can you ever imagine being able to  
24 answer that question yes regardless of what the  
25 evidence would be?

1 A. If it come down to yes or no, I am sure I could  
2 say yes, if I could, you know, if it could be  
3 proven, but I am not saying, you know, I can't  
4 say that because --

5 Q. Do you feel like it could ever be proven to you,  
6 though? That is kind of what I am getting at.

7 When you ask a juror imagine now you  
8 are on the jury panel and now you've got to  
9 answer that question and the evidence looks to  
10 you like your answer should be yes, what would  
11 you do, any law-abiding citizen, any person who  
12 registers to vote tries to abide by the law.  
13 What are they going to say? They will say I  
14 will do what I have to do. That is the type of  
15 situation we have now, where you say, "Yes, if  
16 I go to the jury box, I will do what the law  
17 requires me to do," but you don't have to go in-  
18 voluntarily.

19 This is not the type of situation where  
20 the bailiff grabs you by the scruff of the neck  
21 and says, "Mr. Foreman, go over there whether  
22 you believe in it or not. Get over there.  
23 Violate your moral, religious, and personal  
24 convictions." That is not what we want.

25 That is why in a case like this, we

1 take time to talk with the jurors individually  
2 to find out exactly what they feel. That is why  
3 I am saying if you have objections to Question  
4 No. 2 where you feel it is unfair to make a  
5 prediction about a person, don't feel bad about  
6 feeling that way, but if you do feel that way,  
7 now is the time to tell us.

8 A. I wouldn't feel bad about answering the question,  
9 but like I said, if it come down to yes or no,  
10 I could say yes.

11 Q. Okay, and the test that you would have to use  
12 before you could answer the question yes is  
13 whether or not you have been convinced by the  
14 evidence beyond a reasonable doubt. Not beyond  
15 all doubt or any doubt, but using that test,  
16 could you then still answer the question? Not  
17 all doubt, any doubt, or a shadow of a doubt, but  
18 put these personal proofs out of your mind, if  
19 you could.

20 Could you answer the question if you  
21 were convinced from the evidence beyond a  
22 reasonable doubt and not all doubt? You might  
23 still have nagging doubts in your mind about the  
24 kind of person on trial, but as long as you were  
25 convinced from the evidence beyond a reasonable

1       doubt you should answer the question yes, unless  
2       Mr. Foreman is the type of person that would need  
3       more proof than that, would have to have all  
4       doubt removed or any doubt removed before he  
5       could answer that question.

6               Do you feel you could abide by that  
7       beyond a reasonable doubt burden or test, or do  
8       you feel like you would need to have all doubt  
9       removed from your mind or any nagging doubts  
10       removed from your mind before you would be able  
11       to answer that second question yes?

12   A.   I think I could do it beyond a reasonable doubt.

13   Q.   You think you could stick by it? I know when you  
14       think something, you are probably like I am when  
15       someone asks me something new and novel. I will  
16       say, I think this is the way I feel, or probably  
17       the way I feel," that way, and that is fine.

18       Those are natural responses.

19               The only thing we need to have from  
20       you, though, on a case like this -- we have been  
21       at this for five weeks, and we have another week's  
22       worth of testimony, have roughly six weeks  
23       invested -- the one thing I live in deadly fear  
24       of is that a juror or prospective juror will  
25       wind up serving on a case without having made a

1 definite commitment that he or she could do it.

2 When you say "think," don't put yourself  
3 in the position of saying a week down the road  
4 you could not do it. When you say "think," are  
5 you telling me you could and you could abide by  
6 that instruction given by the Court or are you  
7 telling me you couldn't?

8 A. I could abide by the rule reasonable doubt.

9 Q. Good. I needed that commitment from you, because  
10 when you go to the jury panel a week from now,  
11 that might be exactly the position you find  
12 yourself in.

13 Now, can you tell me you would answer  
14 these questions just based on the evidence without  
15 letting the life sentence or death penalty  
16 punishments affect what your answers are?

17 You see, that is another thing the  
18 jurors have. That is another oath the jurors have  
19 to take. They have to say that, "I will render  
20 a true verdict according to the evidence and the  
21 law given to me, so help me God," and also jurors  
22 have to state that their answers to those  
23 questions will not be affected by the mandatory  
24 punishments the man might receive, that being  
25 either the life sentence or the death penalty.

1                    Could you give me an opinion as well?  
2                    Would your feelings let you do that?

3                    Don't get me wrong. I am not trying  
4                    to scare you again or talk you into something.  
5                    I am trying to tell you you will have to let the  
6                    cards fall where they may, so to speak.

7                    If the evidence indicated your answers  
8                    should be yes, even though you had a preference  
9                    at the end of the evidence that the man receive  
10                   the life sentence rather than the death penalty,  
11                   you would have to answer yes and put your personal  
12                   preferences aside and answer those questions  
13                   strictly on the evidence.

14                   Do you feel you could do that?

15                   A. Yes. I feel I could do that.

16                   Q. I take it when you say, "I think I could" --

17                   A. Yes. I could do it.

18                   Q. This first question, which we only talked about  
19                   briefly, that is a common sense question. That  
20                   asks you to make a determination about the conduct  
21                   of the man that has been found guilty of capital  
22                   murder.

23                   Let me give you a hypothetical as to  
24                   how that works. A man goes into a convenience  
25                   store with a pistol and points it at the cashier

1 and says, "Give me your money."

2 She is frightened, and she turns the  
3 money over to him. It is early in the morning.  
4 This is the only witness to the robbery, so he  
5 shoots her twice and she dies. He shoots her  
6 once in the chest and once in the head.

7 Unbeknownst to him, she steps on some  
8 type of alarm and alerts the police and he is  
9 arrested as he exits the store. He is convicted  
10 and indicted for capital murder, murder during  
11 the course of robbery. That is capital murder,  
12 one of the crimes we talked about earlier.

13 After the jury found that man guilty,  
14 they would have to answer the first question, and  
15 the question asks you to make a determination  
16 about the conduct of the man on trial that has  
17 been found guilty of capital murder.

18 Was the conduct on his part that caused  
19 the death of the deceased, was it deliberate  
20 conduct, and was it done with the reasonable  
21 expectation that the deceased would die? In  
22 other words, when you take a loaded pistol into  
23 a convenience store to rob someone and you point  
24 it at a person and you fire bullets from that  
25 weapon into that person's body, into their chest



1 and head, is that a deliberate act? Is that  
2 deliberate conduct, and is it reasonable to  
3 expect someone would die when you shoot him in the  
4 head with a loaded gun or shoot him in the chest  
5 area with a loaded gun?

6 You see where that is a rather  
7 straightforward question that the juror is given,  
8 based on the evidence they have heard to find  
9 the man guilty, the evidence they have heard to  
10 find him guilty of capital murder?

11 Do you follow me on that first question?

12 A. Yes, I follow it.

13 Q. You will have to use your own definition for the  
14 word "deliberately." You have to use your own  
15 definition.

16 Do you feel those are the types of  
17 questions you would be able to answer based on the  
18 evidence you would hear?

19 A. I know I could answer that one.

20 Q. And, of course, if you answer the first question  
21 yes, we pass to the second question and try to  
22 make a determination about the type of person on  
23 trial and try to make that determination to a  
24 probability.

25 The question doesn't ask you to make a

1 finding of certainty that the man would commit  
2 criminal acts of violence that would constitute  
3 a continuing threat to society, because I think  
4 you realize that the only person in the entire  
5 world who could state what a person would do in  
6 the future is God Almighty himself, and you, as  
7 a juror, are not to put yourself in that position.  
8 You are to put yourself in the position of being  
9 a human being, and base your verdict on the  
10 evidence which will be heard.

11 Do you follow me on what that question  
12 would ask you to do?

13 A. Yes.

14 Q. We talked about the first question.

15 Do you feel the second question is the  
16 type of question you could answer depending upon  
17 the evidence you would hear?

18 A. Yes.

19 Q. Let me ask you this: Can you tell me what your  
20 definition for the word "deliberately" is? What  
21 do you think deliberately means to you, in your  
22 own words?

23 A. He meant to do it.

24 Q. Okay. That is kind of what it means to me: on  
25 purpose, he meant it.

1 A. Uh-huh.

2 Q. Do you feel like if the evidence convinced you  
3 in your mind that a person had intentionally  
4 taken another human being's life under the facts  
5 and circumstances we have mentioned, that would  
6 amount to capital murder, whether it be robbery  
7 or rape or kidnapping or murder of a police  
8 officer or fireman? If you feel a person has  
9 intentionally committed that crime and you heard  
10 from the evidence he was guilty of that, what  
11 do you think your answer to the first question  
12 would be?

13 A. Yes.

14 Q. What do you think that type of evidence tells you  
15 about the type of person who had done that,  
16 someone who would intentionally take another  
17 human being's life in the course of committing  
18 one of those crimes or setting a fire just to have  
19 the firemen put it out and then shoot one of them  
20 down because that is his particular definition  
21 of good, nice fun?

22 Do you think that tells you something  
23 about an individual as to what type of person he  
24 is?

25 A. Uh-huh.

1 Q Do you have or can you tell me what your own  
2 personal definition is for the word "probability"?

3 If you can, put it into your own words.  
4 If not, I will give you some help.

5 A I really haven't thought much about it.

6 Q More likely than not, chances are?

7 A Yes. That pretty well defines it.

8 Q Do you have any questions of me now about Questions  
9 1 and 2, before we get off of those? Is there  
10 anything that I can clear up for you at this  
11 time?

12 A No. They seem to be pretty well covered.

13 Q Okay. The judge will give you one admonition  
14 in writing, just something he will tell the jurors  
15 about in writing. He will tell you you are not to  
16 consider how long the Defendant would have to  
17 serve on the life sentence. That is just not a  
18 discussion that is to take place among the  
19 jurors. It will not take place. The jury will  
20 not discuss how long the person will serve a life  
21 sentence. That is within the exclusive  
22 jurisdiction of the Board of Pardons and Paroles.  
23 They will decide that. Jurors can't even discuss  
24 that.

25 A Uh-huh.

1 Q It seems like there was something I wanted to  
2 talk to you about, and I have lost my train of  
3 thought.

4 I expect the evidence in the trial will  
5 show the Defendant is not legally here in our  
6 country, that he is an illegal alien. I think  
7 it is at least partially apparent to you by the  
8 fact there is an interpreter telling him about  
9 these proceedings in English. Things that I  
10 say are being interpreted from English to Spanish  
11 for him.

12 Do you feel that would cause you  
13 difficulties as to being fair and impartial, the  
14 fact that man is illegally in our country and has  
15 taken the life of a police officer, and had he not  
16 been here like he should have been, the man would  
17 still be alive? Do you feel that would cause  
18 difficulties in being impartial during the course  
19 of the trial, and if it does, fine, and if not,  
20 that is fine, too.

21 A. No. I don't believe that would keep me from being  
22 fair.

23 Q. Okay. Let me tell you, cover a few other things  
24 with you.

25 Let me talk about this first.

1 I think the judge mentioned it. I  
2 don't think I did. I meant to.

3 The range of punishment for murder is  
4 five to ninety-nine years or life. It is a different  
5 range of punishment from capital murder. It is a  
6 different punishment range for someone to  
7 intentionally or knowingly take another life. He  
8 can only receive a minimum of five years to a  
9 maximum of ninety-nine years or life, and in  
10 addition, he can ask the jury to consider giving  
11 him probation even though he has been found guilty  
12 of killing another human being.

13 Are you familiar with that term,  
14 "probation"? Have you ever heard that in  
15 connection with what goes on down here at the  
16 courthouse?

17 A. Yes.

18 Q. Let me explain a little bit technically about how  
19 probation works.

20 A man can only receive probation for  
21 having committed a felony offense if, first of  
22 all, the jury unanimously agrees he should  
23 receive only ten years or less in the  
24 penitentiary.

25 You see, if the jury hears the facts

1 in the case and decides the man ought to be  
2 sent to the penitentiary for a very long time,  
3 that is where he will go. He doesn't get  
4 probation.

5 Only where the jury unanimously agrees  
6 the man should not go to the penitentiary for  
7 more than ten years, then the jury can discuss  
8 and consider among themselves whether or not they  
9 are going to recommend probation to the judge,  
10 and if the jury does recommend probation, the  
11 judge has to follow that recommendation. He will  
12 give the man probation. Okay?

13 Do you see how probation works?

14 A. Uh-huh.

15 Q. Probation is release by the Court. The person  
16 doesn't have to go to the penitentiary and he  
17 is placed on the terms and conditions of probation.

18 The only reason I wanted to explain  
19 that to you is to ask you: If you were a juror  
20 on a murder case, had found someone guilty of  
21 murder, which is to intentionally and knowingly  
22 end another human being's life, can you think of  
23 a fact or circumstance where you could consider  
24 probation for someone committing that type of  
25 crime if you felt it was proper, or do you feel

1       like probation should never be a possible  
2       punishment for someone taking another human  
3       being's life?

4       A.   No.   I don't believe probation would be fitting.

5       Q.   Well, you are entitled to your feelings and I  
6       am not going to try to change your mind.

7               I am really not going to try to change  
8       your mind, but I want to be sure I haven't asked  
9       you that question unfairly. I want to give you  
10      examples of specific types of homicides and see  
11      if you feel those would be proper cases for  
12      probation, or if there are proper cases for  
13      probation in taking another person's life.

14             Imagine a battered wife type of case  
15      where a husband comes home every Saturday night  
16      and his idea of a good time is to beat her up  
17      in front of the kids and blacken her eyes, and  
18      she has been working hard and trying to keep her  
19      family together and has been working hard and  
20      getting the children off the school like a good  
21      housewife does and trying to get him straightened  
22      out with his drinking problem, and he refuses  
23      all help and this goes on for a long period of  
24      time.

25             She takes the gun out from the bed



1 table and shoots him one night and he dies. She  
2 has intentionally and knowingly taken his life,  
3 gets fed up and kills him, takes his life.

4 Let me give you another example of what  
5 might be in your mind the sympathetic type of  
6 homicide case where --

7 THE COURT: Mr. Moen, hold up just a  
8 minute.

9 (Brief interruption.)

10 Q (By Mr. Moen) Let's just, by way of explaining  
11 to you, the cases that fall within the definition  
12 of murder -- of course, you are entitled to feel  
13 the way you do about probation for someone who  
14 has taken another person's life and many people  
15 come and tell us what you have stated, that  
16 where someone has taken another human being's  
17 life, no matter what type of case it is, mercy  
18 killing, battered wife, anything else, they don't  
19 feel any person should receive probation for  
20 having ended another person's life. That is fine.  
21 There is nothing wrong with feeling that way.

22 The only thing I need to clear up is  
23 exactly how you do feel.

24 Can you think of any circumstances in  
25 your mind where probation could be considered by

1           you for someone who has intentionally taken  
2           another's life, or do you feel like someone  
3           who has committed that type of crime should at  
4           least have to spend some time in the penitentiary  
5           to answer for having taken another life?

6       A.    I believe that he should --

7       Q.    You are entitled to that belief.

8       A.    -- at least spend time.

9       Q.    I am not arguing with you.  Many people feel that  
10           way, and you are entitled to feel that way, and  
11           I am not going to try to change your mind and  
12           give you an example of a mercy killing, and  
13           say what would you do in this mercy killing when  
14           a couple was fifty or sixty years old, and we  
15           could go on and on and on, and you are entitled  
16           to the way you feel, and I don't want you to worry  
17           about the way you feel.

18                    Let me pass on to something else.

19           The Defendant in this trial is presumed to be  
20           innocent.  That is a legal presumption.  If jurors  
21           can do it, they are to keep an open mind and not  
22           presume where there is smoke, there is fire.

23                    Of course, he wasn't snatched up off  
24           the street because he was walking down the street  
25           at the wrong time and wrong place.  The Grand

1 Jury must have heard some evidence, and here he  
2 is in the courthouse answering a capital murder  
3 indictment. He is represented by two lawyers.  
4 Those are thoughts the jury is to put out of their  
5 minds if they can, and presume the Defendant be  
6 innocent and base their verdict on the evidence  
7 they may hear, if they can do that.

8 Of course, that is kind of like saying,  
9 "Look at that pink elephant walking down the  
10 sidewalk," and we go to the window, and sure  
11 enough, there is a pink elephant, and then the  
12 judge is saying, "Forget about the pink elephant.  
13 Disregard it." It is kind of hard to get it out  
14 of your mind. You saw it.

15 Presumption of innocence is kind of like  
16 that. In a way, it goes contrary to your common  
17 sense, after the Defendant finds himself in the  
18 courtroom.

19 The only thing I want to ask you is:  
20 Do you feel you could abide by that presumption  
21 of innocence, or based on the circumstances,  
22 there must be some evidence he did something or  
23 some testimony of someone somewhere, or otherwise  
24 he wouldn't find himself here in one of these  
25 courtrooms?

1 A I could abide by that because I have been  
2 accused wrongly before.

3 Q Not in connection with a criminal case, was it?  
4 Was it something at work, or a family affair?

5 A It was a D.W.I.

6 Q What happened on that? Did you have to come and  
7 hire a lawyer and go through a trial or anything  
8 like that?

9 A No, I was on vacation in Ohio, and I didn't know  
10 the roads and had out-of-state tags, and I had  
11 liquor on my breath, and that is just the way it  
12 happened.

13 Q How did you manage to explain your way out of  
14 that? Were you a Texan at the time?

15 A I didn't. It cost me three hundred dollars. I  
16 didn't explain my way out.

17 Q What happened? Did you have to pay the fine for  
18 it?

19 A Yes.

20 Q I was going to ask you how a Texan in Ohio managed  
21 to talk their way out of a D.W.I.

22 A I didn't get out of it. I was on vacation. I  
23 told him I was on my way back to Texas. It was  
24 a three-day sentence.

25 Q The Defendant doesn't have to testify in this

1 case, if he doesn't want to. I don't know if  
2 they told you that, or if you had that type of  
3 legal advice back when you were accused by Ohio  
4 police of a D.W.I., but he can, if he chooses,  
5 remain silent at his trial.

6 Do you feel you could abide by that  
7 admonition and base your decision on what you  
8 have heard rather than on what you did not hear  
9 from the Defendant, or do you feel like you would  
10 want to hear his side of it, hear what he had to  
11 say?

12 A. I could abide by it, but wouldn't it -- you know,  
13 it would be a little fairer if he, you know, gave  
14 his side of the story.

15 Q. How do you think you would feel if you didn't hear  
16 from the Defendant when it came to answer both  
17 of these questions yes or if you felt from the  
18 evidence your answers to both these questions  
19 should be yes, but you hadn't heard from the  
20 Defendant? How do you think you would feel  
21 or might feel if you found yourself in that  
22 position?

23 Do you feel like you might hold it  
24 against him if he didn't get on the stand and  
25 tell you what his version of the facts were, or

1           what do you think would be going on in your mind?  
2   A.   I wouldn't hold it against him, but I would, you  
3       know, I would expect him to at least try to defend  
4       himself. .  
5   Q.   What if he didn't?  
6   A.   Well, I would just -- I would have to go by what  
7       was said and all that.  
8   Q.   Okay.  
9   A.   I couldn't -- I say I couldn't --  
10   Q.   Do you think a Defendant ought to, at least when  
11       he is accused of such a serious crime as capital  
12       murder, much less some lesser type of crime, do  
13       you think he should be required almost to put  
14       forth some type of evidence in his behalf, call  
15       some witnesses on, or get on the stand himself?  
16   A.   I don't think he ought to be required. I think  
17       it would be to his benefit.  
18   Q.   Do you think it would be a good idea if he tried  
19       to do something like that?  
20   A.   Uh-huh.  
21   Q.   If he doesn't you will have to decide the case  
22       based on what you heard from the witness stand.  
23   A.   Yes.  
24   Q.   Mr. Foreman, I appreciate your letting me visit  
25       with you.

1                   Because of your feeling concerning  
2 probation, I am going to ask the judge if you can  
3 be excused, so that is what I am getting ready to  
4 talk to him about.

5                   MR. MOEN: Judge, pursuant to my  
6 conversation to Mr. Foreman concerning probation  
7 and his feelings with regard to probation  
8 concerning someone committing the offense of  
9 murder, we would respectfully ask that he be  
10 excused.

11                   THE COURT: Mr. Elizondo or Mr.  
12 Hernandez?

13  
14                   EXAMINATION

15  
16                   QUESTIONS BY MR. HERNANDEZ:

17                   Q   Mr. Foreman, let me see if I can clear this up  
18 a little bit.

19                   In a capital murder case, along with  
20 it, comes lesser included offenses.

21                   Say, for example, you don't find someone  
22 guilty of capital murder but find him guilty  
23 of murder, he or she, find him guilty of murder,  
24 whoever it might be, the Defendant.

25                   The punishment for murder is five to

1           ninety-nine years or life.

2       A.    Yes.

3       Q.    Now, in a situation where the specific Defendant,  
4           say, in a hypothetical, has not been convicted of  
5           any crime or had any prior record before, then  
6           the jury can consider what they call probation.  
7           Okay?

8                       MR. MOEN:  The onliest slight objection  
9           I would have, Judge, is that a person can be  
10          convicted of a crime and ask the jury for  
11          probation, and the only thing they would have  
12          to prove is they haven't been convicted of a  
13          felony in this state or any other state of the  
14          United States.  That is a slight misstatement,  
15          to which I object.

16                    THE COURT:  Yes.

17       Q.    (By Mr. Hernandez)  Now, let me give some  
18           examples of some hypotheticals where, in certain  
19           cases, there is a probability -- where probation  
20           might come into play.

21                    Say in the hypothetical of an elderly  
22           couple who have been married for thirty-five years.

23       A.    Yes.

24       Q.    He's got an illness, terminal illness.  He is not  
25           expected to live, and the only way he is living



1 now in the hospital is through life-saving  
2 machinery.

3 The wife is there. He is there. They  
4 talk about how their financial assets that they  
5 have gathered throughout the thirty-five years of  
6 marriage is draining, and that he knows that  
7 slowly but surely he is going to die. The doctors  
8 have told him it is terminal. It is just a matter  
9 of time.

10 They have talked about perhaps it would  
11 be best if she could go ahead and pull the life-  
12 saving plug and let him die and perhaps he is  
13 in pain, and, of course, initially she refuses,  
14 but after many discussions, she finally decides  
15 or both decide on their part that it is best that  
16 way, and perhaps she could have a little left  
17 over in the savings that might be left. She  
18 pulls it and he dies.

19 A member or members of his family find  
20 out about it and there is a piece of property, say,  
21 in the lake area in Conroe that this developer  
22 has been seeking to buy from them for many years  
23 and they have refused. He has refused. All of  
24 a sudden, she wants to erase all the memories,  
25 so she sells all this property.

1                   Somehow she gets indicted by the Grand  
2 Jury for capital murder, murder in that she pulled  
3 the plug for money, in that she received money  
4 from the property. Okay?

5     A. Uh-huh.   

6     Q. The jury hears the case and decides that it is  
7 not an act of murder for money, but it is an act  
8 of murder for love, so they find her not guilty  
9 of capital murder, but they find her guilty of  
10 murder, because actually that is what it was.  
11 I mean, she intentionally took the life of  
12 another human being.

13                   Do you understand now what I am trying  
14 to get at?

15     A. Yes. I understand that.

16     Q. Do you see where in that hypothetical you could  
17 consider, or the jury --

18                   MR. MOEN: Excuse me. I would ask  
19 that he not limit the question as to what he  
20 could do to that specific hypothetical. I think  
21 the juror needs to be qualified on whether he could  
22 make a general application of probation, rather  
23 than on one specific case.

24     Q. (By Mr. Hernandez) Let me explain to you two more  
25 hypotheticals: the hypothetical of Mr. Moen about

1 the battered wife where she couldn't take it,  
2 had done everything she could, found him jobs,  
3 taken him to A.A., and he is still an alcoholic,  
4 where she couldn't take it no more and then one  
5 Saturday night, he comes in and continues to do  
6 the same thing and she decides that enough is  
7 enough, and through the heat of the argument, she  
8 pulls the trigger.

9 Or, to go further on --

10 MR. MOEN: I object to the example  
11 used because if the trigger was pulled in the heat  
12 of the argument, it may very well not be a murder  
13 case, but a lesser offense of murder if she  
14 intentionally and knowingly shot him to death.  
15 I think that should be explained. I object to that  
16 as misleading.

17 THE COURT: Sustained.

18 Q. (By Mr. Hernandez) What I am trying to get at  
19 -- I won't argue with you. From the initial start,  
20 what the judge talked to you about was that we  
21 were here to ask you personal questions, not to  
22 pry into your personal life, but to see what your  
23 feelings are, and I am not here to argue, so don't  
24 think -- I am not here to embarrass or humiliate  
25 you in any way. There are no right or wrong

1           answers.   It is how Mr. Foreman feels.

2                       What I am trying to get at is: Can  
3           you think -- or think of certain situations where  
4           a consideration of probation could come into play  
5           in a murder case?

6                       MR. MOEN: I object to the form of the  
7           question as to whether it could come into play.  
8           I think the proper question is whether or not  
9           he could consider probation for someone who had  
10          been found guilty of the offense of murder, not  
11          whether it could come into play or not.

12                      THE COURT: Sustained as to the form.

13       Q    (By Mr. Hernandez) In other words, there are no  
14           instances whatsoever in which you could consider  
15           probation?

16       A.   Well, as far as I am concerned, there would only  
17           be one, and that was the way you explained it a  
18           while ago, the act of love. I can sympathize with  
19           that kind of situation.

20                      But then again, the way I believe, I  
21           think they should be given every chance to live  
22           without pulling the plug.

23       Q    Let me give one more hypothetical and see how  
24           you feel about this situation. When a husband  
25           comes home and sees his children dead and his

1 wife has been sexually abused, and in her dying  
2 breath, she says, "Joe Blow down the street did  
3 it." He grabs his gun, goes down there and knocks  
4 on the door, and Joe Blow answers with a smile  
5 and the husband says, "Did you do it," and he  
6 says, "Yes. So what?" And, Joe Blow blows him  
7 away.

8 Can you see in that certain situation

9 --

10 A. Can I see me in that certain situation?

11 Q. No. Can you see probation being considered in  
12 that type of situation?

13 MR. MOEN: Excuse me. Once again, I  
14 object to him giving examples of a certain type  
15 of case, but the law is queer -- clear -- it is  
16 also very queer at times -- but the question is  
17 to not limit it like he is probably doing to stake  
18 the juror out, but only to generally apply the  
19 law to someone found guilty of murder.

20 THE COURT: Sustained.

21 Q. (By Mr. Hernandez) You could unequivocally say  
22 you could not consider probation in any murder  
23 case? Couldn't you --

24 A. You put it that way. I can't -- I can't say I  
25 wouldn't consider probation.

1 Q. You would consider the facts of the case with  
2 its merits?

3 A. But it is more than likely I wouldn't consider  
4 probation. It would have to be a real -- I don't  
5 know how to say it. It would have to be a certain  
6 -- very specific situation.

7 Q. But you could consider probation in a proper case  
8 in your own mind?

9 A. Yes. Yes.

10 MR. HERNANDEZ: I think he is qualified,  
11 Judge.

12 THE COURT: Objection overruled.

13 MR. MOEN: May I talk to Mr. Foreman  
14 for just a second on that point, based on his  
15 responses?

16 MR. HERNANDEZ: I don't know if he has  
17 any time, Your Honor.

18 THE COURT: I will let you have him  
19 back when they are finished.

20 MR. MOEN: I can do it now and pass  
21 him back rather than let them go on twenty or  
22 thirty minutes.

23 THE COURT: Go ahead.  
24  
25

1 EXAMINATION

2  
3 QUESTIONS BY MR. MOEN:

4 Q On the type of cases Mr. Hernandez was talking  
5 about, what he didn't tell you is this: Is that  
6 before you could even find the woman guilty on the  
7 case where she had killed her husband at the  
8 hospital, you would have to believe she  
9 intentionally and knowingly did that. If she was  
10 acting out of a feeling of remorse where her  
11 thought processes weren't clear, et cetera, she  
12 might not be accused of murder. She would have  
13 to intentionally and knowingly act, not out of  
14 a sense of remorse or sorrow where she was acting  
15 as a result of impulse from some sudden passion,  
16 that is not murder.

17 She would have to intentionally and  
18 knowingly do it with a clear mind.

19 Does that even strike you as being the  
20 type of case where you wouldn't be able to even  
21 find her guilty?

22 MR. ELIZONDO: I object to the  
23 prosecutor staking this juror out as to a certain  
24 set of facts.

25 THE COURT: I would have to agree with

1       you.

2       Q     (By Mr. Moen)   The examples he was giving you  
3       were not examples of murder.   That is what I wanted  
4       to point out.

5               The situation where he talked about  
6       the old woman, it is not what you would do, but  
7       murder is to intentionally and knowingly take  
8       another's life, not to act out of a second of  
9       passion or remorse such as the examples Mr.  
10      Hernandez used about the woman who finds herself  
11      with a husband in the hospital, or the man who  
12      comes home and finds himself with the wife and  
13      daughter.

14             A person is only guilty of murder if  
15      they intentionally and knowingly take another's  
16      life without justification.   That is our law.  
17      If there was justification for it, such as self-  
18      defense --

19             MR. HERNANDEZ:   Objection, Your Honor.  
20      That is not murder, Your Honor?

21             MR. MOEN:   Self-defense is not murder.

22      Q     (By Mr. Moen)   Do you follow me on that?

23      A     I understand that.

24      Q     So on the examples he is giving you, basically,  
25      no one is trying to mislead you, but they can



1           be misleading.

2                     If someone acts out of passion, with  
3           adequate cause, such as the man who goes down to  
4           the house immediately, grabs a pistol, there is  
5           no one on the face of the earth -- that is sudden  
6           passion with an adequate cause, to go down that  
7           way, and, you see, that is not murder. Murder  
8           is only where you intentionally and knowingly  
9           take another's life without justification.

10                    Those are the types of cases I was  
11           basically asking you about. If you were a juror  
12           on a case where you had found someone guilty of  
13           intentionally and knowingly taking another's  
14           life and you believed in your mind there was no  
15           justification for it, in that type of case, would  
16           you ever be able to consider probation, or do  
17           you feel like a person who takes another person's  
18           life and there is no justification for it should  
19           spend at least some time in the penitentiary and  
20           probation should not be a form of punishment for  
21           that type of offense?

22       A.   Well, if there is no justification, then -- you  
23           know, you've got me trying to answer two questions  
24           here.

25       Q.   Okay.

1 A. Okay. Under certain situations, I could see it,  
2 but if there is no justification, I don't think  
3 it should even be brought up.

4 Q. Okay. That is what I am getting at. Our law  
5 is exactly that.

6 For a person to be guilty of murder,  
7 he has to intentionally and knowingly take  
8 another person's life under facts and circumstances  
9 that do not justify taking a life. It is for a  
10 person to participate in a homicide without  
11 justification. For a person to act in self-  
12 defense, he is not guilty of murder.

13 A. We go back to --

14 Q. For a person to take another person's life from  
15 sudden passion arising from adequate cause, that  
16 is not murder. That is voluntary manslaughter.  
17 That is another crime altogether, a form of  
18 homicide, but it is not murder for a man to come  
19 home and find his children killed, and his wife  
20 says, "Joe Blow down the street did it," and he  
21 runs down and shoots the man in the face. That  
22 is voluntary manslaughter, not murder.

23 Murder is where a person intentionally  
24 or knowingly ends another human's life with facts  
25 and circumstances that don't justify the taking of

1           that life. That is murder.

2                       Try, if you can, to separate those  
3 voluntary manslaughter cases from the offense of  
4 murder, if you can.

5   A.   I can do that.

6   Q.   And search yourself, your mind and heart, and can  
7 you think of any circumstances in your mind, any  
8 fact situations or circumstances in your mind  
9 where you would ever be able to consider probation  
10 for someone who had committed the offense of  
11 murder intentionally and knowingly, taking  
12 another's life without justification, in that  
13 type of case, murder case?

14   A.   Like I said, if there is no justification, I  
15 couldn't see it.

16   Q.   Okay. I take it you could, from your early  
17 responses, where it was a case of voluntary  
18 manslaughter, where there was some type of  
19 justification such as the wife and husband at  
20 the hospital and she is acting out of feeling of  
21 remorse or overwhelmed by the situation the  
22 husband finds himself in, et cetera or the man  
23 who comes home and finds his wife and daughter,  
24 et cetera and grabs the pistol and rushes to the  
25 man's house and the man laughs in his face, I

1 take it in those types of cases where sudden  
2 passion was taken into consideration by the jury,  
3 it had arisen in a moment in those types of  
4 voluntary manslaughter cases, you could consider  
5 probation in those types of cases?

6 A. Yes, in something like that. I would have to say  
7 yes under very specific situations like that.

8 Q. But as far as the crime of murder is concerned --  
9 and I wanted to be absolutely clear on this point  
10 -- but as far as the crime of murder is concerned  
11 where someone intentionally or knowingly acts  
12 and it is not as a result of passion or not as a  
13 result of some adequate cause or self-defense,  
14 in other words, there is no justification as our  
15 law requires, where someone intentionally or  
16 knowingly takes a person's life under those  
17 circumstances, are you telling me you can't at  
18 least at this time think of circumstances where  
19 you could consider giving the person probation?

20 A. Not at this time, not without justification I  
21 couldn't.

22 Q. You would always require, rightfully so, always  
23 require justification for the taking of another's  
24 life before you could consider probation?

25 A. At least. At least.

1 Q What type of justification would you like to  
2 have?

3 Let me try to get a little more  
4 specific. What type of thing would you like to  
5 hear?

6 A I don't know. Like I say, some man sitting there  
7 beating -- I wouldn't say that either -- some man  
8 sitting there beating me to death and all I've got  
9 is a club. To me, that is justification.

10 Q You act to protect yourself?

11 A Yes. I can't put myself in that situation. I  
12 can't even imagine myself in that situation.

13 Q In that type of case, the law would say, "Where  
14 Mr. Foreman were being attacked by someone, Mr.  
15 Foreman was trying to act to save his own life,  
16 either from the act or force against him or from  
17 the man's fear of force or danger, Mr. Foreman  
18 would have the right to respond and take a  
19 person's life," and that is not murder. That is  
20 self-defense. That is what I am getting at.

21 The only type of situations we are  
22 talking about is where a person intentionally and  
23 knowingly takes another human's life and there are  
24 no facts or situations that excuse it as being  
25 self-defense. In other words, there is no

1 justification of someone guilty of murder, and  
2 that is how our law defines murder.

3 Could you ever consider probation for  
4 someone who had done something like that?

5 A. No, not -- like I said, not without justification.

6 Q. Now, let me explain to you something about the  
7 case earlier that Mr. Hernandez was talking about.

8 Imagine both of those fact situations,  
9 but let's put them in the framework of murder  
10 rather than voluntary manslaughter.

11 Take the situation where a man comes  
12 home and finds his wife dying and she tells him,  
13 "Joe Blow did it," and he thinks -- he doesn't  
14 rush with passion, but let's say he sits around  
15 and simmers down. He is mad like anyone would be  
16 and upset like anyone would be, but he calms down,  
17 and acting with a cool manner, he thinks, "My wife  
18 has died. My daughter is dead. What evidence is  
19 there to convict Joe Blow? Of course, my wife in  
20 her dying breath told me, but what, if we get down  
21 to the courthouse and they don't believe me and  
22 he gets off scot-free for killing my wife and  
23 daughter," and he takes the law in his own hands  
24 and he goes to the door and when Joe Blow gets  
25 to the door, he intentionally or knowingly fires

1 the gun and kills Joe Blow.

2 A Doesn't that still put him back into the crime  
3 of passion?

4 Q The difference I have drawn for you between the  
5 example Mr. Hernandez gave and I gave is he has  
6 calmed down now. He is no longer acting out of  
7 passion as a result of what happened to his wife  
8 or daughter, or let's say it is during the course  
9 of the trial even and he doesn't like the way  
10 the trial is going, or let's say he reports it  
11 to the police and a policeman goes by and he starts  
12 thinking about what might happen at the courthouse,  
13 he starts thinking about what might happen at  
14 the trial, and he says, "It will be my word against  
15 Joe Blow's. What might happen then? What if this  
16 man gets off scot-free?" Enough time has passed,  
17 and he is no longer acting under passion. Time  
18 has passed, and he has cooled off and thought about  
19 it and he waits and goes to Joe Blow's house, and  
20 when Joe Blow gets home, when he gets back from  
21 work, he walks up and blows his brains out or  
22 shoots and kills him. He has intentionally and  
23 knowingly taken Joe Blow's life.

24 The law doesn't say you can kill  
25 someone because they kill a member of your family.

1 Certainly if you walked in and saw Joe Blow in  
2 the act, you would have the right, certainly if  
3 it was done to protect any member of your family,  
4 but I am talking about time's past and Joe Blow's  
5 cooled off -- or rather, the man's cooled off.  
6 Certainly he has had a sorrow from his wife's  
7 death, but he has made a rational decision, that  
8 rather than to risk a trial, he is going to take  
9 matters in his own hands and kill Joe Blow. That  
10 is to take a person's life into his own hands  
11 without justification.

12 A. You put it that way and it goes back to  
13 justification, without justification.

14 Q. That is right.

15 A. That is no excuse.

16 Q. That is exactly right. In the eyes of the law,  
17 there is no excuse for that.

18 A. I am looking at it two ways, and it is hard to  
19 answer.

20 Q. You see, one way would be voluntary manslaughter  
21 and not murder.

22 The way I have described it to you is  
23 actually an act of murder. You see, they are  
24 both homicides. Don't get me wrong. See, we  
25 have different forms of homicides in our state.



1                   For a man to take a person's life  
2 under a sudden passion arising from adequate  
3 cause, that is voluntary manslaughter, not murder,  
4 and I would suggest, not to insult your  
5 intelligence, but I think you realize what would  
6 happen if you went home today and found Ms. Foreman  
7 and your threeyear-old daughter dead with your  
8 wife in her dying breath saying your daughter's  
9 been killed and sexually molested, and in her  
10 dying breath, your wife says, "Brown two houses  
11 down the street did it. Darling, I love you,"  
12 and she dies, and you pick up a pistol and go  
13 down and shoot him in the face, what do you think?  
14 Don't you think a person would be acting from  
15 sudden passion arising from a cause?

16 A. I think I would do it.

17 Q. Hey, I would be down there with you. I would  
18 run to the house, wouldn't walk.

19                   What I am talking about is a situation  
20 where time passes and he reports it to the police.  
21 He cools down and three, four days, or a week  
22 goes by and he decides rather than risk that  
23 jury trial or rather than come down to the  
24 situation where it is my word against his and  
25 my dying wife's word against his, I am not going

1 to run the risk that he will be found not guilty  
2 by a jury down there if someone doesn't believe  
3 me. I will take matters in my own hands. I'll  
4 wait for him to get home from work, and when he  
5 arrives, I will take matters in my own hands and  
6 kill him.

7 A. I can't see a man coming home and seeing his  
8 wife, you know, being -- knowing who done it --  
9 I can't see him not reporting it to the police.

10 Q. He might not ever do it as a matter of fact, but  
11 I am speaking in hypothetical terms.

12 A. I understand that.

13 Q. I am trying to separate it from that voluntary  
14 manslaughter situation where he comes home --

15 A. I can understand that, but it is still hard for  
16 me to see the situation.

17 Q. Sure, it is because we have given you the most  
18 hypothetical example we can think of.

19 Do you think that man ought to be found  
20 guilty or not guilty for having done that? In  
21 your mind, does that even strike you as being a  
22 murder case?

23 A. Well, I am sure it is -- you know, I would have to  
24 see it as a criminal offense, but --

25 Q. Not necessarily you wouldn't have to. I am not

1           trying to talk you into it.

2       A.    I am not saying you are.

3       Q.    I am trying to see how that grabs you.

4       A.    After, you know, after seeing something like  
5           that, it wouldn't even phase me as far as that  
6           goes, you know. I mean, I wouldn't -- I wouldn't  
7           have no remorse over it. The man, if I was told  
8           a man killed my wife and all that.

9       Q.    If you were a juror on a case like that. Take  
10           it out of the personal situation.

11                    If you were a juror. Let's not ask  
12           what you would do in that case. What I am trying  
13           to do is give you specific examples of cases,  
14           specific examples of murder cases, to get you to  
15           thinking as to whether or not -- that is what I  
16           am doing, trying to get you to think as to whether  
17           or not in your mind you could ever consider the  
18           question of probation, in fact, consider giving  
19           someone probation who had, in fact, intentionally  
20           or knowingly taken another human being's life  
21           without justification.

22                    Can you think of any facts or do you  
23           feel like where a person has ended another  
24           human being's life intentionally and knowingly  
25           and there is no justification for it, that

1 person should go to the penitentiary and  
2 probation should not be a question?

3 A. I still can't see it without justification.

4 Q. Okay. Well, I am not trying to confuse you, and  
5 I hope I have not. You are entitled to the way  
6 you feel.

7 A. Well --

8 Q. That is why we take so much time to give you  
9 different examples, to talk to you about it. So  
10 no one is trying to trick you. We try to give  
11 you the most farfetched hypotheticals we can  
12 think of. You are entitled to the way you feel.  
13 We are not trying to change your mind.

14 Is there any set of facts where you would  
15 feel different, or is that the way you would feel  
16 period if a man had taken or a woman had taken  
17 another's life intentionally without justification?  
18 Is that the way you would feel?

19 A. Not without justification.

20 Q. Okay. Thank you, Mr. Foreman.

21 Well, since you are clear in your mind,  
22 I am going to respectfully ask the judge again  
23 to excuse you because of your feelings on  
24 probation, and that is nothing to be ashamed of.  
25 You are entitled to the way you feel. That is

1           why we spent so much time, and I am sure Mr.  
2           Hernandez and Mr. Elizondo are going to ask you  
3           questions, maybe give you the mercy killing again,  
4           but listen to what they say and answer as best  
5           you can.

6                       I will pass the juror.

7  
8                       EXAMINATION

9  
10           QUESTIONS BY MR. ELIZONDO:

11   Q     Mr. Foreman, how are you doing?

12   A     Pretty good.

13   Q     I am sure you are pretty well confused now.

14   A     Working on it.

15   Q     What Mr. Moen is asking is can you consider, not  
16           necessarily give, but consider probation in the  
17           proper case in your own mind, bearing in mind  
18           all these examples?

19                   Now, if you have justification, you  
20           don't have a murder case. Self-defense would  
21           justify a murder case.

22                   MR. MOEN: I object to "self-defense  
23           justifying a murder case." If it occurs in self-  
24           defense, it is not a murder case.

25                   THE COURT: If the juror believes it is

1 self-defense.

2 Q (By Mr. Elizondo) That is what I am saying: If  
3 the juror believed the man or Defendant acted  
4 in self-defense, the jurors would have to follow  
5 their oath and say not guilty.

6 Now, these examples we have been  
7 giving you, we are just giving these examples  
8 so we can stimulate your thought processes and  
9 see if you can consider, not necessarily give,  
10 but just consider probation in the proper case  
11 in your own mind.

12 There is an example about the elderly  
13 couple where the wife pulls the plug and kills  
14 her husband of thirty-five years.

15 Under our law, if she pulls that plug,  
16 she is guilty or if a juror believed that she did  
17 it intentionally and knowingly, pulled that plug  
18 knowingly and intentionally, and that by pulling  
19 that plug she had caused the death of her beloved  
20 husband, under our law, that is murder,  
21 intentionally and knowingly causing the death of  
22 somebody.

23 Now, in that hypothetical situation,  
24 you can see where a juror might consider probation?

25 A. Uh-huh.

1 MR. MOEN: Excuse me, but I object  
2 to staking him out or attempting to stake him  
3 out or saying what a juror might do in a  
4 hypothetical.

5 He can ask the juror as to whether or  
6 not -- test his general qualifications, but not  
7 stake him out as to a specific set of facts.

8 THE COURT: As to that objection, I  
9 will overrule it.

10 Q (By Mr. Elizondo) Or in the example Mr. Moen  
11 gave you where this murderer goes in there and  
12 sexually molests his two daughters and kills them  
13 and beats up his wife and she lives and in her  
14 dying breath to her husband while he is seeing  
15 her she says, "Joe Blow down the street did it,"  
16 and he calls the police and says, "Joe Blow did  
17 it. Go down and arrest him," and they arrest  
18 him and he starts thinking about it and he says,  
19 "This time he might not be found guilty. I am  
20 going to take the law in my hands. I am going to  
21 make sure this man gets what he deserves, and I  
22 am going to go and kill him," and he does, and  
23 kills him.

24 In that hypothetical situation, you can  
25 see where a juror might consider probation in that

1 case?

2 MR. MOEN: Same objection. He is asking  
3 a juror to make -- asking him what he would do in  
4 a specific set of facts, or what a juror might  
5 do.

6 THE COURT: I did not understand him  
7 to ask the question in the way you object to it.

8 I overrule it.

9 Q (By Mr. Elizondo) There are many, many kinds of  
10 fact situations, and that is why murder has got  
11 a wide range of punishment of five to ninety-nine  
12 years or life.

13 The legislature says there are many  
14 ways a murder can be committed and a jury can  
15 consider -- not give it, but consider probation if  
16 it is a proper case in their own mind.

17 Now, I hope that I have given you some  
18 examples that might stimulate your thought  
19 process, and I am going to ask you this: Bearing  
20 all that in mind, can you, in the proper case in  
21 your mind, consider, just consider probation in  
22 a murder case?

23 A. In a situation like y'all are giving me, I can.

24 Q. So you can consider probation? I am not saying  
25 give, but just consider it, even for a minute and



1 say, "I am not necessarily going to do it, but  
2 just consider it"? Do you see what I am getting  
3 at?

4 A. Yes, I can see.

5 Q. So you can consider probation in the proper case  
6 in your own mind?

7 A. Yes.

8 Q. Okay.

9 A. You make it real easy.

10 Q. That is all we wanted. All I want to know is how  
11 you honestly feel about certain things, and you  
12 say you can consider it?

13 A. Under situations like I heard just now.

14 Q. I am not saying give, but just consider. Okay?

15 A. Yes.

16 MR. ELIZONDO: We submit that he is  
17 qualified.

18 THE COURT: The objection is overruled.

19 MR. MOEN: What objection, Judge? I  
20 thought I had a challenge, not an objection.

21 THE COURT: Yes. Challenge.

22 MR. ELIZONDO: Did you pass him?

23 MR. MOEN: Twenty minutes ago.

24 MR. ELIZONDO: It has been a long  
25 day, Mr. Foreman.

1 Q (By Mr. Elizondo) This is a capital murder  
2 case, and I am sure you know, as in all cases  
3 in Texas, it is divided into two parts. First  
4 of all is the guilt-or-innocence phase and then  
5 the punishment phase. They are two separate and  
6 distinct parts of a criminal trial.

7 In the first part, the jury's sole  
8 function is to determine if the man is guilty of  
9 the offense charged.

10 I can guarantee you one thing: As  
11 actively as they are seeking the death penalty,  
12 we will be actively seeking a not guilty in the  
13 guilt-or-innocence stage. It will be your job,  
14 as one of the prospective jurors, to determine  
15 if the State has met its burden of proof, its  
16 burden of proving its case to you beyond a  
17 reasonable doubt.

18 They have to prove to you, first of  
19 all, that on a particular day in Harris County,  
20 Texas, this Defendant shot and killed a police  
21 officer in the lawful discharge of an official  
22 duty knowing at the time he was a police officer.  
23 They must prove that to you beyond a reasonable  
24 doubt.

25 The term reasonable doubt will not be

1 defined for you. The judge will not give you a  
2 definition. I can't give you one. He can't give  
3 you one, because there is no legal definition  
4 of the term reasonable doubt.

5 About all I can do is tell you that  
6 across the street in the civil courthouse at 301  
7 Fannin where they try lawsuits for millions of  
8 dollars over money, over property damages, the  
9 burden of proof over there is proof by a  
10 preponderance of the evidence, the greater weight  
11 of the credible evidence.

12 Over here in the criminal courthouse,  
13 the legislature said before you can find anyone  
14 guilty of capital murder or any kind of crime,  
15 the State has to have a higher burden of proof  
16 than on the civil side, and that will be proof  
17 beyond a reasonable doubt, and rightfully so;  
18 that before you can find anyone guilty of this  
19 type of offense and before you can kill him, you'd  
20 better make sure we have the right man.

21 Do you agree with that or disagree with  
22 that?

23 A. I agree with that.

24 Q. Do you think that the burden of proof should be  
25 heavier in a civil case where they try lawsuits

1       for money or damages?

2       A    I really couldn't tell you, because I don't know  
3       that much about civil law.

4       Q    In a capital murder case, the way the State  
5       normally goes and proceeds on a criminal case in  
6       Texas is, first of all, they will read the  
7       indictment to the jury. The Defendant will plead  
8       not guilty. The witnesses will then be asked to  
9       come forward and come by here and take the same  
10      stand where you are sitting right now, and they  
11      will give their version of the facts.

12               After the State is through presenting  
13      witnesses, they will then rest their case, which  
14      means, "That is all we have and we rest our case,  
15      Your Honor."

16              The Defendant can, if he chooses, he  
17      can also rest his case right behind the State.  
18      He doesn't have to, but he can.

19              I suggest in this case, the Defendant  
20      probably will testify and he will probably call  
21      witnesses and testify, and at that time, at that  
22      point in time, I can almost guarantee you there  
23      will be two diametrically different stories,  
24      and it will be your job as a juror to resolve the  
25      conflict of testimony, and I am sure you will

1 do that.

2 A. I am sure I can, if I can get -- or pass before  
3 y'all. I am sure I can.

4 Q. We are not laughing at you. We are tired.

5 Anyway, in a capital murder case, if the  
6 Defendant is found guilty -- and I am talking of  
7 this in an abundance of caution, we go to the  
8 punishment phase where you can answer those two  
9 questions either yes or no. At that point in  
10 time, then there will only be one of two possible  
11 punishments, life or death, and, of course, life  
12 or death is determined by how you answer those  
13 two questions up there.

14 If you believe beyond a reasonable doubt  
15 that the conduct of the Defendant that caused the  
16 death of the deceased was committed deliberately  
17 and with the reasonable expectation that the  
18 death of the deceased or another would result,  
19 if you believe that beyond a reasonable doubt,  
20 then your answer should be yes. If you don't  
21 believe it beyond a reasonable doubt, then your  
22 answer should be no.

23 Do you agree with that?

24 A. Yes.

25 Q. The second question is if you believe beyond a

1 reasonable doubt whether there is a probability  
2 that the Defendant would commit criminal acts of  
3 violence that would constitute a continuing threat  
4 to society. Then if you believe that beyond a  
5 reasonable doubt, that the answer to that should  
6 be yes, then it will be your duty to say yes.

7 If you don't believe that beyond a  
8 reasonable doubt, then you've got to follow your  
9 oath and say no.

10 You can do that, correct?

11 A. Yes.

12 Q. The word probability is underlined there in  
13 Question No. 2, and it is more or less asking  
14 you to foretell or forecast the future.

15 Probability to some people means  
16 chances are, more likely than not.

17 Do you agree with that definition?

18 A. Uh-huh.

19 Q. Do you think that a person can change his mode  
20 of behavior, mode of operations, mode of conduct?  
21 Anything is possible, I guess.

22 A. I am sure it could be changed, yes, but is it --  
23 you know, without that -- you know, like I said,  
24 without the reasonable doubt, I don't see where  
25 I would have any problem with the question.

1 Q Let me backtrack a little bit.

2 During the guilt-or-innocence stage,  
3 if the Defendant testifies, he can be impeached  
4 or discredited with the proof of any felony  
5 convictions within the last ten years, and you  
6 can use that to judge his credibility. I am  
7 sure you could. The law says you can.

8 Let me ask you a few questions,  
9 general questions about your job.

10 What do you do exactly for Merichem  
11 Chemical Company, I guess?

12 A. I am an operator. I make chemicals and distill  
13 them and all that.

14 Q. How long have you been doing that?

15 A. Going on four years.

16 Q. And before that, you worked for O & M Manufacturing  
17 Company?

18 A. Yes.

19 Q. And what did they do?

20 A. It's a heat transfer plant. We made radiators  
21 and stuff like that for offshore rigs and diesels.

22 Q. Do you have any brothers and sisters?

23 A. I've got four; three brothers and one sister.

24 Q. And what do your brothers do for a living?

25 A. One of them is a painter. One of them is a cook.

1 We don't go into the other one, but my sister  
2 is a housewife.

3 Q Hold on for a second. Okay?

4 Let me ask you one question: If you  
5 don't want to talk about it -- I don't want to  
6 pry, but is he a police officer?

7 A. No. No, he just has a hard time holding a job.  
8 Let's put it that way.

9 Q Okay. I just have a couple of more questions,  
10 and I want to ask you: Would you demand or want  
11 the State to prove its case to you beyond a  
12 reasonable doubt --

13 A. Uh-huh.

14 Q -- before you could find this man guilty?

15 A. They would have to prove it to me beyond a  
16 reasonable doubt, definitely.

17 Q You wouldn't expect us to put on evidence,  
18 because we don't have to. They have to put on  
19 the evidence. The burden is on them. They  
20 brought the charges, and they've got to prove  
21 them.

22 A. Uh-huh.

23 Q That is what the law says.

24 A. Uh-huh.

25 Q That is all I have, Mr. Foreman.



1                   Thank you for talking to us. I look  
2 forward to seeing you on that jury panel.

3                   MR. BAX: May we have a moment, Your  
4 Honor?

5                   (Discussion between attorneys.)

6                   MR. MOEN: We will excuse Mr. Foreman.

7                   THE COURT: All right. Mr. Foreman,  
8 you will be excused. You will not be required  
9 to serve on the jury.

10                  Thank you very much. We appreciate  
11 your time.

12                  You can have a cigarette anyway.

13                  MR. ELIZONDO: Thank you, Mr. Foreman.

14  
15  
16  
17                  JAMES ANDREW CHOPP,  
18 was called as a prospective juror and responded to  
19 questions propounded as follows:

20  
21                               EXAMINATION

22  
23                   QUESTIONS BY MR. BAX:

24                   THE COURT: All right. You may  
25 proceed.

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

2       Q     (By Mr. Bax) This is Mr. -- is it Chopp?

3       A     Chopp.

4       Q     Okay. I am sorry you had to wait around as long  
5             as you did. It is going to be longer, I guess.

6                   As you can tell, this is a long, drawn-  
7             out deal that we go through. I want to put you at  
8             ease first and tell you there are no right or  
9             wrong answers to anything we are going to talk  
10            about today.

11                   We do this individually so we can get  
12            to know you a little better and so you will feel  
13            more comfortable in telling us things.

14                   Monday mornings, we usually pick a jury,  
15            and Monday afternoon, after everybody goes to  
16            lunch, we start taking testimony.

17                   I will tell you we started picking this  
18            jury on August 30th, and it has taken us almost  
19            the entire month of September. We have interviewed  
20            ninety people now, and out of those ninety people,  
21            have now eleven jurors. We need one more.

22                   You can see it takes a while, and the  
23            reason we do it individually and the reason it  
24            takes as long as it does is because of the nature  
25            of this case.

1           As the judge told you earlier this  
2 morning, should this Defendant be found guilty  
3 of capital murder, of killing a police officer,  
4 he will receive one of only two possible  
5 punishments. It will either be life imprisonment  
6 or it will be the death penalty.

7           In our community, no one in America is  
8 ever forced to sit on a jury where that jury  
9 service would do harm or violence to their  
10 beliefs. Okay?

11           We have had several different types  
12 of people that have come through that we have  
13 talked to, and like we said earlier, we are not  
14 going to try to change your opinion as to how it  
15 is. Okay?

16           You have an absolute right to feel however  
17 you feel, and neither Mr. Elizondo or the judge  
18 or myself will argue with you or try to change  
19 your opinion. That is not what we are here for.

20           We are here to see if Mr. Chopp can be  
21 a juror in this case, without doing violence to  
22 his beliefs. We don't want to put you in that  
23 position, and the only way you can become a juror  
24 is by your answers to the questions, and we don't  
25 put you on the jury by your answers; you put

1           yourself on the jury.

2                     If you can do it, fine, and if you  
3           can't fine.

4                     A lot of people say, "Gosh, I am a  
5           citizen and ought to be able to go along with  
6           what the laws are," but a lot of people say, "Wait  
7           a minute. You are talking about taking a person's  
8           life. That is not my game. I can't do that. I  
9           can see where someone else might be able to, but  
10          personally, because of my religious background,  
11          I couldn't do it, couldn't sit on that type of  
12          jury."

13                    Okay. Let me give you a little back-  
14          ground. Some people say, "I could do it. I  
15          could do it and return that verdict." Other  
16          people say, "No, that is God's decision who  
17          should die. I, as an individual, am equal to  
18          that person on trial. I personally could never  
19          do that."

20                    Can you tell us how you feel? Can you  
21          tell us if you feel you could ever personally  
22          participate in a verdict that could result in the  
23          death of an individual?

24          A. I don't believe I could, because I don't believe  
25          one death should be the cause of another one, is

1 the way I feel, and it is just that I don't  
2 believe in taking a life for another life.

3 Q. Is that something pretty much the way you have  
4 felt --

5 A. That is just the way I feel about it. I don't  
6 feel I could take someone else's life myself,  
7 regardless of how angry I got, and if I did  
8 commit a murder or something of the sort, I  
9 wouldn't want, you know -- I would want them to  
10 be as lenient as possible, just punish me any  
11 other way but by death. That is the way I would  
12 look at it.

13 Q. That is the way I would feel, too. That is the  
14 way a lot of people have felt who have come  
15 through here. They have told us in the same way  
16 you have.

17 The death penalty is irreversible. You  
18 give somebody the death penalty, and you can't  
19 reverse that down the line somewhere.

20 If a guy gets fifty years in the  
21 penitentiary, someday he could be let out. Okay?

22 A. That wouldn't bring him back in any manner and  
23 wouldn't help too much as far as I could see.

24 Q. And probably wouldn't stop anybody else from  
25 doing it?

1 A. No, it wouldn't.

2 Q. Is it fair to say you are opposed to the death  
3 penalty?

4 A. I don't agree with it. Not through this --

5 Q. That is fine, and you can see where it would be  
6 wrong to try and force someone to sit on a case  
7 asking for the death penalty if that person says  
8 I couldn't do it.

9 A. Right.

10 Q. Can you think of any case, any fact situation  
11 where you could be a party to the death penalty,  
12 or would you be opposed to the death penalty in  
13 all cases?

14 A. Where it's a little kid, you know, or something  
15 like this.

16 If we are allowed to make an example,  
17 like the kid, his head was wedged in a commode  
18 over there in Kountze that time. I could kind  
19 of find malice within my heart and say yes, burn  
20 him or shoot him.

21 Q. When you read about somebody, at that very moment,  
22 you can get very angry and say, "I can feel fine  
23 about taking that person's life," but how would  
24 you feel a month later or a year later when the  
25 tempers have cooled down? Could Mr. Chopp sit

1 on that jury?

2 A. After I found out all the facts about it, if I  
3 had looked into it, and then, you know, down  
4 within, just thought about it, and say, you know,  
5 well, I wonder if this could have been prevented  
6 or was it done through some kind of defense or  
7 something, you know -- but a kid, like I say,  
8 in that example I gave, a little kid couldn't  
9 help himself or do anything about it.

10 But in this case, he could help himself.  
11 There is no defense.

12 Q. You think you would still prefer in that case,  
13 still go for a life sentence rather than the  
14 death penalty, wouldn't you?

15 A. I believe so.

16 Q. Let me go over the questions the judge will ask  
17 you. I have to ask you these questions. Okay?

18 What I think you are telling me is  
19 because of your beliefs, the way you feel, you  
20 could never be a juror in that type of case?

21 A. I wouldn't like to.

22 Q. And you could never return a verdict that would  
23 cause -- call for the death penalty, but would  
24 always return a verdict for a life sentence?

25 A. Like I say, if I were to sit on a case and get

1 the details, but before I go home, don't have  
2 it in my mind for the death penalty, but if I sat  
3 on a case and found out all the facts about it,  
4 I could change my mind maybe about it.

5 Q See, I am not here -- I am not here trying to  
6 change your mind about it.

7 A I still don't believe in it.

8 Q That is what I am trying to find out. A lot  
9 of people say, "I don't believe in it." Okay?

10 A Uh-huh.

11 Q "And I don't believe in it strong enough, and  
12 I don't care what the facts are, I am not going  
13 to try to be a party to taking someone's life.  
14 I can't do it. I am a strong person, but this  
15 is the way I believe. This is the way I was  
16 brought up, and I don't care if I hear the facts  
17 or not, I am not going to go for the death  
18 penalty. I can go for a life sentence. I can  
19 see a person needs to be punished and needs to  
20 be kept away from us as long as possible, but my  
21 religion tells us I don't have that right to take  
22 another person's life. You may do it in your  
23 courtrooms, but I can't do it."

24 I thought that was what you were  
25 telling me when you started off that Mr. Chopp



1 was of the opinion that, sure, maybe the death  
2 penalty was proper in some cases, but you  
3 personally could not return that verdict?

4 A. No.

5 Q. Is that basically what you were telling us?

6 A. Right.

7 Q. Let me take you through the steps and see if you  
8 could serve on a jury.

9 I think what you are telling us, in  
10 any other case other than the death penalty, you  
11 could be a fine juror and make a decision on the  
12 evidence?

13 A. After I listened to all the evidence, you know,  
14 of the case, I am pretty sure.

15 Q. Let's say you heard some evidence in this case,  
16 and I can't talk to you about the facts of this  
17 case. Okay?

18 We are going to talk make-believe.  
19 I want to make up some facts. Okay, and assume  
20 you heard the evidence, and after hearing all  
21 the evidence, you said to yourself, "The man is  
22 guilty. It is proven to me that he committed  
23 a capital murder." Okay? But, you know if you  
24 found him guilty of capital murder, if you  
25 returned that verdict, that the judge either is

1 going to sentence him to life or death. Okay?

2 Knowing that the judge is going to  
3 sentence him to either life or death, could you  
4 find a person guilty of capital murder? Could  
5 you sit in judgment of him, or would your feelings  
6 prevent you from participating in a verdict of  
7 guilty because you would know by that verdict  
8 he would receive either life or death?

9 A. Well, from the beginning, I would have to know  
10 if he had been tried for that penalty before I  
11 could really give a verdict.

12 Like I say, I would go for any other  
13 type of punishment, life imprisonment or whatever,  
14 but not the death penalty until I find out really  
15 what the whole situation is, you know, the details  
16 on it.

17 Q. Let me tell you something right now. I am going  
18 to try to be as honest as I can. All right?  
19 We are out here talking right now about make-  
20 believe and hypothetical cases, and what about  
21 this and what about that. Okay?

22 But I will tell you straightforward.  
23 You see him sitting right there, and if the jury  
24 that is finally selected on this case finds him  
25 guilty of killing this police officer, Mr. Moen

1 and I will be actively seeking the death penalty.  
2 It is not going to be make-believe, not going to be  
3 "what if." We will be before this jury, and if  
4 you are on it, I will be asking you to go against  
5 your beliefs on the death penalty and return a  
6 verdict that will call for the death penalty.

7 I don't want to put you in a position  
8 of being on the jury where later down the line,  
9 Mr. Chopp will say, "I know what the facts are  
10 and I believe the facts will prove to me he  
11 should receive the death penalty, but I could not  
12 do it."

13 You are the only one who could put  
14 yourself in that switch.

15 A. Like I say, if I get all the facts, but by just  
16 going on, I couldn't say, not knowing the facts  
17 that caused it and all that. I would have to say  
18 no to it.

19 If I am chosen to sit in on it, I would  
20 have to go along with whatever facts I gather in  
21 the case.

22 Q. Can you ever imagine yourself voting for the  
23 death penalty in any case?

24 MR. ELIZONDO: I object. He has  
25 already answered that question, if he knows the

1 facts.

2 THE COURT: I am not satisfied in my  
3 own mind he has.

4 Ask him the question.

5 Q. (By Mr. Bax) Can you imagine voting for the death  
6 penalty with eleven other jurors?

7 A. I probably could where there was someone close  
8 to me, a member of the family or someone.

9 Q. Of course, you couldn't be a juror, and the law  
10 wouldn't put you in that position.

11 Of course, anyone who would say, "The  
12 only time I could agree with the death penalty  
13 is if someone killed my child, my mother, my  
14 brother, or close family member." In that case,  
15 it wouldn't be fair for the person on trial to  
16 have a family member of the deceased on the  
17 jury. Okay?

18 A. Okay.

19 Q. Is that the only case you can think of, where it  
20 was a personal case for you, to return the death  
21 verdict?

22 A. What I feel, if I knew it wouldn't bring them  
23 back, I would like God to punish him. I would  
24 be that way.

25 Q. So you would go for the life sentence?

1 A. That is right, or whatever happened there, if  
2 someone else takes his life while he is in prison  
3 or something, that would be fine with me, but  
4 as far as me saying take it, it is not anything  
5 to me.

6 Q. You see these two questions here? These two  
7 questions? The first one is talking about the  
8 conduct of the Defendant on trial, and the second  
9 one is talking about committing criminal acts of  
10 violence in the future.

11 Those two questions, the answers to  
12 them, decide whether a man lives or dies. Okay?

13 If you find a person guilty of capital  
14 murder and you and eleven other jurors say yes  
15 to No. 1 and you say yes to No. 2, okay, you  
16 know what will happen. The judge automatically  
17 assesses the death penalty.

18 You know, the judge could be up there  
19 saying, "I don't think this man should die. I  
20 don't think he should," but he can't change what  
21 the jury will do with those two questions. If  
22 they answer yes, yes, he is going to die, and  
23 the reason he is going to die is because twelve  
24 people answered those questions yes.

25 A lot of people come before us and say,

1 "I can deal with that. If that is what the  
2 evidence called for, I can do it."

3 Other people say, "You are telling us  
4 I can take another's life, and I would  
5 automatically answer no which means a life  
6 sentence."

7 If the jury answers 1 or 2 no, it  
8 means a life sentence. Okay?

9 Would you automatically answer one of  
10 those no to make the death penalty, to make sure  
11 the man received the life sentence?

12 I think that is what you are basically  
13 telling us when you say you cannot take a life,  
14 leave that to God to decide?

15 A. I would say no to No. 2. I probably would.

16 Q. A lot of people say, "You could never prove No.  
17 2 to me. You could never prove No. 2, no matter  
18 what the facts are. I would probably always  
19 answer No. 2 yes."

20 A. Uh-huh.

21 Q. That way, he would receive a life sentence?

22 A. That is what I said.

23 Q. Can you ever imagine in any situation automatically  
24 answering those questions yes which would result  
25 in the death penalty, or would you answer one no,

1       which would result in a life sentence?

2       A     I could answer one yes if I heard the facts,  
3       whether it were deliberately or --

4               THE COURT:  Mr. Chopp, let me clear  
5       up one thing.  Before you are asked to render  
6       a verdict on either guilt or innocence or  
7       punishment, you are going to hear all the facts.  
8       You are not going to be set down in the jury box  
9       and not hear anything and be asked to render a  
10      verdict.  You are going to hear all the facts.  
11      Let's assume that right off the base.  Okay?

12             THE JUROR:  Okay.

13      Q     (By Mr. Bax)  This may be confusing you, and you  
14      haven't had a lot of time to consider all of this,  
15      but, you see, I think what you are telling me,  
16      deep inside and what your feelings are, is you  
17      are opposed to the death penalty, and that is  
18      fine.  I am not going to sit here and say, "Mr.  
19      Chopp, don't you think there are good cases --"

20             That is fine.  You have a right in  
21      our society to feel the way you want to under  
22      the law.  That does not make you any less a  
23      citizen than anyone who's come before us, and  
24      probably has made you a lot better than the  
25      people who would withhold these feelings within

themselves and not tell us how they feel.

Sure.

I am trying to find out how you feel, and if your feelings are so strong -- and you appear to be a man, when he says he believes in something, he doesn't believe in it just a little bit, but all the way --

Right.

-- and when you are telling us you believe only God decides if a man lives or dies, to me, that is a strong feeling you have inside you?

That is right.

Q And I don't think it is a feeling anyone can change, whether these two questions are put before you or before anyone asks you could you sentence him to die. I think your answer is going to be the same: Mr. Chopp couldn't do that?

I don't believe so.

Q Are you telling me then you could probably answer No. 1 yes if the evidence proved No. 1 were yes?

Yes.

Q But in no case could you ever answer No. 2 yes, because if you answered that yes along with No. 1, he is going to ask for the death penalty?

Like I said, that is for God to decide. Like a



1 person, whether he tried to be a God-fearing  
2 child or just a violent-type person.

3 Q And there is no way you could tell for sure what  
4 the future was going to be?

5 A I would feel guilty. I would feel like I  
6 committed a crime myself. If he would go out --  
7 if he would go out and do something else --

8 Q Of course, you know he is going to be in prison  
9 the rest of his life, you see, so even if you  
10 answer it no, the chances are he is going to be  
11 in prison from that day until the day he dies.  
12 Okay?

13 Do you follow me so far?

14 A They commit crimes in prison, in the  
15 penitentiary, if they are going to be prisoners.

16 Q They sure do, but even knowing they are going  
17 to commit crimes in the future, you could not  
18 answer that question yes, knowing he is going to  
19 get the death penalty?

20 A No.

21 Q Mr. Elizondo or Mr. Hernandez are going to ask  
22 you questions in a few minutes, and may put  
23 emphasis on different words.

24 I think I am fairly clear in my mind  
25 there is no situation where Mr. Chopp could

1 answer both of these questions yes, no matter  
2 how bad the facts were, and no matter how bad  
3 the evidence was, Mr. Chopp says, "God decides  
4 those issues, not me as a juror."

5 Is that a fair statement?

6 A. That is a fair statement.

7 Q. And even if I told you about thirty children  
8 were gunned down by a man who did it for money  
9 -- and this is what they usually talk to people  
10 about -- suppose a man goes out and kidnaps  
11 thirty children, five and six-year-olds, and  
12 demands a million dollars' ransom or they will  
13 kill the children.

14 The people get up the million dollars,  
15 and they pay the ransom. They go and pay the  
16 money, and he kills them anyway.

17 A. I have a different attitude about that.

18 Q. Still, isn't your feeling still the same? You  
19 still don't have the right to take that man's  
20 life? It is still God's decision to take that  
21 man's life?

22 A. It is.

23 Q. And even if faced with that case, when you got  
24 to Question 2, you are still going to answer that  
25 Question 2 no? You are not going to answer that

1       yes, knowing it would be the death penalty?

2       A.    I can't say always.  If something personal --

3       Q.    Personal?

4       A.    To me, that I have happen to me, I could; something  
5       in that case, something like that.

6       Q.    If one of those thirty kids were one of your  
7       children -- is that what you are saying?  On that  
8       school bus?

9                You said personal to you.  Are you  
10       saying if someone in your family were killed,  
11       you could answer these questions?

12       A.    That case like that, kidnapping and killing, I  
13       could see where I could answer yes to that,  
14       kidnapping and taking them out and killing them.

15       Q.    All right, but let me ask you this:  You can see  
16       where that could be a death penalty case?

17       A.    Right.

18       Q.    Could you do it knowing you don't believe in the  
19       death penalty and knowing your beliefs are that  
20       God should make that decision?

21               I agree with you.  That is a death  
22       penalty case, if someone did that.  I would  
23       have no problem answering yes, yes, but I believe  
24       in the death penalty.

25       A.    But like I say, that is not going to bring any

1 of them back, and I can't say definitely whether  
2 I should or not. If I be -- after everything  
3 has presented itself and everything, I could  
4 probably get a whole different inner feeling.

5 Q Okay. I am not sure if I follow where you are  
6 at right now. I think we have gone back to the  
7 point --

8 A I want to consider the facts, as the judge said.

9 Q Even after you considered the facts, you know  
10 if you assess the death penalty, you are not  
11 going to bring those thirty kids back.

12 A No.

13 Q By knowing you can't bring those thirty kids  
14 back by answering yes, yes to these questions,  
15 would you still answer one of them no to avoid the  
16 death penalty?

17 A I still would.

18 Q You see, that is what I am getting at. You  
19 disagree with the death penalty, no matter what  
20 the facts are.

21 A Like I said, until I get a different feeling  
22 within --

23 Q You are pointing to your heart.

24 Have you ever had a different feeling  
25 other than being opposed to the death penalty?

1 A Not really. It is just when something presents  
2 itself to me like that. It is up to me after  
3 I think about it. I wonder if I could do it  
4 from the way I feel.

5 Q Let me give you an example of something and see  
6 if we follow each other.

7 I am sure you have heard of the terms  
8 like bias, prejudice, and impartiality.

9 A Correct.

10 Q And a lot of times, when people accuse another  
11 person of being biased or prejudiced, the person  
12 being accused of being biased and prejudiced  
13 takes offense at it and says, "I am not biased  
14 and I am not prejudiced," because for some  
15 reason, we give bad connotations to those terms.

16 But I think we all have biases and  
17 prejudices.

18 I am biased against green vegetables.  
19 I don't like green vegetables. You can't convince  
20 me green vegetables are good. I could not be a  
21 good judge of green vegetables.

22 I've got another bias. I don't like  
23 this law that says you can't sell certain goods  
24 on Sundays. There is a law that says on Sundays,  
25 grocery stores can't sell some kitchen utensils.

1 To me, that is a ridiculous law. If I can  
2 buy a spoon on Monday through Saturday, why can't  
3 I buy it on Sunday to make my dinner?

4 I would like to think I could be fair  
5 on any type of jury I would sit on. I don't think  
6 of myself as a bigot or biased or prejudiced in  
7 any manner, but if I were called to sit on a  
8 jury where a man were accused of selling a spoon  
9 on Sunday, to be honest, I don't think I could  
10 be a fair juror in that case because of my  
11 position on the case.

12 I would probably distort the facts  
13 to believe the Defendant was not guilty. You  
14 see how I feel? I would not do it consciously  
15 but subconsciously, because of my beliefs. It  
16 would affect the way I follow the evidence. Do  
17 you understand?

18 A. Yes.

19 Q. Both sides have a right to a fair trial. There  
20 is no question the Defense has a right to a fair  
21 trial, but, you know, the officer in this case  
22 has a right to a fair trial, too, and the widow  
23 of the officer has a right to a fair trial and  
24 the people of the state have a right to a fair  
25 trial.

1                   You know what your feelings are?

2     A.     Sure.

3     Q.     You know how strong they are?

4     A.     Right, at the present.

5     Q.     Do you think the way you feel presently, that  
6            this is the type of jury that you should be on  
7            or do you think that perhaps Mr. Chopp, because  
8            of his feelings, would be a good juror in an auto  
9            theft case or burglary case, but when we are  
10           talking about killing somebody --

11    A.     I would not like to sit on the jury, but I would  
12           sit on the case.

13    Q.     Even if you are not selected on this jury, feel  
14           free to come and listen every day.

15    A.     I could get a better outlook on whether it should  
16           be done or shouldn't be done.

17    Q.     Okay. Getting back to my question again, you've  
18           got some reservations in your mind, obviously,  
19           whether you can do it?

20    A.     Right.

21    Q.     Even if the evidence called for it, you are not  
22           sure you could do it? You are saying you would  
23           have to be there and see it done?

24    A.     Yes.

25    Q.     Knowing you have reservations right now, can you

1 tell me that you are positive in your own mind  
2 you can be a fair juror to both sides, or do you  
3 feel that maybe, "This is not my type of case, at  
4 least not right now. Maybe after I sit and listen  
5 to a case like this, I will know better"?

6 A. That is the way I look at it. If I could listen  
7 to it, by getting the facts, I have to gather them  
8 to myself after you present them to me, and I have  
9 to, you know, get a feeling about it.

10 Q. Sure, and right now, you don't know what your  
11 feeling would be, even if the evidence would be  
12 so overwhelming you knew you would answer yes?  
13 You can't tell me you would answer yes if  
14 confronted with them, and even in a case where  
15 you found they should be answered yes, you might  
16 answer them no?

17 A. That is a possibility.

18 Q. You can't tell me one hundred percent you will  
19 answer yes to these questions because maybe your  
20 feelings will take over and you will answer them  
21 contrary to the evidence just so you can wake up  
22 in the morning and look in the mirror and face  
23 yourself?

24 A. That's it. That's it.

25 Q. When I say, "Mr. Chopp, do you think you can be



1 fair to us in this case," I am not saying  
2 that in a nasty manner.

3 Do you understand?

4 A. Yes.

5 Q. I think what you are telling us is Mr. Chopp  
6 cannot be a fair juror in a death penalty case  
7 because he can't tell me now he can follow the  
8 evidence.

9 A. I see.

10 Q. Would you agree with me?

11 A. Just like going to a funeral. If it's not any  
12 of my relatives, it doesn't affect my emotions.  
13 I might sit there like I am at a football game  
14 or something, and that doesn't have any effect  
15 on me, but I would have to let it take effect  
16 within me in order to make a decision on it, you  
17 know, and I don't say yes or no.

18 Q. So what you are telling me is you may hear all  
19 the evidence, okay, and after hearing all the  
20 evidence, you may be convinced that the answers  
21 should be yes, yes --

22 A. Yes.

23 Q. -- but you can't tell me you would answer them  
24 yes, yes because your personal beliefs about the  
25 death penalty might prevent you from doing it?

1 A That's right, because of what effect it might  
2 have on me.

3 Q And you don't believe in a man dying by another  
4 man's act, but that should be God's decision,  
5 and that it doesn't matter what the facts are  
6 in the case?

7 A No, I can't.

8 Q You can't tell me if you believed the answer  
9 was yes, you would go ahead and answer it yes?

10 A Yes.

11 Q You would answer it no?

12 Mr. Elizondo is going to tell you you  
13 are going to take an oath and swear to God you  
14 would answer the questions according to the  
15 evidence, and he is going to say, "Are you saying  
16 you are going to violate your oath," and I  
17 believe when we are talking about something as  
18 strong as the death penalty and a man dying,  
19 what would stand between your oath would be your  
20 personal feelings, because if you wanted to, you  
21 could refuse to answer these questions. You  
22 wouldn't have to violate your oath. You could  
23 go back and say, "I am not answering. I know  
24 the answer should be yes, but I am not answering,  
25 because if I answer, he is going to die, and I

might be a party to that."

2 Do you feel that is the position you  
would find yourself in? You wouldn't be able to  
answer the questions?

5 A. That is right.

MR. BAX: At this time, the State would  
have a challenge for cause.

3 THE COURT: Mr. Elizondo;

#### EXAMINATION

#### QUESTIONS BY MR. ELIZONDO:

Q. Mr. Chopp, how are you doing?

It has been a long day, and I hope  
you are not confused.

I need to talk with you a little bit  
about the death penalty. It would be a sad day  
in this country if we had twelve people in that  
jury box, and say there were twelve people and  
the death penalty didn't affect them at all.

They should be affected, don't you  
think?

A. Certainly.

Q. There is nothing wrong with the way you are  
thinking. That is natural. It would be sad

1 if you were to come in and say, "I could answer  
2 the two questions yes right away without even  
3 thinking about it." That would be sad, but,  
4 fortunately, in this country, we have people who  
5 will think about it, and after thinking about it,  
6 they will answer those questions the way they  
7 believe those questions should be answered.

8 Don't you agree with that?

9 MR. BAX: I object to that based on  
10 what the evidence would require, not what the  
11 evidence should be.

12 Q. (By Mr. Elizondo) That is what I mean, what the  
13 evidence shows, they should answer yes or no.  
14 They should answer yes or no.

15 Do you agree with that?

16 A. I agree with it. That is what I said.

17 Q. And, you know, there are some people in this  
18 country who have forfeited their right to live  
19 by their conduct and their past conduct.

20 Let me give you a few examples. Mr.  
21 Bax brings up the school bus full of children,  
22 you know, and I am going to give you a  
23 hypothetical example and I am going to give you  
24 some more examples just to kind of stimulate your  
25 thought processes and see how you would feel

1       about certain things.

2               Let's say a school bus full of five-year-  
3 old deaf children gets hijacked by a kidnapper  
4 over here at the south end of town in the southeast  
5 mall, and the kidnapper calls the police department  
6 and the kidnapper tells the police department,  
7 "Give me a million dollars by noon or I will kill  
8 all these children."

9               The parents somehow, they scrounge the  
10 money up somehow and they give the money to the  
11 police and the police give it to the kidnapper,  
12 and the kidnapper puts that money in his pocket,  
13 gets his machine gun out and kills those children  
14 anyway.

15              You come to find out when he gives his  
16 confession -- he confesses to the whole thing --  
17 you come to find out he has done the same thing  
18 on two other occasions.

19              There is one thing about the death  
20 penalty. If he gets the death penalty, we can  
21 guarantee one thing, and that is that he will never  
22 do it again. Isn't that right?

23   A.   Right.

24   Q.   He will never bother any more school children.

25              Don't you agree?

1 A. There you go.

2 Q. What I am trying to get at: There are other  
3 situations. There are these people running  
4 around the country, this guy running around  
5 the country in Canada, Michigan, Houston,  
6 Galveston, going around killing women --

7 MR. BAX: If he is referring to a  
8 specific example of someone, that is not a  
9 capital murder case, and I object to him using  
10 that.

11 MR. ELIZONDO: Your Honor, if I may,  
12 I would like to give him a hypothetical example.

13 MR. BAX: But to say there is a guy --

14 MR. ELIZONDO: Let me give him a  
15 hypothetical situation.

16 Q. (By Mr. Elizondo) In a hypothetical situation,  
17 there is a person running around all over Canada,  
18 Michigan, all over Houston and Galveston, and  
19 he is killing women. He kidnaps women, sexually  
20 molests them, and then blows their brains out  
21 with a .45.

22 That, under our law, would be capital  
23 murder.

24 If a jury believed that he did it --  
25 and he admitted these offenses -- beyond a

1 reasonable doubt and he goes to trial, and you  
2 find out during the trial, you find a lot of  
3 facts; you find he's been convicted on two other  
4 occasions for the same type of stuff; you find  
5 he gives a confession in that type of hypothetical  
6 case, you can see where a juror can consider  
7 -- might even find him guilty, first of all,  
8 and then we go to the punishment phase, and you  
9 can see in that hypothetical situation a jury  
10 could consider answering Question 1 yes because  
11 he did it deliberately in that situation, and  
12 you can see in that situation, a jury might  
13 consider and might answer Question 2 yes?

14 A. I believe I could, in that matter.

15 Q. You see what I am getting at? There are many,  
16 many fact situations.

17 Ronald Clark O'Bryan. Remember him?  
18 He was the guy who ruined Halloween, went out  
19 there and bought some cyanide poison and put it  
20 in Pixie Sticks and gave it to his children and  
21 went to the insurance company and made himself  
22 a beneficiary and goes out there and gives the  
23 cyanide to his children.

24 You can see where that conduct might  
25 be committed deliberately.

1 MR. BAX: I object to him trying to  
2 commit it to any one fact situation. I have  
3 no objection to him just talking in hypothetical  
4 terms, but he is asking the question as to whether  
5 he could himself ever participate in answering  
6 those questions yes, is what we are here about.

7 MR. ELIZONDO: Let me rephrase the  
8 question.

9 Q (By Mr. Elizondo) You can see there are many,  
10 many people who don't believe as we do and  
11 forfeit their right to live.

12 Do you see that?

13 Let me ask you: Do you think in the  
14 proper case, in your own mind, you could assess  
15 the death penalty, in your own mind?

16 A In the matter of the kids on the bus, yes.

17 Q I am not saying in that particular situation.

18 A Or either where he had committed a crime two  
19 or three times, sure.

20 Q Okay.

21 A Like I said, I could go on that No. 2 yes.

22 If I were to say, just say no to it  
23 and he would go out and commit a crime, I would  
24 figure I did it, I was a cause of it, you know.  
25 I might as well go out and help --



1 Q By answering?

2 A -- by sending out a no to No. 2. That is, the  
3 second time.

4 Q At the second phase, they don't shoot that  
5 question at you but give you other evidence  
6 sometimes.

7 MR. BAX: I object to that. There  
8 doesn't have to be other evidence.

9 MR. ELIZONDO: Judge, I said sometimes.

10 THE COURT: Sustained.

11 Q (By Mr. Elizondo) You know, they can, if there  
12 is evidence, they can give other evidence, or  
13 they can just judge that by itself. You can  
14 submit that to a jury, just the case itself,  
15 how it was committed, and based upon that,  
16 then a jury can, if they believe beyond a  
17 reasonable doubt there is a probability that the  
18 Defendant will commit a criminal act of violence  
19 that will constitute a continuing threat to  
20 society, if they believe that, they can answer  
21 the question yes.

22 "Probability": What does the word  
23 probability mean to you? Possibility, anything  
24 is possible?

25 A. Probability: Had it on his mind to do so in the

1 first place, or probably he had been thinking  
2 about it all along.

3 Q Okay.

4 A To commit that crime. He had --

5 Q So you can see where you could answer in any kind  
6 of situation, you could answer Question 2 yes,  
7 if the State has proven to you beyond a reasonable  
8 doubt that it should be answered yes and you  
9 answered yes?

10 A Sure. Sure.

11 Q And you could answer 1 yes if the State has  
12 proven to you beyond a reasonable doubt that the  
13 answer to that question should be yes?

14 There is nothing magical about that.

15 A I follow you.

16 Q Could you answer that question yes?

17 A On the basis of, you know, what the type, the  
18 type of crimes that you asked me, you know,  
19 demonstrated to me, gave me an example of, I  
20 could say yes to both of them.

21 Q Right.

22 A But like -- in just a case where a guy commits  
23 a crime one time, I couldn't say yes to No. 2.

24 Q We are not trying to commit you to a certain  
25 set of facts. We are just asking you if you can

1 consider in the proper case, in your own mind,  
2 the death penalty and could you give it, and  
3 just, you know, you don't have to tell me what  
4 you are thinking about, but just in the proper  
5 case in your own mind?

6 A. Like I said, about the -- you know, the example  
7 that you gave me on the crime that was committed  
8 more than once --

9 Q. Sure.

10 A. -- yes.

11 Q. Okay. Now, but a crime doesn't have to be  
12 committed more than once.

13 MR. BAX: I object to him going into  
14 anything else. He has, I believe, gotten the  
15 answers he's required on his challenge.

16 THE COURT: Sustained.

17 MR. BAX: And I would like to ask him  
18 some further questions at this time.

19  
20 EXAMINATION

21  
22 QUESTIONS BY MR. BAX:

23 Q. Mr. Chopp, I am confused.

24 A. Well, he asked me a question about the little  
25 kids --

1 Q See --

2 A -- on the bus, and he gets his ransom and he goes  
3 out and shoots all the kids down.

4 Q Does that change it?

5 A That is not the first time he did it. He did it  
6 again. He committed some crime before similar  
7 to that.

8 Q Okay.

9 A So, I could say yes to that.

10 Q Sure, and I think you could; you and I talking  
11 about it, you could agree that the answer to that  
12 question should be yes?

13 A He put it more than once.

14 Q We are going to get to more than that in a second.

15 Could you answer that question yes,  
16 knowing the person you were answering that about,  
17 he is going to die?

18 MR. ELIZONDO: If it's proved beyond  
19 a reasonable doubt.

20 We are going to object.

21 Q (By Mr. Bax) Mr. Chopp, let's separate two  
22 things. Okay?

23 You and I are talking, and Mr. Elizondo  
24 and I are talking, and we are talking about  
25 hypothetical cases. All right?

1 A All right.

2 Q I know what you are telling me. Yes, if a guy  
3 guns down thirty school children and he had done  
4 it before, you can see where you could answer  
5 Question 2 yes, your answer should be yes based  
6 on the evidence.

7 What I want to know and what you and  
8 I talked about before was: Could you answer that  
9 question yes knowing the person was going to die  
10 as a result of that?

11 A If the evidence proved it to me, then I could  
12 answer it yes, but if I were to feel different  
13 after I sat and listened to all the evidence,  
14 I couldn't. Just like now, I can't say yes  
15 without, you know, knowing the full facts and  
16 evidence, like I know the facts will be  
17 presented.

18 Q You remember a couple of minutes ago I asked you  
19 a question? I said, "Mr. Chopp, can you imagine  
20 yourself in a situation where you heard all the  
21 evidence, and after hearing all the evidence,  
22 can you imagine yourself in a situation where  
23 you would answer yes, yes, but you couldn't  
24 answer yes because of your feelings on the  
25 death penalty?

1 A I told you I couldn't answer yes right now until  
2 after I heard the evidence. I couldn't say right  
3 now, but I don't know what would happen --

4 Q The Court --

5 THE COURT REPORTER: One at a time,  
6 gentlemen.

7 THE COURT: The court reporter is  
8 getting ready to get all of us with the machine  
9 if you don't talk one at a time. If somebody  
10 else is talking, let him talk, and when he is  
11 talking, let him talk. Okay?

12 Q (By Mr. Bax) This has been a long day for all  
13 of us and I am not picking at you, Mr. Chopp. I  
14 just have a question in my mind as to whether  
15 you could put aside a personal belief.

16 MR. ELIZONDO: Objection, Your Honor.  
17 It is repetitious. He has already answered that  
18 question.

19 THE COURT: Overruled.

20 Q (By Mr. Bax) Can you promise me you could do  
21 that and be a juror and answer both of those  
22 questions yes knowing that a man -- after  
23 hearing the evidence, of course. I am not asking  
24 you to answer these yes now. That would be  
25 ridiculous. But after hearing all the evidence

and knowing in your heart and knowing the answers should be yes, could you answer those yes knowing a person on trial who is living and breathing is going to have a needle injected into his arm and he is going to die as a result of that?

I can't give you that answer now. That will be evidence.

I can't talk to you and get you off this jury in two weeks from now after you have heard all the evidence and Mr. Chopp says, "I can't take the life of another person. I don't care what the evidence

"That is going to be getting down to the nitty-gritty, and we are not going to have a chance at time to say, "Judge, time out. I am not going to do it."

We would have to pick a new jury and start over again if you can't tell me now.

That is what I need to know. I don't need to know what your answers will be in this case, but I want to know if I prove it to you that your answers should be yes, are you going to do it or are you going to say, "God is the only one who can do that"? This is a probability, what I feel within me.

See the position you are putting yourself in? -- it is not the law, it is what you are

1 thinking from the man up there.

2 Q You see the position you are putting yourself in,  
3 Mr. Chopp? Do you really know and do you have a  
4 belief in yourself that you would be able to do  
5 that?

6 I think you have reservations in your  
7 own mind as to whether you could answer those  
8 questions yes.

9 A I do. I have a doubt in my mind whether I could  
10 answer it yes.

11 Q Based on the evidence?

12 A Yes.

13 Q Even after hearing the evidence, you don't know if  
14 you could answer them?

15 A I don't know.

16 Q Because your reservations, your personal feelings,  
17 may prevent you from answering it yes no matter  
18 what the facts are?

19 A Right.

20 Q Let me go to one other thing you mentioned, and  
21 that is -- there is no requirement by the law --  
22 now you may require it and that is fine again, but  
23 you told Mr. Elizondo, "Sure, you heard it before."  
24 Okay?

25 I think you are talking about Question



1 No. 2. Sure, if you heard he was on trial for  
2 this killing, if it was brought out that two years  
3 before, he killed someone else, and two years  
4 before that, he killed someone else, then you could  
5 answer this question yes?

6 A. Beyond a reasonable doubt.

7 Q. Could you ever answer Question 2 yes if you never  
8 heard about the man killing anybody else, if only  
9 one person was killed, or would you always require  
10 that more than one person were killed before you  
11 could answer that question yes?

12 A. There is a doubt in my mind whether I could or not.

13 Q. You see, the only time that you changed your opinion  
14 when you were talking to Mr. Elizondo -- you and I  
15 had discussed the thirty school children, and you  
16 and I had agreed the death penalty in that case  
17 wouldn't bring the children back -- and Mr.  
18 Elizondo brought facts in and you heard he did it  
19 before, and that is what caught your attention,  
20 and that is when you said, "That is when I could  
21 do it," when it was shown that not only did the  
22 man commit the crime for which he was on trial,  
23 but the State had brought you evidence that he had  
24 done similar things before in his life, like killed  
25 thirty school children before and killed some

1 others some other time, and maybe another time  
2 killed somebody.

3 You would require, before you could  
4 answer 2 yes that more than one person be killed?  
5 If you had only heard that this person on trial  
6 had killed only one person, would you be able to  
7 answer that yes?

8 A. If he's committed it more than one time, I wouldn't  
9 have the slightest problem, you know, the slightest  
10 hesitation --

11 Q. Problem or hesitation.

12 A. -- about, you know, whether he will do it again,  
13 so that is the way I could say it clearly, and  
14 my conscience would be clear.

15 Q. How about if you weren't shown any other evidence  
16 other than the evidence for which he is on trial?

17 MR. ELIZONDO: Objection to the  
18 prosecutor staking the juror out to a certain  
19 set of facts.

20 MR. BAX: I am not staking him to a  
21 certain set of facts. I just want to know if he  
22 would require more than the law would require.

23 THE COURT: Overruled.

24 Q. (By Mr. Bax) Would you require he prove to you  
25 more than one person was killed at the trial?

1 A. Yes.

2 Q. And if I could prove to you the person on trial  
3 has killed only one person, could you answer that  
4 Question 2 yes, or would your answer always be  
5 no?

6 MR. ELIZONDO: Objection. He is trying  
7 to stake this juror to a certain set of facts.

8 MR. BAX: There are no facts.

9 THE COURT: Overruled.

10 A. Like I say, if he gets life in prison, as is God's  
11 will, he will punish him some way through the  
12 prison system. Some criminal already in there  
13 might take his life. That won't be a part of me.

14 Q. That's right.

15 A. It's done practically daily.

16 Q. Right, but are you telling me then that if the  
17 person on trial just killed one person, that is  
18 all you knew about, that you would always then  
19 go for the life sentence rather than the death  
20 penalty?

21 A. Yes, sir.

22 MR. ELIZONDO: Same objection, Your  
23 Honor.

24 Q. (By Mr. Bax) In other words, in that type of case  
25 where only one person were killed, you would

1 automatically answer Question 2 no to guarantee  
2 that he receive the life sentence?

3 THE COURT: Overrule your objection.

4 A. If he reformed.

5 Q. (By Mr. Bax) See, that is what I mean.

6 You would always think if a person killed  
7 one person, he would have a chance of reforming,  
8 correct? And, you would always answer Question  
9 2 no to make sure he had a chance to reform?

10 A. Yes, with one capital murder, I guess.

11 Q. So, if a person were charged with capital murder  
12 just one time and even after you heard the  
13 evidence and you found him guilty and said that  
14 No. 1 should be answered yes, you could never  
15 ever answer Question 2 yes if there was just one  
16 killing and that was the only case you knew about,  
17 just the one capital murder?

18 A. If the way it was went about, you know, if it was  
19 a gang-style murder or something like that, go get  
20 a guy out of bed and blow him away or something  
21 like that.

22 Q. You see, gang style or something like that, it is  
23 usually -- it is not a capital murder.

24 MR. ELIZONDO: Objection to that as a  
25 misstatement of the law.

1 THE COURT: It could be. I will allow  
2 you to rephrase that question.

3 Q. (By Mr. Bax) You see, Mr. Chopp, you are giving us  
4 different answers. Okay?

5 I don't know how to feel about it, but  
6 whether I feel comfortable or not -- and I know  
7 you are trying to tell us as honestly as you can  
8 how you feel --

9 A. Yes, I am.

10 Q. -- and on the one hand, you keep telling me that  
11 is God's decision. Okay? Because Mr. Chopp feels  
12 the life sentence is severe enough and God's will  
13 will take care of him either in the prison or  
14 after his death. God will have a way of handling  
15 him in his afterlife, okay, and then you are telling  
16 us that is the way you feel, and you feel strongly  
17 about it. Okay?

18 A. Yes.

19 Q. And I believe you do, but you turn around and say,  
20 "I could be a party to taking someone's life," and,  
21 you see, they don't agree, don't go together.

22 A. You see, more crimes than one, murders, where you  
23 have committed more murders than one or get someone  
24 out of bed or take him in the yard and shoot him  
25 down like a bird or rabbit and get in the car and

1 drive off --

2 Q. How about somebody who shoots a police officer  
3 in the head three times?

4 MR. ELIZONDO: Objection, Your Honor.  
5 The prosecutor is staking the juror out as to a  
6 certain set of facts.

7 THE COURT: Sustained.

8 Q. (By Mr. Bax) Do you think you could ever look at  
9 yourself in the face if you assessed the death  
10 penalty?

11 MR. ELIZONDO: Objection, Your Honor.  
12 Repetitious.

13 THE COURT: Not under these circumstances.  
14 Overruled.

15 A. Repeat that.

16 Q. (By Mr. Bax) Can you ever envision yourself  
17 waking up in the morning after giving someone the  
18 death penalty and looking at yourself in the face  
19 knowing you helped take the life of another person?

20 A. I probably could until they have taken his life,  
21 as long as he is on Death Row or something.

22 Q. You can't look at it that way. Okay?

23 If you give someone the death penalty --  
24 and I want you to think about this this way --  
25 you've got to assume it is going to happen.

1 I know there are two hundred people on  
2 Death Row and no one has been executed since the  
3 1960's, but when you are answering these questions,  
4 you've got to assume, if you say yes, yes, that  
5 man is going to die.

6 A. If I answered yes to No. 2 --

7 What is the question you just asked me?

8 Yes, I could look myself in the face with  
9 a mirror all day long.

10 Q. Knowing that you have answered Questions 1 and 2  
11 yes?

12 A. Yes.

13 Q. Knowing you are going against this belief, how  
14 could you justify that in your mind, knowing that  
15 you believe God is the only one to take a life, and  
16 now in our society you have helped take a life?

17 A. He has committed, you know, murder in such a way  
18 he doesn't have any business in society, if it's  
19 done the way you quoted it as being done.

20 Q. So you are telling me then that you do believe in  
21 the death penalty?

22 A. I said I could answer yes to it if it was done  
23 in the manner like you described it to me.

24 Q. So in certain situations you do believe in the death  
25 penalty?

1 A. Certain situations, certain types of murders or  
2 whatever was committed, I believe I could find out  
3 what you mean and say yes and walk around, like  
4 I say, with a mirror in front of me.

5 Q. You could answer both questions yes and do that?

6 A. From what you just said, if it was committed the  
7 way you explained it to me.

8 MR. ELIZONDO: Your Honor, he has  
9 answered the question already. It is repetitious.

10 THE COURT: Overruled.

11 Q. (By Mr. Bax) Mr. Chopp, imagine yourself being  
12 charged with a crime. I want you to understand  
13 the position I find myself in right now.

14 Imagine yourself charged with a crime  
15 you didn't commit. All right?

16 A. Right.

17 Q. And you are sitting there with your attorneys and  
18 your attorneys are picking the jury and I happen  
19 to be one of the people out there when they are  
20 picking the jury. All right?

21 Just before your attorney sits down, he  
22 says, "Is there anyone out there that has anything  
23 to tell me about my client," and I raise my hand  
24 and say, "You want to know the truth? I don't  
25 believe that black people ever tell the truth. I



1 don't know why I feel that way, but that is the  
2 way I feel. I can give your client a fair trial."

3 Would you want me on your jury?

4 A. Like I say, that is --

5 Q. Would you really want me on your jury?

6 A. No, I wouldn't.

7 Q. Okay, and that is not the way I feel. I am just  
8 trying to bring home a point to you.

9 A. Uh-huh.

10 Q. You say you are telling me you don't believe in  
11 the death penalty, and yet you can do it, and to  
12 be quite honest with you, I feel the same way you  
13 just mentioned to me. I don't want you on my  
14 jury. Okay?

15 A. Uh-huh.

16 Q. Because I don't think you can do --

17 MR. ELIZONDO: I object to the  
18 prosecutor's harassing and intimidating the juror.

19 THE COURT: Sustained.

20 Q. (By Mr. Bax) Do you think you can give me a fair  
21 trial?

22 MR. ELIZONDO: Same objection, Your  
23 Honor.

24 THE COURT: Not as to that question.

25 Q. (By Mr. Bax) Seriously, not as a game, but I am

1       serious. Can you give me a fair trial when we are  
2       talking about the death penalty?

3   A.   No, not when, as you just stated, you don't believe  
4       that. You don't believe black folks told the  
5       truth.

6   Q.   You misunderstood me. I tried to give you an  
7       example of something.

8   A.   Like I say --

9   Q.   I don't believe that, that no black people tell  
10      the truth.

11                Do you understand that?

12  A.   Well, back to the example you just made about would  
13       I want you on my jury, and I said no. Well, you  
14       just made an example. I wouldn't say you were  
15       saying that.

16  Q.   Because I believed that?

17  A.   Meaning that black folks don't tell the truth to  
18       people or whatever.

19  Q.   Some people believe that, and if some people believe  
20       that, I can see where --

21                That is why I want to know can you give  
22       me a fair trial knowing you have this feeling  
23       against the death penalty? Can you be fair and  
24       impartial in this case the same way you would  
25       in any other case, or would your feelings prevent

1       you from being a fair and impartial judge, from  
2       being objective as far as the facts were concerned?

3       A.    It would make me show some partiality until I did  
4       sit on it.   I would be doubtful.

5       Q.    Can you give me a fair trial?

6       A.    I don't know.

7       Q.    Can you promise me that if I prove the answers to  
8       these questions should be yes, you will answer them  
9       yes?

10               MR. ELIZONDO:  Objection to the  
11       prosecutor pointing his finger at the Defendant.

12               THE COURT:  Overruled.

13       Q.    (By Mr. Bax)  See what I mean?  If I prove it to you,  
14       if I prove the answers should be yes, yes and this  
15       man should receive the death penalty, can you  
16       guarantee me you will do it?

17       A.    No guarantee.

18       Q.    So even if the evidence shows it should be yes,  
19       yes, you can't guarantee me you will answer those  
20       yes, yes?

21       A.    No, I can't.

22       Q.    Because your personal feelings might prevent you  
23       from doing that?

24       A.    Right.

25       Q.    And I think that is what -- that is what I was

1 getting at when I said you can't guarantee you  
2 would be fair to me, because you wouldn't be fair  
3 to me, but what would really be the case, you  
4 couldn't be fair to yourself?

5 A. Right.

6 Q. You couldn't guarantee me, even if I proved the  
7 answers should be yes, you can't guarantee me the  
8 answers would be yes?

9 A. Not right at present.

10 Q. You might answer them no?

11 A. That is right.

12 Q. Even though the evidence shows they should be yes?

13 A. That is right.

14 MR. BAX: Again, Judge, I renew our  
15 challenge. I think we have a juror here who cannot  
16 tell us unequivocally that he could answer both  
17 questions yes based on the evidence, that it would  
18 require him to first hear the evidence and then  
19 to his comparing that evidence to his personal  
20 feelings, and would require his personal feelings  
21 to make the decision rather than the evidence, and,  
22 therefore, we would challenge.

23 MR. ELIZONDO: Your Honor, we submit  
24 he is qualified.

25 THE COURT: Let's take a couple of

1 minutes and retire just a second.

2 (The Court and counsel retired to chambers  
3 outside the presence and hearing of the prospective  
4 juror and the court reporter, after which time,  
5 they returned to the courtroom, and the following  
6 proceedings were had.)

7 Q (By Mr. Bax) Mr. Chopp, I've got a few more  
8 questions.

9 Where we left off was where I had asked  
10 you the question: Even if you had heard all the  
11 evidence.

12 Assume with me you have heard all the  
13 evidence. Make up the evidence you want to think  
14 about, as horrible a fact situation as you can  
15 conceive, whether it is Mr. Elizondo's case about  
16 the thirty school children, whatever he had done  
17 before, whatever fact situation, you put that in  
18 your mind and think about it.

19 Can you tell me, after hearing the  
20 evidence, if you are convinced the answers to  
21 these questions will be yes, are you telling me  
22 you won't know that?

23 A. Won't know that until I have heard it.

24 Q. Really, what you are telling me, it may not be the  
25 evidence that causes you to answer one way or the

1 other, but your feelings about the death penalty  
2 that would cause you to act one way or the other?  
3 A. Yes.  
4 Q. Do you agree with me that even though you agree with  
5 Mr. Elizondo that the man who killed the school  
6 children and he did it before, you agreed the  
7 answers should be yes in that case --  
8 A. Yes.  
9 Q. -- but you don't know if you could answer the  
10 questions yes at this time?  
11 A. Not to know the probability he would continuously  
12 -- to be able to decide that he would be a threat  
13 to society.  
14 Q. Can you see a situation -- do you agree with Mr.  
15 Elizondo in that situation if a man killed thirty  
16 school children for ransom money, shot them down,  
17 cut their heads off, horrible acts to collect a  
18 million dollars, and it was proved he had killed  
19 someone before, let's say, okay, you are telling  
20 me now if you believed if you read that in the  
21 newspaper or I were to walk up to you on the  
22 street, do you believe your answers could be yes?  
23 A. I could say yes to No. 2 without a doubt.  
24 Q. If we are talking about it, yes?  
25 A. Yes.

1 Q What I am asking you is: In a situation like that  
2 where you are asked those questions as a human  
3 being, how would you feel about those? When  
4 you are answering those questions and deciding  
5 whether a man lives or dies, how would you answer  
6 those questions? Can you tell me beyond a  
7 reasonable doubt how you would answer those  
8 questions?

9 A. Not now.

10 Q. You can't guarantee what you would do until Mr.  
11 Chopp is put in that situation?

12 A. That is right.

13 Q. Even in the fact situation Mr. Elizondo gave you  
14 where you can talk about yes, the answers should  
15 be yes, you can't even tell me your answers would  
16 be yes if it meant the death penalty until you were  
17 actually put in that situation?

18 A. That is right.

19 Q. And even though you heard that evidence and you  
20 thought it should be yes and you knew it should be  
21 yes, you would still answer no because of your  
22 feelings about the death penalty?

23 A. Yes.

24 Q. Which would be contrary to the evidence, correct?

25 A. I am talking, you know, the part where he would

1 continue, would constitute a continuing threat to  
2 society.

3 Q The second question?

4 You can't tell me if you believed the  
5 answer would be yes -- you can't tell me you would  
6 answer it yes based on the evidence?

7 A. No, I couldn't.

8 Q. You might answer it no because of your feelings  
9 about the death penalty? In other words, your  
10 feelings about the death penalty would interact  
11 with the facts and you would take the facts in  
12 reaching the decision and not just the facts alone?

13 A. That's right.

14 Q. And that doesn't matter whether it is Mr. Elizondo's  
15 situation about the thirty kids?

16 A. No.

17 Q. You can't tell me today what you would do in that  
18 situation?

19 A. True.

20 Q. You don't know what your personal feelings would  
21 be in that?

22 A. No, I don't.

23 Q. And in all honesty in that situation, you can't  
24 give me a fair trial, can you, Mr. Chopp?

25 A. I don't believe I could.



1 MR. BAX: We renew our challenge. Even  
2 in Mr. Elizondo's fact situation, he is saying yes,  
3 he can see where the answer should be yes, but  
4 putting that question where the answer means the  
5 man is going to die, he can't tell us he is going  
6 to do it, even though it is required by the  
7 evidence..

8 MR. ELIZONDO: Can I question him?

9 MR. BAX: Perhaps the Court would like  
10 to question him. I don't know, Judge.  
11

12 EXAMINATION  
13

14 QUESTIONS BY THE COURT:

15 Q Let's assume that you were chosen to serve on a  
16 jury and you heard facts about whatever the case  
17 was, and it was a capital murder case just like  
18 this one and you decided, after hearing the  
19 evidence, that the verdict on guilt or innocence  
20 should be guilty of capital murder.

21 Are you with me so far?

22 A. Right.

23 Q Now, you are sitting in that jury box right over  
24 there, not out on the street talking to your  
25 neighbors and not sitting up here talking about

1 hypothetical situations. You are sitting in a  
2 jury box over there and it is down to yourself and  
3 eleven other people's decisions as to whether an  
4 individual gets the death penalty or a life  
5 sentence.

6 Are you with me?

7 A. Right.

8 Q. Now, the State puts on evidence. They have put on  
9 the evidence about what happened and you have found  
10 that man guilty of that offense. Okay?

11 Then it becomes your duty and eleven  
12 other people's duty to answer those two questions  
13 over there on that blackboard.

14 Now, what I want to know is: Can you,  
15 if the evidence calls for it, answer both of those  
16 questions yes?

17 A. Well, like I told the D.A., Judge, the way I would  
18 have to feel down here, after getting -- whether I  
19 am doing the right thing -- I don't know if I  
20 could answer yes to take another person's life.

21 Q. Wait a minute. If you heard the evidence and you  
22 were convinced that the answer ought to be yes  
23 to both questions, would you be able to answer both  
24 of them yes?

25 A. I am not -- I am not in a position to say right

THE COURT: Sustain the objection.  
MR. ELIZONDO: May I question him?  
THE COURT: Go ahead.

EXAMINATION

QUESTIONS BY MR. ELIZONDO:

Q. You know, Mr. Chopp, when I talked to you a while ago, maybe forty-five minutes ago, do you remember talking about that there were some people in society that deserved to die, should have their lives forfeited for what they do?

I gave you examples: The school bus, the guy going around all over the country killing women, Ronald Clark O'Bryan, who killed the little children.

There are many, many types of people in this society. Society, by the way, means the penitentiary, too. The people that are in the penitentiary deserve to be protected from people who are bad. There are just some bad apples in this world, people who deserve to have their lives forfeited.

MR. BAX: I object to him making a final

1 argument from the State's position.

2 THE COURT: Sustained.

3 Q (By Mr. Elizondo) You know what I am getting at,  
4 you know, and I am not trying to limit you to a  
5 certain set of facts.

6 There are other sets of facts probably  
7 more gruesome than the ones I have given.

8 All I am asking you is: In a capital  
9 murder case if you have found him guilty of  
10 capital murder, and that, you know, you were in the  
11 punishment phase after you have heard evidence  
12 and if you believe beyond a reasonable doubt that  
13 the answer to those two questions should be yes,  
14 now keeping in mind those hypotheticals I gave you,  
15 you could answer those questions yes, couldn't  
16 you?

17 A. If the evidence presented convinced me that to my  
18 belief, I could say yes.

19 Q. Yes, if they prove it to you beyond a reasonable  
20 doubt to your satisfaction?

21 A. I could yes to both of them.

22 Q. And you can give him a fair trial? You wouldn't  
23 be unfair to him, would you?

24 A. I would be if I put it like he made the example  
25 a while ago.

1 Q Yes. That was just an example.

2 A I said example, but for real, I could give him a  
3 fair trial.

4 Q You wouldn't be biased or prejudiced to him, would  
5 you?

6 A No.

7 MR. ELIZONDO: I submit he is  
8 qualified.

9  
10 EXAMINATION

11  
12 QUESTIONS BY THE COURT:

13 Q I will go back to the same question I asked you  
14 a moment ago. We are not talking about a  
15 hypothetical situation. We are talking about where  
16 you have found a man guilty of capital murder and  
17 you are over there in that jury box and the question  
18 becomes those two on the board over there. The  
19 evidence is before you. You have heard all there  
20 is to hear, and you've got to make up your mind  
21 whether or not you answer those two questions yes  
22 or no or one yes and one no.

23 Could you, if the evidence called for it,  
24 answer both of those questions yes?

25 A Yes, I answered that to you, Your Honor, when I

said if I feel within me that the evidence that they have presented to me deserved a, you know, what I feel that he should -- I could give both of them. I just answered that.

Q. Okay. In view of that, I will change my ruling.

## EXAMINATION

QUESTIONS BY MR. BAX:

Q. Mr. Chopp, are you going to be making that decision on the evidence or making it on the way Mr. Chopp feels about the death penalty at the time?

A. The way the evidence presents it. The way I feel about it is the way I would take the evidence.

Q. Let me ask you this: You have heard the evidence. You would say to yourself, "Yes, the State has proven that first one should be yes. The man's conduct was deliberate, and he killed someone knowing he would die, killed with the expectation someone would die, and, yes, they have proved to me Question No. 2 should be yes by the evidence; proved to me the answers should be yes"?

A. If it's proven to me, I can yes to that, but I am not saying yes now. I am saying I could yes to it.

Q. How about if the evidence said yes, but Mr. Chopp's

1 personal feelings said, "No, I can't do it"?

2 Which would win out? Your personal feelings or  
3 the other?

4 A. Well, that would have to remain -- I couldn't just  
5 say right off.

6 Q. So perhaps even though you have heard the evidence  
7 and perhaps even though the evidence tells you the  
8 answer should be yes, you might still answer it  
9 no because your personal feelings would not allow  
10 you to answer it yes because the man would receive  
11 the death penalty?

12 I understand that you say yes, I could,  
13 but isn't it true, sir, that even in some cases,  
14 in some cases, yes, you could answer both questions  
15 yes, you agree, but aren't you telling me also  
16 there may be some cases where the answer in your  
17 mind should be yes, but you would still answer  
18 one no because you might feel either the man doesn't  
19 deserve the death penalty or your personal beliefs  
20 tell you you couldn't participate in death penalty?

21 A. Whatever the evidence proved beyond a reasonable  
22 doubt, I could say yes, but it would have to be  
23 without a doubt within me.

24 Q. Now, getting back to the other question: Could you  
25 ever answer Question 2 yes based on just one

1       killing, or would you always require more than one  
2       person to be killed?

3       A.   The way I base -- I wouldn't say yes to it because  
4       he wasn't constituting a continuing threat to  
5       society unless that happened.

6       Q.   So, before you could answer Question 2 yes, I would  
7       have to prove more than one person was killed?

8       A.   Not necessarily; just prove the facts and evidence.

9       Q.   Wait a minute, Mr. Chopp. If I put on my case  
10      and I prove that only one person has been killed by  
11      the Defendant on trial, okay, that is all I can  
12      prove, that is all I can bring to the jury, you  
13      are convinced beyond a reasonable doubt that the man  
14      is guilty, that Question No. 1 should be answered  
15      yes, based on one person being dead, could you  
16      answer Question No. 2 yes?

17      A.   I couldn't see the threat to society.

18      Q.   So what you are saying to me is before you could  
19      answer Question 2 yes, I would have to prove to  
20      you the Defendant killed more than one person,  
21      correct?

22      A.   Committed something.

23      Q.   Or committed some other act?

24      A.   Yes.

25      Q.   But if all I have is the facts of one case, no



1 matter how bad the facts of the one case were, no  
2 matter how bad someone were killed, you couldn't  
3 answer 2 yes?

4 A. After the evidence in the case, you present the  
5 facts to me and I will follow the facts, you know,  
6 and get them. Well, I could go on that one. The  
7 answer is yes.

8 Q. So now you could do it on one?

9 A. Yes. If the facts present it is beyond a doubt,  
10 without a doubt.

11 Q. Mr. Chopp, I am thoroughly confused.

12 You know, you have told me and told Mr.  
13 Elizondo and told the judge three or four different  
14 things.

15 MR. ELIZONDO: Objection to the prosecutor  
16 intimidating and harassing the juror.

17 THE COURT: Don't argue.

18 MR. BAX: I am not arguing.

19 Q. (By Mr. Bax) Are you saying you haven't said  
20 two or three different things?

21 A. One answer.

22 Q. One minute, yes, you could; one minute, you would  
23 require me to prove more than one person was dead  
24 before you could answer 2 yes, and another minute,  
25 you have it turned around before I could prove it.

1           What is it? I need to know.

2       A.   Based on the evidence I would get after hearing  
3           the case and how it all came about, what was, you  
4           know, the case of the whatever -- the case --  
5           bringing the case about, I probably would, you  
6           know, wouldn't have a doubt. I could say yes.

7       Q.   So, Mr. Chopp --

8       A.   There could be evidence -- the evidence would have  
9           to come out on that one.

10      Q.   Mr. Chopp, despite your strong feelings against the  
11           death penalty, you are telling me you could  
12           participate in the taking of a life by a verdict  
13           of two yes answers?

14                   MR. ELIZONDO: Objection, Your Honor.  
15           Repetitious.

16                   THE COURT: Under the circumstances, I  
17           will overrule it.

18      Q.   (By Mr. Bax) Are you telling me that is the way  
19           you feel? You would do that, even though you are  
20           a man of strong feelings and everything, you could  
21           put those strong feelings aside and assess the  
22           death penalty?

23      A.   If the evidence proved to me without a doubt, I  
24           could. There would have to be no doubt in my  
25           mind that, you know --

1 Q Let's change the subject for a second.

2 Can you ever imagine a situation where  
3 you have found a person guilty of intentionally  
4 and knowingly taking the life of another person  
5 without justification, without legal excuse? Can  
6 you think of any case in that type of situation  
7 where you could give a person probation?

8 Do you know what probation is?

9 A Yes.

10 Q Probation means you go home. You don't go to  
11 jail. Okay?

12 You have certain rules you have to live  
13 up to.

14 Can you ever think of a case where  
15 probation would be proper for the intentional  
16 taking of a life?

17 A I have seen it happen.

18 Q Okay, but could you participate or can you think  
19 of any situation where you feel it would be proper,  
20 or would you be opposed to probation if someone  
21 intentionally took the life of another person?

22 A In the manner that it was taken, a dice robbery or  
23 robbery or something of the sort, I would be  
24 opposed to it.

25 Q Well, are there any cases where you are not opposed

1 to it?

2 A. Well, where two neighbors get into a dispute, a  
3 brawl, and one kills the other one, I don't think  
4 he should --

5 Q. Get probation?

6 A. I believe that would be sufficient.

7 Q. To give him probation?

8 A. Yes.

9 Q. Two guys have a fight, one pulls out a gun and  
10 kills the other one. The guy with the gun should  
11 get probation? That is the way you feel?

12 A. Yes.

13 MR. ELIZONDO: Objection, Your Honor,  
14 to the way he is staking out the juror.

15 THE COURT: Sustained.

16 Q. (By Mr. Bax) What do you think about this man?  
17 He has been indicted by the Grand Jury. Did you  
18 know that?

19 A. That is the first I have seen him.

20 Q. He has. The Grand Jury has indicted him. They  
21 have said he probably did it, and there was probably  
22 a crime committed. He's got two lawyers here and  
23 got a judge calling the rules as we go along. What  
24 does that mean?

25 MR. ELIZONDO: I object to the prosecutor

1 going over his time limit.

2 How far has he gone over his time limit?

3 THE COURT: In view of the fact that  
4 we've been going back and forth, let's recess.

5 I don't know exactly how long that is.

6 MR. BAX: It's been about ten minutes,  
7 I think. I just have a few more questions.

8 THE COURT: Wrap it up quickly.

9 Q. (By Mr. Bax) What do you think of him sitting  
10 over there charged with killing a police officer  
11 doing his job, a Grand Jury has indicted him, and  
12 he is represented by two attorneys here?

13 A. I couldn't judge.

14 Q. What do you mean you couldn't judge him?

15 A. Not sitting here looking at him.

16 Q. How about the fact he's been indicted? Does that  
17 mean anything to you?

18 A. Evidence will come out and I need to make my  
19 decision on the evidence that comes out.

20 Q. Have you ever been accused about anything? Has  
21 anybody ever come up at work and accused you of  
22 anything?

23 A. Not as I know of.

24 Q. How about as a kid at school? Did anybody ever  
25 accuse you of taking a pigtail and putting it in

1 the ink?

2 A. I am not saying it as a joke. No one pinned  
3 anything on me since I was a baby.

4 Q. If anybody accused you of doing something --

5 A. Of course, mischief things.

6 Q. Say somebody accused you of something you didn't  
7 do. Would you go and tell the people you didn't  
8 do it or sit by and keep silent?

9 A. I would tell them I didn't do it, sure.

10 Q. You would be the first one to speak up and tell  
11 them you didn't do it, right?

12 A. Right.

13 Q. If a Defendant in a criminal trial accused of  
14 killing a police officer, if he didn't get up and  
15 tell them he didn't do it, would you hold that  
16 against him, thinking if he didn't do it, he would  
17 be up there telling them he didn't do it?

18 A. Well, there would be a doubt in my mind whether  
19 he conducted -- or the death of the decedent was  
20 committed deliberately.

21 Q. No, no.

22 A. I would have to go back to that.

23 Q. We are not going back to that. I am talking about  
24 whether -- here we are trying to decide if he is  
25 guilty or not guilty. Right?

1 A. Yes.

2 Q. You are on a jury sitting there with eleven other  
3 people and the State puts on witnesses saying the  
4 man on trial did it. He did it. He just sits  
5 there, the Defendant, and never gets on the stand  
6 and denies it, never gets up and says, "I didn't  
7 do it," or anything else. He just sits there and  
8 says nothing.

9 Would you think he probably did it because  
10 if he didn't do it, he would be the first one telling  
11 us he didn't do it, and he must be trying to hide  
12 something from us?

13 In other words, would you consider that  
14 as some evidence against him, because like you say  
15 --

16 A. There is a possibility.

17 Q. You know if you were charged and didn't do it, you  
18 would be the first one up there?

19 A. Yes.

20 Q. And if he is charged with a crime and doesn't get  
21 up there, it must mean something? Why doesn't he  
22 get up there and tell us? Would that be a strike  
23 against him, do you thin?

24 A. I doubt it.

25 THE COURT: All right. I am going to

1 call time on you, Mr. Bax.

2 MR. BAX: We pass the juror.

3  
4 EXAMINATION

5  
6 QUESTIONS BY MR. ELIZONDO:

7 Q. Mr. Chopp, how are you doing?

8 We are going to be talking briefly about  
9 a capital murder case. Of course, this man is --  
10 this man -- this man is charged with capital murder,  
11 you know, and as in all trials in Texas, it is  
12 divided into two parts.

13 The first part is the guilt-or-innocence  
14 stage.

15 I can't even think anymore. You are  
16 number eighty-nine, I believe.

17 Anyway, it is divided into two parts, and  
18 the first part is the guilt-or-innocence stage,  
19 and the second part is the punishment stage.

20 If he is found guilty, we go to the  
21 punishment stage, and at the punishment stage, his  
22 punishment will be determined by how you answer  
23 these two questions, and, of course, if the  
24 evidence calls for it, he can answer those questions  
25 yes or no depending on the evidence. If he is



1 found guilty.

2 If he is found not guilty, we don't have  
3 a punishment phase.

4 I can assure you, as much as the State  
5 is pushing for the death penalty, we are going to  
6 go ahead and push for a not guilty vote, and that  
7 is basically all we have to ask you, but --

8 MR. BAX: May I have a few moments, Your  
9 Honor?

10 THE COURT: Yes.

11 MR. BAX: Your Honor, I thought the State  
12 did not have another peremptory challenge, but  
13 since we have another peremptory challenge, we will  
14 exercise it and excuse this juror.

15 THE COURT: Mr. Chopp, thank you very  
16 much. You may be excused.

1 SUSAN BENCH BENTLEY,  
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

9 THE COURT: Ms. Bentley, I apologize for  
10 the late hour. We have been out here working for  
11 some time.

12 Are you ready to proceed?

13 MR. ELIZONDO: Your Honor, may I have  
14 a moment?

15 MR. MOEN: Ms. Bentley, both sides are  
16 in agreement to excuse you. We noticed your answers  
17 on the back about the business problems you and  
18 your husband are having.

19 We anticipate this case will take about  
20 a week to try in addition to the voir dire  
21 examination where we have to do the jurors  
22 individually on a case like this and can't take  
23 them out of order, so we had to wait until we got  
24 to you just now, but we appreciate your kind  
patience with us.

5 It certainly has not been fun and games

1 through the last five weeks, and it hasn't been  
2 that way with us.

3 Judge, I think we can agree.

4 THE COURT: Do I understand the Defense  
5 agrees?

6 MR. ELIZONDO: We agree, Your Honor.

7 THE COURT: Ms. Bentley, thank you so  
8 much.

9 THE JUROR: Thank you.  
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