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R E P O R T E R ' S R E C O R D
VOLUME 10 OF 53 VOLUMES


TRIAL COURT CAUSE NO. 380-80047-01

THE STATE OF TEXAS) IN THE DISTRICT COURT
VS.) COLLIN COUNTY, TEXAS
IVAN ABNER CANTU) 380TH JUDICIAL DISTRICT

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On the 28th day of August, 2001, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Charles F. Sandoval, Judge Presiding, held in McKinney, Collin County, Texas:

Proceedings reported by Computerized Machine Shorthand.

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14 VOLUME 10

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1 PROCEEDINGS: 4

2 (Open court, defendant present.)

3 THE COURT: This is Cause No. 380-80047.

4 State of Texas versus Ivan Cantu. He is present
5 together with his two attorneys. The attorneys for the
6 State are present. Are you ready to bring the first
7 juror in?

8 MR. SCHULTZ: Yes, sir.

9 MS. FALCO: Who is that going to be, Your
10 Honor?

11 THE COURT: That's going to be, let's see,
12 John Penhollow, No. 23.

13 (Venireperson Penhollow present.)

14 THE COURT: Mr. Penhollow, you are still
15 under oath from last Tuesday. Please have a seat. All
16 right. Mr. Schultz?

17 MR. SCHULTZ: Thank you, Judge.

18 VOIR DIRE EXAMINATION

19 BY MR. SCHULTZ:

20 Q. Good morning, Mr. Penhollow. Do I have the
21 syllables right?

22 A. That's right. Penhollow.

23 Q. Penhollow, I got you. And you are a
24 prospective juror in this case. And you understand that
25 this is the point of jury selection in which we try to

09:14 1 focus really on the death-related issues. That doesn't
09:14 2 mean that we won't talk about some other things like
09:14 3 burden of proof, because that relates to the death
09:14 4 penalty issue.

09:14 5 As I get into discussing these questions
09:14 6 with you and probably truly as the defense also does the
09:14 7 same thing, many times without us saying it, the
09:14 8 questions we're going to ask you assume, without us
09:14 9 saying it, that the defendant has been found guilty of
09:14 10 capital murder at the first part of the trial. And that
09:14 11 doesn't in any way mean that the State is overlooking
09:14 12 its burden to prove he's guilty beyond a reasonable
09:14 13 doubt of capital murder. Because if we don't prove
09:14 14 that, we don't worry about punishment anyway.

09:14 15 And without speaking for the defense, that
09:14 16 doesn't mean they are somehow conceding that he's going
09:14 17 to be found guilty. But we move into the penalty phase
09:14 18 questions because that's really what this individual
09:14 19 part is designed for.

09:15 20 I have a couple of questions. And I'm
09:15 21 remiss because I didn't really introduce myself to you.
09:15 22 My name is Bill Schultz. I'm an assistant district
09:15 23 attorney representing the State of Texas, along with my
09:15 24 two co-counsel, Ms. Gail Falco to my left, and Ms. Jamie
09:15 25 Lowry to her left.

09:15 1 You recall the defendant who is seated at
09:15 2 the defense table in the white shirt. Next to him are
09:15 3 two fine Plano attorneys, Mr. Don High and Mr. Matt
09:15 4 Goeller.

09:15 5 A. Hi.

09:15 6 Q. My recollection, Mr. Penhollow, is that you
09:15 7 don't recall ever meeting any of us, as I recall; is
09:15 8 that correct?

09:15 9 A. That's correct.

09:15 10 Q. And if it turns out that you did, it couldn't
09:15 11 be -- it certainly would not be of any great
09:15 12 significance because none of us remember that. What I
09:15 13 told you all as a group is true about the juror that I
09:15 14 got caught at the gas pumps with, and he showed up on
09:15 15 the panel. And 20 years later, that's still my
09:15 16 recollection of the horror story that happened. But
09:15 17 even he, for all of that, even he was a sport and told
09:15 18 me who he was.

09:16 19 When qualified, I'm sure you listened to
09:16 20 the disqualifications for -- I guess I should say the
09:16 21 exemptions that might have been available to you. And
09:16 22 you probably actually have one because of your age, if
09:16 23 you had chosen to use it. Did you remember -- did you
09:16 24 understand when the Judge talked about it?

09:16 25 A. Yes.

09:16 1 Q. You know, I'm curious about that because, you
09:16 2 know, I'm not -- when I started this business, I was a
09:16 3 lot farther away than I am from your age now, and I'm
09:16 4 curious why you wouldn't have taken such an exemption
09:16 5 when given the opportunity?

09:16 6 THE COURT: Say, the exemption is 70.

09:16 7 VENIREPERSON: It's 70.

09:16 8 MR. SCHULTZ: Has it gone up?

09:16 9 THE COURT: Yeah. Inflation, I think.

09:16 10 VENIREPERSON: Just like age is.

09:16 11 MR. SCHULTZ: But if it had been 65, you
09:16 12 would have taken it, if you had one.

09:16 13 VENIREPERSON: I don't know. I probably
09:16 14 would have.

09:16 15 MR. SCHULTZ: When did it change?

09:17 16 THE COURT: I think it was about three
09:17 17 years ago, I think, but it may have been less than that.

09:17 18 MR. SCHULTZ: Well, you can tell I'm in
09:17 19 court everyday.

09:17 20 VENIREPERSON: Well, between then and now,
09:17 21 I passed one more marker, so a good thing.

09:17 22 THE COURT: You are getting closer. I
09:17 23 hope I make mine. All right.

09:17 24 Q. (BY MR. SCHULTZ) Same question, a different
09:17 25 way. If given the opportunity to not be on this jury,

09:17 1 would you take that? If the Judge gave you that choice,
09:17 2 if you want to be here, you can. If you don't -- what
09:17 3 would you do?

09:17 4 A. I would probably not be here. I view that kind
09:17 5 of like the Army. I see it as a service that I really
09:17 6 am obligated to perform, but I'm not going to stand up
09:17 7 and volunteer.

09:17 8 Q. I think most jurors would feel that way. And
09:17 9 I'll kind of give you the State's, I'll give you my
09:17 10 view, and I don't know if all prosecutors would agree.
09:17 11 I would be concerned about an individual. Even though
09:18 12 it would seem to favor the State in a death penalty
09:18 13 case, I would be very concerned about somebody that said
09:18 14 this is the thrill of my life. And the opportunity to
09:18 15 perhaps vote in favor of death is something that I
09:18 16 consider rewarding or exciting or somehow good.

09:18 17 And I'm not saying -- I'm not saying that
09:18 18 those people are bad or insensitive. I'm just saying
09:18 19 that's a little different because I think the prevailing
09:18 20 view of most of the people that sit in that chair where
09:18 21 you do is I think it's awfully unfortunate that we have
09:18 22 things in our society that require a death penalty. And
09:18 23 this is not work that any of us look forward to, even
09:18 24 though we may believe in the death penalty.

09:18 25 It's almost like what you said with the

09:18 1 Army. We may believe in a strong defense or fighting
09:18 2 when our national interests are challenged, but I don't
09:18 3 bet there are many people in our society that are just
09:18 4 really thrilled at the idea of combat, war, and killing
09:19 5 and that sort of thing.

09:19 6 And I have a sense -- I have a sense that
09:19 7 you are probably that way and so are most of those other
09:19 8 200 people that we have as a full panel in this case.
09:19 9 And I note that you have indicated that you do believe
09:19 10 in the death penalty, and you favor it.

09:19 11 And your explanation for that is: If the
09:19 12 accused is proved to be guilty of capital murder beyond
09:19 13 a reasonable doubt, then I believe he or she should be
09:19 14 executed in accordance with Texas law.

09:19 15 And I want to talk about that answer with
09:19 16 you a little bit because when we do these
09:19 17 questionnaires, Mr. Penhollow, the way we do them is
09:19 18 before any of the lawyers get a chance to explain the
09:19 19 law to you and, although the Judge gives a brief
09:19 20 explanation, it's really not of the same level as -- as
09:19 21 might be done later on when everybody wants to make sure
09:19 22 you understand exactly what the procedure is.

09:19 23 And I'll bet most of those 200 people come
09:20 24 into this court -- come to court thinking that, well,
09:20 25 capital murder means a death penalty occurs because a

09:20 1 person has been convicted of capital murder. And I wish
09:20 2 we had a different term for that. I wish we would call
09:20 3 it something like aggravated murder or murder plus or
09:20 4 multiple murder. I wish we had a term instead of
09:20 5 capital murder for the crime itself because I don't
09:20 6 think the confusion would then exist.

09:20 7 Why I say there is confusion is because,
09:20 8 and I know you know this now from earlier discussions,
09:20 9 in a capital murder case, once found guilty, there is
09:20 10 still a punishment range. It may be life or it may be
09:20 11 death, and that's really the range. But there's no
09:20 12 automatic, either one, in capital murder.

09:20 13 The only automatic sentence in capital
09:20 14 murder that I know of, the only automatic sentence is if
09:20 15 a person is a juvenile at the time that the crime is
09:20 16 committed and gets certified as an adult. That is an
09:21 17 automatic life sentence if you are found guilty because,
09:21 18 under our law, you can't give the death penalty for a
09:21 19 person of that age. That's the only automatics.

09:21 20 I mean, it could be Timothy McVeigh. We
09:21 21 could be trying him here in Texas for what he did, and
09:21 22 everybody would know what's coming in that case.
09:21 23 Everybody would know, you could try it a hundred times,
09:21 24 you are going to get a hundred death penalties. It
09:21 25 still wouldn't be automatic. The jury would be free to

09:21 1 consider both options in this situation. Does that make
09:21 2 sense to you?

09:21 3 A. Yes. My answer reflected ignorance of the
09:21 4 finer points of the law.

09:21 5 Q. I wouldn't call it ignorance. I think it
09:21 6 reflected logic, frankly.

09:21 7 A. I didn't understand. I was not separating
09:21 8 between --

09:21 9 Q. I know that.

09:21 10 A. The crime and --

09:21 11 Q. And I guess here's the way the legislative
09:21 12 thinking works on that: I guess what they think is we
09:21 13 will identify a certain class of crimes that we think
09:21 14 are so bad that a person should be risking his life to
09:21 15 commit such a crime. And that's kind of thinking that
09:22 16 there is a class of crimes that's so bad that the death
09:22 17 penalty should be possible punishment for them. And
09:22 18 after that, it becomes up to the jury whether that --
09:22 19 his specific circumstances and how he did it and all the
09:22 20 overview of it, all is one that really warrants death in
09:22 21 his particular case.

09:22 22 And so being convicted of capital murder
09:22 23 means you are looking at the death penalty, and you are
09:22 24 also looking at a life sentence. Does that make sense?

09:22 25 A. Yes.

09:22 1 Q. Okay. And the idea of a juror in a capital
09:22 2 murder case really isn't one of somebody being right
09:22 3 down the middle. If we were to say, well,
09:22 4 Mr. Penhollow, as you sit there right now, where are
09:22 5 you? Are you leaning one way or the other, in the sense
09:22 6 of a death penalty? And your answer being, no, I'm
09:22 7 right down the middle. I mean, that's okay, but that's
09:22 8 not all there is to be being qualified.

09:23 9 You could say, I believe we don't do it
09:23 10 enough. And you belong in the eligible pool for people
09:23 11 to be considered as jurors. And you can say I think --
09:23 12 I think we are barbaric in doing that, and you can still
09:23 13 belong in that pool of qualified jurors as long as you
09:23 14 express a genuine ability to consider voting in a way
09:23 15 that would result either according to the evidence.
09:23 16 Does it make sense to you?

09:23 17 A. Yes.

09:23 18 Q. You know, and if, for example, if I -- if I
09:23 19 were to as a lawyer perceive you to be an extremely
09:23 20 reluctant juror in a capital -- to actually cause a
09:23 21 death sentence to occur, but you told me you could do
09:23 22 it, but I think Mr. Penhollow is an individual who
09:23 23 probably is going to require a lot more convincing than
09:23 24 the average juror, if I felt that way.

09:23 25 We have peremptory challenges. That means

09:23 1 each side gets to say, Judge, I would request
 09:23 2 Mr. Penhollow not be on this jury. I could do that, and
 09:24 3 you know, nothing personal. And, of course, you're
 09:24 4 telling me you are not going to be aghast anyway if you
 09:24 5 don't have to be up here.

09:24 6 And the same with the defense, they might
 09:24 7 perceive that you are somebody who is going to be a
 09:24 8 little more or a lot more harsh than the average person
 09:24 9 for the death penalty. And they do the same thing. You
 09:24 10 are still qualified. Then we get to use our -- our --
 09:24 11 our challenges.

09:24 12 There's another kind of challenge that
 09:24 13 occurs, and that is if a juror comes in and absolutely
 09:24 14 says, I can't follow some part of the law that the Judge
 09:24 15 will give me. It's not that I'm unAmerican. It's not
 09:24 16 that I'm disrespectful of the Judge. But I've got such
 09:24 17 tremendous feelings about some part of the law that --
 09:24 18 that I could, that I could never, no matter what, vote
 09:24 19 in a certain way. And those individuals would be
 09:24 20 challenged, what's called, for cause. That means we
 09:24 21 don't have to use our discretionary challenges.

09:24 22 It would be a challenge for cause because
 09:25 23 the law says both sides have the right to be examining
 09:25 24 only those jurors that could follow all the applicable
 09:25 25 law that might happen in the case. And I can't think of

09:25 1 other examples other than the death penalty.

09:25 2 I think, for example, if we're prosecuting
 09:25 3 parents for not letting their children have medical
 09:25 4 treatment, and their position is, the reason we don't do
 09:25 5 that is we belong to a faith that believes that prayer
 09:25 6 substitutes conventional medical treatment. It might be
 09:25 7 that we would get a juror on, as a potential, that would
 09:25 8 be from that same faith.

09:25 9 And, you know, asking that juror to
 09:25 10 prosecute one of their own people as a juror for doing
 09:25 11 what they believe also might be more than they would be
 09:25 12 willing to do. It's kind of that idea. And where it
 09:25 13 usually arises, it arises in a couple of contexts in our
 09:25 14 business. One, is sometimes asking jurors: Could you
 09:25 15 consider probation for a certain kind of crime? And
 09:25 16 sometimes jurors say, no, I could never consider it.

09:25 17 And perhaps those people would end up
 09:25 18 disqualified, depending on how strong they were. Like
 09:26 19 rape of a child. That's probably about as awful a crime
 09:26 20 as I could even mention to anybody. And sometimes you
 09:26 21 get a juror and you say, you know under our law, rape of
 09:26 22 a child or aggravated sexual assault, as it is more
 09:26 23 properly called, aggravated sexual assault has a
 09:26 24 possible punishment of five years' probation, assuming
 09:26 25 the jury finds certain things. It finds eligibility.

09:26 1 Could you fairly consider it in a proper
 09:26 2 case that says five years' probation? And some jurors
 09:26 3 say: No, there's no way. I would like to tell you I
 09:26 4 could, but I couldn't because I think that's true.

09:26 5 And other people say, well, I can't think
 09:26 6 of a case like that right now, but the legislature must
 09:26 7 have known there are such cases or they wouldn't have
 09:26 8 given that option. And I can fairly look for those
 09:26 9 cases, and if I found such a case, I would impose it.

09:26 10 And -- and what they are meaning is, I
 09:26 11 can't imagine how I'd ever do that, but there must be a
 09:27 12 case where I would, and I'm open to it. But if they
 09:27 13 say: No. I could never give probation no matter what.
 09:27 14 There is nothing you could ever tell me, then they are
 09:27 15 not qualified. Does that make sense to you?

09:27 16 A. Yes.

09:27 17 Q. Now, that really happens a lot in death penalty
 09:27 18 cases. And it happens where people have moral
 09:27 19 objections to the death penalty as a concept. Asking
 09:27 20 for somebody to come in and vote for an execution that
 09:27 21 believes that it's against God's law is asking more of
 09:27 22 most people than they are willing or able to give. And
 09:27 23 so they just say: No. There is no way I'll ever give a
 09:27 24 death sentence.

09:27 25 And then the Judge hears that. The Judge

09:27 1 hears what they say they mean. And then the Judge
 09:27 2 rules, and normally those people don't serve because
 09:27 3 they are against a portion of the law the State has a
 09:27 4 right to rely on.

09:27 5 Certainly you are not in that category of
 09:27 6 people that have a moral opposition to the death
 09:27 7 penalty. And I also don't get the impression from
 09:27 8 talking with you that you are a person who has made up
 09:27 9 your mind that, since the law required an open view of
 09:28 10 life or death at the punishment phase, you have not made
 09:28 11 up your mind one way or the other what you are going to
 09:28 12 do if you get that far as a juror. You are not that
 09:28 13 way, are you?

09:28 14 A. No.

09:28 15 Q. And I ask you that because, again and this --
 09:28 16 and I disagree with your term ignorant. I think you are
 09:28 17 logical and that just means that you are not familiar
 09:28 18 with some of the legal procedures. Your best argument
 09:28 19 in favor of the death penalty is to make clear to
 09:28 20 society in general that capital murder, if proved in
 09:28 21 court, will result in the death -- in death to the
 09:28 22 accused. And that's a good argument in favor of the
 09:28 23 death penalty.

09:28 24 In fact, that's an argument that I
 09:28 25 probably will make. If the defendant is found guilty of

09:28 1 capital murder, and we introduced our punishment
09:28 2 evidence, and we are finished with the trial, and we get
09:28 3 to the punishment argument, that's probably the argument
09:28 4 I would make.

09:28 5 I would say, ladies and gentlemen of the
09:28 6 jury, it is absolutely necessary in our society to send
09:29 7 a message by strong verdicts to people contemplating
09:29 8 such awful crimes, that when you take a life, you are
09:29 9 risking your own. And there's nothing wrong with that.
09:29 10 And that's proper argument, even in a death penalty
09:29 11 case. But still you have to answer the special
09:29 12 questions that don't take into account just the
09:29 13 deterrence aspect.

09:29 14 From what you are telling me, you think
09:29 15 deterrence is the best argument for a death penalty.
09:29 16 And while you are free to have that view, it doesn't --
09:29 17 the deterrence aspect doesn't have a strong -- it
09:29 18 doesn't have a direct place in answering those
09:29 19 questions. When we talk about the questions, you'll
09:29 20 really not see much in the question that talks about
09:29 21 deterrence. Am I making sense?

09:29 22 A. Yes.

09:29 23 Q. You think the best argument in opposition of
09:29 24 the death penalty is that people that commit murder may
09:29 25 still serve some purpose by living in prison the rest of

09:30 1 their lives and may serve a greater punishment thereby.
09:30 2 And a couple quick observations on that, and again, it's
09:30 3 just -- there's no reason you would know that. We don't
09:30 4 have anything in Texas called life without parole.

09:30 5 So, even though the jury will ultimately
09:30 6 be instructed not to speculate on how or when a
09:30 7 defendant might get out on a life sentence, you will be
09:30 8 instructed in certain form that there is no such thing
09:30 9 as a life sentence. There's a -- what we have right now
09:30 10 is a minimum 40 years you have to do on a life sentence
09:30 11 before being eligible for parole. And then thereafter,
09:30 12 that's up to somebody else, not you, me, or the Judge.
09:30 13 It's up to the Texas Board of Pardons and Paroles.

09:30 14 And then after telling you all that, you
09:30 15 get told not to consider that in this case, which never
09:30 16 made any sense to me, but they didn't ask me when they
09:30 17 did that. So when you put in there the best argument
09:30 18 against the death penalty is that people have to stay
09:30 19 for the rest of their lives, that would be an argument
09:31 20 for us to have such a thing as life without parole. I'm
09:31 21 just saying we don't have such a thing now.

09:31 22 The kinds of capital murder that are
09:31 23 alleged in this case are that a person was murdered in
09:31 24 the course of committing burglary. That means entering
09:31 25 a habitation without consent, and then once inside,

09:31 1 committing murder. Murder in the course of robbery --
09:31 2 that means murder in the course of forcibly taking
09:31 3 property from someone and then -- and then after that, a
09:31 4 murder ensued.

09:31 5 That happens most often probably at
09:31 6 7-Eleven, robbery murders or a convenience store, fast
09:31 7 food robberies, and that sort of thing. But it can also
09:31 8 happen in a residential setting. If I break into your
09:31 9 house tonight and get into it with you and kill you and
09:32 10 then take your property, all part of that same
09:32 11 transaction, all interconnected, then we'd probably have
09:32 12 capital murder. And also we also have capital murder
09:32 13 because of the burglary. Does that make sense to you?

09:32 14 A. Yes.

09:32 15 Q. And then, thirdly, the other type of capital
09:32 16 murder alleged in the indictment is the murder of two
09:32 17 people in the course of the same criminal episode. And
09:32 18 what I said before, the legislature has decided those
09:32 19 are classes of cases that, if you do them, you are
09:32 20 risking your life by doing them.

09:32 21 And I ask you: Do they seem like the kind
09:32 22 of crimes, does that seem like the kind of murder plus
09:32 23 that ought to potentially carry the death penalty in
09:32 24 your mind?

09:32 25 A. Yes.

09:32 1 Q. We will perhaps give the jury options on those
09:32 2 cases. And it might be, for example, if you find the
09:32 3 defendant murdered in the course of burglary, murdered
09:32 4 in the course of robbery or murdered two people in the
09:32 5 same criminal episode, if you find any of those three or
09:33 6 even all of those three, your verdict would be guilty of
09:33 7 capital murder. And if you don't so find any of them,
09:33 8 then maybe you could consider something lesser. Does
09:33 9 that make sense to you?

09:33 10 A. Yes.

09:33 11 Q. And it's not like -- sometimes as prosecutors
09:33 12 we worry that the jury will think, well, they don't know
09:33 13 what the proof's going to be because they have all these
09:33 14 different varieties. The simplest and most honest way I
09:33 15 can explain it to you, it's insurance.

09:33 16 If we have different varieties of the same
09:33 17 crime that might work. I hate to think that we limit
09:33 18 ourselves to submitting burglary, and then have you have
09:33 19 some question about the issue of consent on the first
09:33 20 entry or something like that. So we have these
09:33 21 alternatives because if it's a capital murder, we are
09:33 22 entitled to have all these different varieties.

09:33 23 So you are not going to hold that against
09:33 24 us, the fact that we have different theories that some
09:33 25 of which might not work as long as something works. And

09:33 1 if none of them work, then you find the defendant
09:33 2 guilty -- I mean, not guilty; is that right?

09:34 3 A. That's right. As long as it's proven.

09:34 4 Q. Exactly. And we have to do that beyond a
09:34 5 reasonable doubt which may not be defined, but still
09:34 6 juries for centuries have been using that term and
09:34 7 getting through it just fine. And most of us think that
09:34 8 the criminal justice system works okay once we get to
09:34 9 trial.

09:34 10 So you got to find him guilty of capital
09:34 11 murder beyond a reasonable doubt or else he's not
09:34 12 guilty. And you don't have any problem calling it like
09:34 13 you see it that way. Assuming that he's been found
09:34 14 guilty of capital murder, we move to the punishment
09:34 15 phase. Can you see this the way it's turned now?

09:34 16 A. Yes.

09:34 17 Q. This is the first question, and really we
09:34 18 should have added to that above it: Do you find beyond
09:34 19 a reasonable doubt, instead of *whether this* out of the
09:34 20 statute. But it should be worded: Do you find beyond a
09:34 21 reasonable doubt that there is a probability that the
09:34 22 defendant would commit criminal acts of violence that
09:34 23 would constitute a continuing threat to society?

09:34 24 Now, there are certainly many open-ended
09:34 25 questions in that because we don't give you any

09:35 1 definitions of any of those words. Even *beyond a*
09:35 2 *reasonable doubt*, we don't even give you a definition of
09:35 3 that anymore.

09:35 4 And yet, juries have been doing just fine
09:35 5 with that because that's exactly the same question every
09:35 6 juror in the State of Texas gets asked in every death
09:35 7 penalty case you've ever seen about on TV or heard
09:35 8 about. It's exactly that same question. And although
09:35 9 it's vague, it's -- it's fine, and the juries are able
09:35 10 to work on it just fine.

09:35 11 You notice the term in there, *criminal*
09:35 12 *acts of violence*? Everybody knows, we'd all agree on
09:35 13 what certain acts of violence are. For example, I think
09:35 14 we all agree that shooting somebody is an act of
09:35 15 violence. Beating them up with an instrument is an act
09:35 16 of violence. Setting them on fire. All those kinds of
09:35 17 things would certainly be acts of violence. And they
09:35 18 don't even necessarily have to be acts of serious
09:36 19 violence.

09:36 20 For example, let's talk about domestic
09:36 21 violence. Wife beating, let's say.

09:36 22 A. Uh-huh.

09:36 23 Q. Do you consider that to be an act of violence?

09:36 24 A. Yes.

09:36 25 Q. Okay. And it may only be, I mean, it may not

09:36 1 be that she requires hospitalization. It may be that
09:36 2 she's bruised, and the bruises would heal, for example.
09:36 3 And that still is an act of violence, and it's also
09:36 4 criminal. Do you agree with that?

09:36 5 A. Yes.

09:36 6 Q. And there are probably some criminal acts that
09:36 7 we would all agree are not acts of violence. I mean,
09:36 8 let's say, income tax evasion, criminal act. I mean,
09:36 9 but it -- you would have to do some real thinking in
09:36 10 your head to figure how that could be, how that could be
09:36 11 an act of violence. I mean, unless you -- unless you
09:36 12 sent a bomb to the IRS along with your return or
09:36 13 something like that. Most of the time it would never be
09:36 14 an act of violence.

09:36 15 And yet, if you stop and think about it,
09:36 16 if your purpose is deciding, is this person going to be
09:37 17 a continuing threat to society by probably going to
09:37 18 commit criminal acts of violence, it might be that tax
09:37 19 evasion would be something that you could at least
09:37 20 consider on that issue. Because you'd say to yourself,
09:37 21 well, I mean, I probably got -- you and I probably know
09:37 22 some people that we like that probably have done a
09:37 23 little bit of that.

09:37 24 If we stop and think about it, I bet we
09:37 25 all can think of somebody that maybe hasn't always paid

09:37 1 all the taxes he or she should have paid on all the
09:37 2 money they made. But maybe somebody doing that -- I'm
09:37 3 not talking about this defendant -- I'm just using this
09:37 4 as an example. But maybe somebody do that that would
09:37 5 give you some clue into their character or personality
09:37 6 that would help you answer that question one way or the
09:37 7 other. Does that make sense to you?

09:37 8 A. Yeah, it could. It might.

09:37 9 Q. It might be small. And it might be that
09:37 10 stealing, for example, shoplifting is probably never
09:37 11 going to be a crime of violence. Because if you have
09:37 12 violence along with it, it probably becomes a robbery or
09:37 13 something like that. But somebody that does
09:38 14 shoplifting, that might give you some clue into their
09:38 15 character that would help you answer that question.

09:38 16 You might say, well, if a person steals,
09:38 17 that shows a certain lawless character or an
09:38 18 unwillingness to follow the law. And that's some
09:38 19 evidence of a breakdown of their self-control that might
09:38 20 result in violence later on. And then we get some other
09:38 21 questions. We get some other crimes that are really
09:38 22 borderline.

09:38 23 For example, what about -- what about dope
09:38 24 dealing? What about delivery of controlled substances?
09:38 25 When we first stop and think about it, that doesn't

09:38 1 sound like an act of violence, right?

09:38 2 A. Right.

09:38 3 Q. And yet, if you look at it a little more
09:38 4 broadly, number one, knowing how bad drugs are, anyone
09:38 5 that delivers drugs, knowing how bad they are, it might
09:38 6 almost be a delayed act of violence. Because if your
09:38 7 definition of an act of violence is to do harm to
09:39 8 another human being, to do physical harm to another
09:39 9 human being, if -- if I sell you narcotics, maybe the
09:39 10 act, maybe the transaction itself is not an act of
09:39 11 violence, but what it's going to do to you when you take
09:39 12 them may be.

09:39 13 I'm not saying that you agree, but I'm
09:39 14 saying that becomes a more fuzzy issue whether that's an
09:39 15 act of violence.

09:39 16 A. That's very fuzzy.

09:39 17 Q. And absolutely. And furthermore, I think we
09:39 18 all understand that when you and I get involved in this
09:39 19 business and me selling you drugs or me selling you a
09:39 20 lot of drugs and you go sell to some other smaller
09:39 21 people, a lot of drugs and do all that, that violence
09:39 22 results -- violence is all interlaced with that whole
09:39 23 business we're in. It's a truly violent business.
09:39 24 Somebody is going to try to rob us for our drugs and
09:39 25 some shooting might start. And you got guns, and we got

09:39 1 guns because that's how we do our business.

09:39 2 Somebody is going to get sick or overdose
09:40 3 for the drugs we sell. You and I probably aren't
09:40 4 chemists, and so we don't know if our drugs are even as
09:40 5 safe as they are supposed to be. They might even have
09:40 6 some bad stuff in them that will kill folks, and we
09:40 7 probably don't care. We want our money and we want to
09:40 8 do the transaction, and that's somebody else's problem
09:40 9 down the line.

09:40 10 Maybe, maybe somebody takes those drugs
09:40 11 and that makes them violent, and they go out and do some
09:40 12 really violent crimes because drugs by their nature
09:40 13 create -- create violence and encourage violence in
09:40 14 people. So, I mean, the whole idea of being involved in
09:40 15 a drug -- in the drug business is permeated with
09:40 16 violence, even if the individual act isn't violent
09:40 17 itself. Do you know what I mean?

09:40 18 A. Yes. I know what you are talking about.

09:40 19 Q. So that might give some clue into a person's
09:40 20 propensity of violence in the future. Now, as you sit
09:40 21 there, where you are now, does that look like a
09:40 22 question, if given evidence, you could answer one way or
09:40 23 the other, according to how you view that evidence?

09:40 24 A. Yes, I think I could.

09:41 25 Q. Okay.

09:41 1 A. I think there's some -- as you point out,
09:41 2 there's some troubling words in there as to how you
09:41 3 would interpret it.

09:41 4 Q. Uh-huh.

09:41 5 A. What is really probability? And does it really
09:41 6 constitute violence, or is it propensity to violence,
09:41 7 all of that?

09:41 8 Q. And absolutely. And when we talk about it, at
09:41 9 first it sounds like it's going to be confusing and
09:41 10 difficult. I like to look at it as liberating. I like
09:41 11 to look at it as inviting the jury to actually consider
09:41 12 the entire circumstances of the crime and of the
09:41 13 defendant and really come back with a verdict that's
09:41 14 enlightened and reasonable and a verdict that they
09:41 15 would -- they would, like everybody else in that same
09:41 16 situation would be returning. That's kind of like
09:41 17 society's view of evidence and in that statute.

09:41 18 Another thing that's not defined, you are
09:41 19 right about probability. Some people say it means a
09:41 20 possibility. I mean, if you and I have a coin, and we
09:41 21 are flipping it, and I say let's flip it a hundred
09:42 22 times. And my question to you is: What's the
09:42 23 probability that it's going to come up, you know, 99
09:42 24 times heads and one time tail? And I guess the
09:42 25 probability is probably like a hundred to one, or

09:42 1 something, but that's still a probability that that
09:42 2 would happen, but it's just remote.

09:42 3 And so some people would say that
09:42 4 probability means merely a possibility. I like to think
09:42 5 it has to be more than theoretical. I mean, I like to
09:42 6 think -- I use the example of me making the Olympics. I
09:42 7 mean, you don't know how fast I am. I may be the
09:42 8 world's fastest guy. But the probability of that, as we
09:42 9 all sit here, is pretty light. It's probably really,
09:42 10 really, really low. But I guess there is still that
09:42 11 probability that I could somehow make the Olympics, if I
09:42 12 had a really good race or something one time.

09:42 13 Weathermen, weather people, weather
09:42 14 forecasters often use the term probability rain. 20
09:42 15 percent probability of showers today. And that's a
09:42 16 probability. It's less than 50-50. Some people say
09:43 17 probability means more likely than not.

09:43 18 If I say: "Are you going to the office
09:43 19 party Friday night?" And you tell me "probably." I'm
09:43 20 hearing you saying you more likely than not will be at
09:43 21 the office party. So, you know, you are free to define
09:43 22 it as you want. And your definition may be different
09:43 23 from somebody else's.

09:43 24 Society is another tough one, because I
09:43 25 tell you why that's a little bit tough. You might think

09:43 1 to yourself, well, he's going to one of two places. I
 09:43 2 never get to that question unless he's been convicted of
 09:43 3 capital murder. So he's going to prison either way.
 09:43 4 The only question is: Does he go to the life side of
 09:43 5 the prison or the death row side of the prison? That's
 09:43 6 the only different outcome.

09:43 7 And it is fair, therefore, to consider
 09:43 8 prison society in answering that question because it may
 09:43 9 not be yours or my society. But prison society is -- is
 09:43 10 a society. They've got bathrooms. They have prayer
 09:44 11 services for those who want them. They have television.
 09:44 12 They have reading material. They can go to school.
 09:44 13 There are things like that available. So it's a
 09:44 14 society. And they got rules, and they've got
 09:44 15 hierarchies. And they've got -- you know, they got
 09:44 16 electricity and heat and all the things that make up a
 09:44 17 society.

09:44 18 It's just a very special sort of society.
 09:44 19 So you can consider prison society. You can also
 09:44 20 consider the outside society. You can look, because
 09:44 21 that question doesn't say to you: Do you find that the
 09:44 22 defendant can safely be held in prison?

09:44 23 First of all, it doesn't say that because
 09:44 24 that's not what the words are. And, secondly, if
 09:44 25 that's -- if that's the narrow focus of what that

09:44 1 question involves, there's no way that could -- that
 09:44 2 could ever be said. Because we know any jury in this
 09:45 3 state looking at that question, is looking at a
 09:45 4 defendant that's heading down to the penitentiary.

09:45 5 You can't go anywhere else. You can't do
 09:45 6 that. But that question can also be fairly read to say,
 09:45 7 is that person presently the kind of person that we
 09:45 8 could say right in this point in time is probably going
 09:45 9 to be a violent person in the future? and that includes
 09:45 10 our society out here.

09:45 11 That includes at the ice cream store or at
 09:45 12 the mall, and that includes being our next-door
 09:45 13 neighbor. That includes going to baseball games or, you
 09:45 14 know, being in the barrooms or wherever anybody else
 09:45 15 might be. You can say, is that person likely to
 09:45 16 constitute a continuing threat to our society in that
 09:45 17 society? You can also read it that way. Does that make
 09:45 18 sense to you?

09:45 19 A. Yes, it does. I think the word commit and how
 09:45 20 that chain of criminality plays out is a key issue in
 09:46 21 this. I tend to read a sentence like that thinking of
 09:46 22 the word commit is commit in the first person. That is,
 09:46 23 the person committed the act, whatever violent act this
 09:46 24 was.

09:46 25 But as you were pointing out, it can

09:46 1 also -- you begin to think about, well, commit an act or
 09:46 2 foster the commission of a criminal act. And then
 09:46 3 things get -- that's when it starts to get a little bit
 09:46 4 less black and white.

09:46 5 Q. And you bring up a good point because many
 09:46 6 times in our society a person may only direct or have
 09:46 7 other people commit crimes.

09:46 8 A. Yes.

09:46 9 Q. And I look at Adolf Hitler and I say to myself:
 09:46 10 How many murders did he commit? And I guess the answer,
 09:46 11 depending on how you read it, maybe none. I know of no
 09:46 12 evidence that he ever killed anybody himself. And yet,
 09:46 13 you are absolutely right. You may, in fact, be fairly
 09:46 14 responsible for 6 million murders, even though you
 09:46 15 didn't pull the levers yourself or do the machine
 09:47 16 gunning yourself kind of thing. Does that --

09:47 17 A. Yes. But in that case that you just cited,
 09:47 18 it's less difficult for people to conclude that he was
 09:47 19 certainly involved in a criminal way.

09:47 20 Q. Absolutely. And if you were on trial for
 09:47 21 capital murder, and he might offer evidence, well, I
 09:47 22 never killed anybody. I'm not a violent man. I was
 09:47 23 just running the country kind of thing. But you look at
 09:47 24 the whole character, and you say: Well, how did that
 09:47 25 all work? And how did he -- did he knowingly get

09:47 1 involved with all of these people? And did he -- did he
 09:47 2 encourage them and sponsor them and that sort of thing?
 09:47 3 So that question can be answered according to the
 09:47 4 evidence.

09:47 5 It doesn't require you to -- it doesn't
 09:47 6 require you to certainly know what's going to happen in
 09:47 7 the future. I mean, you and I don't know that the sun's
 09:47 8 going to be shining tomorrow. We assume it is because
 09:47 9 it always has. But we don't even know that for certain,
 09:47 10 but we figure it does. It requires you to find that he
 09:47 11 probably will.

09:47 12 And that term, continuing threat to
 09:47 13 society. Continuing threat really isn't defined either
 09:48 14 because it -- what does that mean? Does that mean he
 09:48 15 has to do it everyday? Does it mean once a year's
 09:48 16 enough? It's just another one of those, you'll know it
 09:48 17 when you see it.

09:48 18 And I believe juries will know the fair
 09:48 19 answer to that question if they are open-minded when
 09:48 20 they see it. And there are cases -- you seem like the
 09:48 21 kind of man to me that can say, this is a one time only
 09:48 22 deal. He's -- a defendant has learned his lesson. It
 09:48 23 was a combination of circumstances that got him into
 09:48 24 this. And for any of a number of reasons he'll never do
 09:48 25 it again. I mean, you can envision cases like that,

09:48 1 right?

09:48 2 A. Right.

09:48 3 Q. And the one I like to always use: What if he's
09:48 4 had a stroke since the crime? He's paralyzed from the
09:48 5 scalp down. Well, he can't be dangerous if he's in that
09:48 6 condition, you know. I mean, that's one example. But
09:48 7 there can be others.

09:48 8 A. There's a lot of examples, I think.

09:48 9 Q. Yeah. I mean, that example I used about the
09:48 10 father of the child that was murdered, and the killers
09:48 11 get out of court on a technicality. And they are
09:49 12 guilty, and they are almost laughing about it. If he
09:49 13 goes and gets a gun and kills both of them, that's
09:49 14 capital murder.

09:49 15 He's intentionally caused the death of two
09:49 16 people. And in the same criminal aspect, he's a capital
09:49 17 murderer. And I'll bet if you looked at his whole life
09:49 18 and said, yeah, this is a great guy that loved his kids
09:49 19 and wanted to dance at his child's wedding some day.
09:49 20 And he just did this because he felt it was the right
09:49 21 thing to do. You easily could say that is not a
09:49 22 dangerous man. That's a broken man. He's not a
09:49 23 dangerous man.

09:49 24 And that's kind of the idea. And that
09:49 25 question even encompasses other things. It would

09:49 1 encompass a legitimate change of heart on the part of
09:49 2 somebody who had done a crime like that. I mean, do you
09:49 3 believe that it's possible for someone to do a horrible,
09:49 4 terrible, terrible capital murder and have some change
09:49 5 of heart or belief or something like that that's really
09:49 6 going to be -- that that can be done by people?

09:50 7 A. I think it can be done. I think it's hard to
09:50 8 climb over that event.

09:50 9 Q. For what one thing you might be skeptical. You
09:50 10 might say, well, isn't it convenient that this
09:50 11 conversion has happened after you got arrested, and you
09:50 12 are looking at a death sentence? You could do that.
09:50 13 You could also say, where was God back when you were
09:50 14 doing all that? You could do all that.

09:50 15 A. Yeah.

09:50 16 Q. But at the same time you recognize such a thing
09:50 17 is possible?

09:50 18 A. Yeah. I think it's possible, but it's
09:50 19 difficult.

09:50 20 Q. Let's assume that you answered this question,
09:50 21 no. Let's assume when you are hearing the evidence you
09:50 22 say, you know, there's not a probability. I can't say
09:50 23 he's a continuing threat to society, either ours or
09:50 24 prison society and any intermediate society that there
09:50 25 might be between them. And my answer to that question,

09:50 1 being fair to the State and being fair to the defendant
09:50 2 is no. Do you know what the result of that no answer
09:50 3 is?

09:51 4 A. As I understand it, it would be that he would
09:51 5 be given a sentence that would involve a life in prison.

09:51 6 Q. That's exactly right. And a no answer to that
09:51 7 question, that's the end of the trial, and we all go
09:51 8 home except the defendant. He goes down to Texas with
09:51 9 his life sentence. He goes down to the TDC or the TDCJ
09:51 10 with his life sentence.

09:51 11 And that's not an automatic life sentence,
09:51 12 in one sense, because you have to look at the evidence
09:51 13 and fairly consider it. But it is -- once that question
09:51 14 is answered, the job is done. You come back and say,
09:51 15 Judge, we're finished, and that's where we are.

09:51 16 If the answer to that question is, yes, we
09:51 17 have proved to you beyond a reasonable doubt that the
09:51 18 defendant is probably going to be a continuing threat to
09:51 19 society by his acts of violence, then there's one more
09:51 20 question for you. And I like to call that question the
09:51 21 last-look question or the humanitarian question or
09:51 22 the -- are we sure that it's the right thing question?
09:52 23 And all of which, I mean, is positive and not in any way
09:52 24 negative. So read it to me or, I mean, read it to
09:52 25 yourself, Mr. Penhollow.

09:52 1 Once again, it's a little bit fuzzy, but
09:52 2 it seems to me -- you'll be the one that would decide
09:52 3 it -- but it seems to me that question is saying there
09:52 4 are cases of capital murder, even involving a dangerous
09:52 5 person where, if you look at all of the evidence, look
09:52 6 at the person's life as a whole, look at the
09:52 7 circumstances of the killing and his motives and his
09:52 8 reasons for what he did, look at the provocations, look
09:52 9 at how his life is now, look at everything about this
09:52 10 whole case, that question tells me that the legislature
09:53 11 says there are cases where a life sentence would be
09:53 12 appropriate, even with a dangerous person.

09:53 13 And that means, sorry, to do this to you,
09:53 14 prison. Here's a dangerous person, but we, the jury,
09:53 15 have decided that you need to be taken care of, the
09:53 16 dangerous person, for the rest of his life because of
09:53 17 what we found in the evidence. And so the legislature
09:53 18 is telling us that it's okay to vote yes on that
09:53 19 question. Yes, there is mitigation because they are
09:53 20 giving it to us.

09:53 21 A. Well, I think that's a -- a good safety feature
09:53 22 in one sense.

09:53 23 Q. Uh-huh.

09:53 24 A. But in my own case, I think I would have
09:53 25 probably crossed this bridge when I was considering

09:53 1 whether this person would be a -- a threat to society in
09:53 2 the first question.

09:53 3 Q. Well, and that may be. And depending on
09:54 4 exactly what you mean by that, that really could happen
09:54 5 because, what this question here, what this mitigation
09:54 6 question actually asks you to consider is the background
09:54 7 of the defendant.

09:54 8 A. Yes. I realize it.

09:54 9 Q. And you already, and I'm serious, but you would
09:54 10 have considered the background of the defendant in
09:54 11 answering that first question.

09:54 12 A. Right.

09:54 13 Q. If he's been a saint all his life, and we have
09:54 14 this one capital murder that pops up, you would have
09:54 15 considered his background in the light of that first
09:54 16 special issue, right?

09:54 17 A. Right.

09:54 18 Q. I mean, you would say, okay, I got to find out
09:54 19 whether he's dangerous or not. Let me see what he's
09:54 20 been like. Let's look at his background. That means
09:54 21 you might consider his growing up stuff. You might
09:54 22 consider how he grew up, and was he good in high school
09:54 23 and got along with everybody and then just turned bad?
09:54 24 Was he a war hero, for example? Was he in the navy?
09:54 25 And did he get the Navy Cross for distinguished Navy

09:54 1 service? Did he -- you know, those kinds of things you
09:55 2 might have considered, and so that's fair.

09:55 3 That's fair for you to say that many of
09:55 4 this stuff might have already, in your mind, been
09:55 5 answered when you dealt with that first question. The
09:55 6 defendant's character and background. I can't imagine
09:55 7 anything more useful to somebody looking at that first
09:55 8 question about his future danger than his character.
09:55 9 Because that's -- that's what we're talking about.
09:55 10 Predicting somebody's future activities is almost a
09:55 11 search for their character.

09:55 12 A. Uh-huh.

09:55 13 Q. You know, you meet somebody when you are young
09:55 14 and you want to marry them. And she says, will you
09:55 15 always love me? Well, it may well be that it's her
09:55 16 character that's going to tend to answer that question
09:55 17 or maybe yours. Predicting the future about what's
09:55 18 going to happen or probably always going to happen
09:55 19 involves a look at people's character, don't you think?

09:55 20 A. It does. It's risky, obviously. It always is
09:55 21 when you try to predict and look forward as opposed to
09:56 22 looking at the history because it can go both ways.

09:56 23 Q. Absolutely. And -- and yet, once again,
09:56 24 however many people we have on death row. Good people
09:56 25 of goodwill and conscious like you have been able to do

09:56 1 it and have been able to get through that -- get through
09:56 2 that just fine.

09:56 3 And then it asks you to look at the
09:56 4 person's moral culpability. The personal moral
09:56 5 culpability of the defendant. And I don't know what
09:56 6 that means and neither does anybody else in this room.
09:56 7 No disrespect to the Judge or the lawyers. Nobody knows
09:56 8 what that means. We ask ourselves, well, if you
09:56 9 intentionally cause somebody's death, how could you not
09:56 10 be morally responsible? Something I think of, and it
09:56 11 may just be me. For example, I think of Dr. Kevorkian.
09:56 12 Everybody knows who he was.

09:57 13 Depending on how you look at that, if he
09:57 14 killed two people at the same time, under our law that
09:57 15 could be capital murder because there's no special
09:57 16 exception in Texas law, for example, for what we call
09:57 17 assisted suicides. That's just plain murder, and yet if
09:57 18 you stop and think about that, there are probably a lot
09:57 19 of people in our society that would say, well, that's
09:57 20 not immoral what he did. It may be illegal, but he
09:57 21 just -- he may be ahead of the curb in terms of our
09:57 22 societal morality. Do you follow what I'm saying?

09:57 23 A. Yes, I follow.

09:57 24 Q. That's an example where a jury could say, you
09:57 25 know, Dr. Kevorkian's a capital murderer because he

09:57 1 killed two people, even though they wanted to die. He
09:57 2 still killed them. And yet it's hard for me to say that
09:57 3 he's morally culpable personally because he's doing what
09:57 4 they wanted, and the law ought to be different. Does
09:57 5 that make sense to you?

09:57 6 A. Yes. I think there's a difference.

09:57 7 Q. And there could be others. And I know the
09:57 8 defense attorneys might have other ideas. But we're
09:58 9 just, I mean, we're just -- that's just a phrase that
09:58 10 you are supposed to consider, do the best you can with,
09:58 11 because none of us can come up with exactly what that
09:58 12 means. It can't be an accident or mistake because those
09:58 13 would never be capital murders.

09:58 14 You are not morally responsible if you
09:58 15 have a tire blowout, and you run over a couple people
09:58 16 and kill them. You are probably not morally responsible
09:58 17 for that, but that wouldn't be capital murder. So we
09:58 18 wouldn't get that question anyway, unless you knew your
09:58 19 tire was bad and you didn't fix it, then maybe so. I
09:58 20 don't know.

09:58 21 A. Yeah, right.

09:58 22 Q. It asks you to consider all of this mitigating
09:58 23 evidence and look for, if there is any, and then decide
09:58 24 if that mitigating evidence is sufficient to warrant a
09:58 25 life sentence. And I'm going to tell you that there is

09:58 1 no such thing as a criminal capital murder case that
 09:58 2 wouldn't have some quote mitigating evidence in it.
 09:58 3 I guarantee you, if we brought Adolf
 09:59 4 Hitler over here, and he were still alive, and we were
 09:59 5 prosecuting him for 6 million crimes of homicide, there
 09:59 6 could be some mitigating evidence presented for him.
 09:59 7 I don't know much about Hitler, because
 09:59 8 I'm not much of a historian kind of person, but I have a
 09:59 9 sense that he didn't have a great childhood growing up.
 09:59 10 I have a sense that he didn't have much of a dad, and I
 09:59 11 have a sense that he was such an unwanted child that
 09:59 12 there was a real contemplation of abortion because I
 09:59 13 heard Paul Harvey talk about that.

09:59 14 The trouble with abortion is, you never
 09:59 15 know if it's a right or wrong thing to do. You never
 09:59 16 know how it works out until, down the road and his
 09:59 17 observation was, you know, as bad as maybe I think
 09:59 18 abortion is, maybe, maybe in Hitler's case it would have
 09:59 19 been better if his mom had gone through with it because
 09:59 20 who is to say all of that.

09:59 21 And so, but Hitler had some mitigating
 09:59 22 evidence. I'm sure he went to bed at night as a little
 09:59 23 boy crying. I'm sure probably he got teased as a child.
 10:00 24 I'm sure he cried because he couldn't go to the -- the
 10:00 25 soccer games with his dad because his dad wasn't around.

10:00 1 I'm sure he was probably not as good in sports as
 10:00 2 somebody else was.

10:00 3 I don't know if he took to drinking. I
 10:00 4 know apparently he did some drinking back in 1923 at the
 10:00 5 beer hall. But other than that, I don't know. But
 10:00 6 maybe he got into some of that German beer and got his
 10:00 7 judgment clouded. There would be mitigating evidence in
 10:00 8 his case. Maybe if he was waiting around for a trial
 10:00 9 for a while and he was in the jailhouse, maybe he'd get
 10:00 10 himself religious. He had been in the military. And
 10:00 11 apparently as a little Austrian corporal, he
 10:00 12 distinguished himself somewhat in World War I.

10:00 13 I mean, all of us can be extremely
 10:00 14 impressed by distinguished military service. And so
 10:00 15 that's all stuff that could be mitigating. And yet, you
 10:00 16 get to answering that question involving Hitler and you
 10:01 17 say, well, I got to take into consideration all the
 10:01 18 evidence, including the circumstances of the offense,
 10:01 19 and you see those people being lined up and moved into
 10:01 20 the gas chambers and exterminated like rodents.

10:01 21 And then you say, okay, I've also got to
 10:01 22 take into consideration the defendant's character, and
 10:01 23 you get the *Mein Kopf* book out and you start reading
 10:01 24 what he was thinking and what was leading up to all of
 10:01 25 that. And you've got to say, wow, that's not the kind

10:01 1 of character that I'm real impressed with. And then you
 10:01 2 got to look at his background.

10:01 3 And you say, well, here's a guy that had
 10:01 4 some brains, and he had some capabilities. He had some
 10:01 5 great oratory skills. He could have motivated people
 10:01 6 for good. He could have created the "We Love Germany
 10:01 7 Society" to go out and help people because he was a
 10:01 8 great orator. Instead, he took and twisted that talent
 10:01 9 around into something -- something very very malignant.

10:01 10 Then you could say the personal moral
 10:01 11 culpability of the defendant. And it's pretty hard to
 10:01 12 say he didn't have any personal moral culpability. And
 10:01 13 then you say, okay, but I'm considering all that other
 10:02 14 stuff, like his military background and his crying at
 10:02 15 night and not having a dad.

10:02 16 Is that sufficient mitigating circumstance
 10:02 17 that he ought to get a life sentence, even though I
 10:02 18 already found he's a dangerous man? I think for most of
 10:02 19 us, I think we probably -- I don't know, I'm just
 10:02 20 guessing -- I think we'd probably say that all that sob-
 10:02 21 story stuff isn't nearly sufficient enough to overcome
 10:02 22 what he's done. Do you agree with me on that?

10:02 23 A. I agree.

10:02 24 Q. Okay. And so when you say you probably have
 10:02 25 already gotten to this point of answering that question

10:02 1 by answering that first question about future danger, it
 10:02 2 seems to me you are right on with that because the
 10:02 3 things that you need to answer the future danger
 10:02 4 question have been things that you had to take into
 10:02 5 consideration. Just like this background, circumstances
 10:02 6 of the crime and his character and background.

10:02 7 So you -- the analysis in many ways will
 10:02 8 be the same, but the -- how you see the evidence will be
 10:03 9 exactly the same. It's your purpose that you are
 10:03 10 looking at the evidence that might be different on that
 10:03 11 second question. Because what the law contemplates by
 10:03 12 that question is that there not be an automatic death
 10:03 13 sentence resulting from that first question.

10:03 14 A. Right.

10:03 15 Q. In other words, the law contemplates that, even
 10:03 16 though you have found a capital murderer is probably
 10:03 17 going to be a continuing threat to society, the law
 10:03 18 contemplates that you actually look at that second
 10:03 19 question, fairly test the evidence against what that
 10:03 20 question is asking you, and give a true answer. And it
 10:03 21 may be, you know, I don't know -- I don't know,
 10:03 22 statistically speaking, how frequently that question
 10:03 23 ever gets answered yes, like across Texas, my suspicion
 10:03 24 is it's rare. But it does happen.

10:03 25 And whether I'm right or wrong about that,

10:04 1 doesn't really matter anyway because we're not
 10:04 2 interested in what some other jury does with that
 10:04 3 question. We're only concerned about what it does with
 10:04 4 Mr. Cantu, the defendant in this case. Are you with me
 10:04 5 on that?

10:04 6 A. Yes.

10:04 7 Q. It may be that how a person became a dangerous
 10:04 8 capital murderer may not even be his fault. It may be
 10:04 9 that realistically we hold him responsible for his acts
 10:04 10 and for his danger, but it is very possible that there
 10:04 11 could be cases where it's not his fault that he did what
 10:04 12 he did. Does that make sense to you that there could be
 10:04 13 such cases?

10:04 14 A. I'm sure there are probably such cases. I
 10:04 15 think that's a very critical issue.

10:04 16 Q. Absolutely. Let me give you an example. Let's
 10:04 17 assume a person develops a brain tumor, a pretty severe
 10:04 18 one that's inoperable.

10:05 19 A. Uh-huh.

10:05 20 Q. And that's what they said about that guy down
 10:05 21 at the tower, down at UT. Do you remember that Whitman
 10:05 22 guy?

10:05 23 A. Yes.

10:05 24 Q. And let's say they were right. Let's say the
 10:05 25 reason he did that was because he had a brain tumor that

10:05 1 was pressing on the aggressive part of his brain. And
 10:05 2 it was inoperable. And he's dead so we never dealt with
 10:05 3 it. So it might be the fair answer to that question
 10:05 4 would be, yeah, he's going to be dangerous and because
 10:05 5 of this inoperable brain tumor. And you may look at his
 10:05 6 life and say, he used to be an okay guy, and he didn't
 10:05 7 do anything to put that tumor in there.

10:05 8 He had bad luck. And, in fact, he used to
 10:05 9 do some good things before that tumor started growing,
 10:05 10 and he was a good fellow. And maybe the doctors all
 10:05 11 came in and say, you know, I wish it weren't so, but
 10:05 12 he's never going to be anything but mean because of that
 10:05 13 brain tumor.

10:05 14 And it's a tragedy because he didn't have
 10:05 15 to have that brain tumor, but he does. Well, he's a
 10:05 16 dangerous capital murderer. We know he is. You've
 10:06 17 heard evidence from doctors to that effect. It might be
 10:06 18 that you'd say in that case, yeah, I considered all this
 10:06 19 on the issue of future danger. And I conclude he's
 10:06 20 going to be a future danger, but this background means a
 10:06 21 whole lot to me. And the background was, until he got
 10:06 22 that tumor up there, he was an okay guy.

10:06 23 And maybe a guy like me, and maybe if I
 10:06 24 had gotten that tumor I would have been up there. You
 10:06 25 might say, maybe that's a personal moral culpability.

10:06 1 Maybe we have to hold him criminally responsible. We
 10:06 2 can't have him out there doing that all the time. We
 10:06 3 don't have to put up with that. But maybe he's not
 10:06 4 morally responsible if there's a brain tumor up there
 10:06 5 because he didn't put it there. Do you know what I'm
 10:06 6 saying?

10:06 7 And the point is: You might consider that
 10:06 8 to be sufficient mitigating circumstances. You got to
 10:06 9 admit that's awful sad. If somebody has a brain tumor
 10:06 10 that has distorted him as a human, that's a sad thing.
 10:06 11 Don't you agree?

10:06 12 A. I agree that is a very sad circumstance. And
 10:06 13 in that case I think this particular question probably
 10:07 14 gives the jurors more of an out and maybe more for them
 10:07 15 than it does for the defendant.

10:07 16 Q. I absolutely believe that question is for the
 10:07 17 jury. I think it would be horrible for a jury to go out
 10:07 18 of court saying, you know, we had to vote the evidence,
 10:07 19 and so he gets a death sentence. And 12 of you look at
 10:07 20 each other and say, what have we done? I think -- I
 10:07 21 think that's for the jury. I don't think that's for the
 10:07 22 defendant. It may benefit the defendant, but that's
 10:07 23 not -- that's for the jury and the peace of mind of the
 10:07 24 good people in our society doing this very difficult
 10:07 25 work. And if the defendant benefits from that, well,

10:07 1 that's fine. The jury -- the jury's worth benefitting a
 10:07 2 capital defendant.

10:07 3 A. I think that's true.

10:07 4 Q. I want to make clear with what you are saying
 10:07 5 that you are not telling me that, if you answer that
 10:07 6 first question, that second question is automatically
 10:07 7 answered by you. You are not telling us that?

10:07 8 A. No.

10:07 9 Q. And I -- I don't have any disagreement with you
 10:08 10 saying that two kind of work in many ways. They are on
 10:08 11 parallel tracks in terms of how you analyze it all, but
 10:08 12 there could be circumstances in which a person's
 10:08 13 background is enough to spare his life but not enough to
 10:08 14 make you wonder if he's dangerous, you know?

10:08 15 A. Well, and as you pointed out earlier, and I
 10:08 16 will say again, you'd have to look at both halves of
 10:08 17 that. You've got to look at the circumstances of the
 10:08 18 offense and what the enormity or the lack of the
 10:08 19 enormity or the cruelty or whatever may have accompanied
 10:08 20 that, along with the issue of character and background
 10:08 21 and moral culpability issues. I'm not quite sure I know
 10:08 22 how to digest that one either.

10:08 23 Q. And probably the worst crime, the more
 10:08 24 mitigation would be required to be sufficient. I mean,
 10:08 25 I'll bet there would never be any mitigation in the

10:09 1 Hitler prosecution, for example. It just couldn't be
10:09 2 done. The crime is just too enormous. Nothing would
10:09 3 matter in a case like that.

10:09 4 A. There's also a question of how far back in time
10:09 5 these events occur, and how vivid the memory is and, you
10:09 6 know.

10:09 7 Q. Sure, sure.

10:09 8 A. How much it weighs on society as a -- as a
10:09 9 crime that is worthy of us.

10:09 10 Q. Okay. The notion is juries that will be fair
10:09 11 and -- I get a sense from you -- and I might be wrong --
10:09 12 I get a sense from you that you might have a higher
10:09 13 standard of sufficient mitigation than somebody else on
10:09 14 the jury might have, but maybe it's lower, too. Nobody
10:09 15 knows. You have never done this before.

10:09 16 Do you think you could be fair to the
10:09 17 State and fairly require us to prove his guilt beyond a
10:09 18 reasonable doubt before we even move to that punishment
10:09 19 phase?

10:09 20 A. Yes, I think so.

10:09 21 Q. And are you the kind of man that, if the State
10:09 22 fails in proving his guilt beyond a reasonable doubt
10:10 23 that could vote not guilty and go out of here and know
10:10 24 that you've done the right thing?

10:10 25 A. Yes, I could do that, too.

10:10 1 Q. And are you the kind of man that could prove
10:10 2 he's guilty beyond a reasonable doubt you would -- you
10:10 3 would vote that way, even though that moves us into the
10:10 4 more difficult part of this trial perhaps, and that's
10:10 5 deciding punishment? You can still do that and just
10:10 6 call it like you see it?

10:10 7 A. Yes.

10:10 8 Q. And the same thing with those questions. Are
10:10 9 you the kind of man that, having heard this evidence,
10:10 10 would say to yourself: That crime looks like he ought
10:10 11 to get death for it? But you could still answer those
10:10 12 questions in a way that wouldn't result in death, if
10:10 13 that's what the evidence required?

10:10 14 A. Yes. If that's what the evidence required.

10:10 15 Q. And that gets tricky because --

10:10 16 A. It is tricky.

10:10 17 Q. When I ask people -- when I ask people that are
10:10 18 opposed to the death penalty: Are you able to vote in a
10:10 19 way that would cause what you are opposed to? That's --
10:10 20 that's asking of them a -- a lot to be mechanical in
10:11 21 answering questions that almost seems like it's doing
10:11 22 the wrong thing to them.

10:11 23 A. You can't.

10:11 24 Q. And yet that's what we have to have from
10:11 25 jurors. We have to have jurors who will be professional

10:11 1 enough and honorable enough to do what they, in their
10:11 2 own minds, if making choices wouldn't like or wouldn't
10:11 3 exactly think is just quite right.

10:11 4 A. That is a very tough choice, but --

10:11 5 Q. You mentioned the Army. Were you in the
10:11 6 military service?

10:11 7 A. Yes.

10:11 8 Q. What branch?

10:11 9 A. Corps of Engineers.

10:11 10 Q. Did you ever -- did you ever get into any type
10:11 11 of combat or combat theater?

10:11 12 A. Fortunately not.

10:11 13 Q. Well, you certainly know in the military that
10:11 14 it is -- everything supports the combat arms when you
10:11 15 get right down to it. I mean, ultimately your job was
10:11 16 to be able to provide ways to cross terrain and ways to
10:12 17 move heavy equipment for combat purposes.

10:12 18 A. Right.

10:12 19 Q. That was your job. And just because you are in
10:12 20 the military and follow orders doesn't mean that you
10:12 21 agree with everything that your unit is doing.

10:12 22 A. No.

10:12 23 Q. Especially if you guys sit out on patrol, for
10:12 24 example. You may not like that idea very much at all.
10:12 25 You might think the other way or the other direction,

10:12 1 right?

10:12 2 A. Right.

10:12 3 Q. At the same time, if the system collectively
10:12 4 works, you got to have a willingness to do a duty and
10:12 5 sometimes follow orders, follow directions, follow
10:12 6 Judge's instructions that you kind of wish you weren't
10:12 7 having to do?

10:12 8 A. I think that's just part of the service.

10:12 9 Q. And although jury service is different, you
10:12 10 only wear badges. You don't wear uniforms. You don't
10:13 11 get marched around. You do get shepherded around by the
10:13 12 bailiff, but it's not the same thing. Still, you got to
10:13 13 sometimes, for the collective good of all of us, do
10:13 14 things that are just not simple for you. Do you feel
10:13 15 you are that kind of man?

10:13 16 A. I think so. I try to be that kind of man.

10:13 17 Q. The law requires you to presume the defendant
10:13 18 innocent until we prove otherwise. Any problem with
10:13 19 that?

10:13 20 A. No problem with that.

10:13 21 Q. In other words, if we don't offer any evidence
10:13 22 or we goof, or we go on strike and walk off the job or
10:13 23 something like that, the only result you could come back
10:13 24 with would be a not guilty?

10:13 25 A. Not guilty.

10:13 1 Q. Because he's presumed innocent, right?

10:13 2 A. Right.

10:13 3 Q. We have to do all of the proving. The only
10:13 4 burden at the first part of this trial is on the State
10:13 5 of Texas. We have to prove beyond a reasonable doubt
10:13 6 that he's guilty, or he goes free. That's the law. He
10:13 7 doesn't have to do anything, and his lawyers don't have
10:13 8 to do a single thing.

10:13 9 If they want to ask no questions, they got
10:14 10 that right. If they want to bring newspapers, well, not
10:14 11 newspapers, and they want to bring in books and be
10:14 12 reading instead of listening to testimony, that's their
10:14 13 right. If they don't want to ask any questions, or
10:14 14 don't want to look at any witnesses, if they want to
10:14 15 just sit there orderly, they've got that right. All
10:14 16 they got to do is be here. And that's not any evidence
10:14 17 for the -- or against the defendant. That's still
10:14 18 always our burden. Any problem?

10:14 19 A. No problem. Just as long as they don't fall
10:14 20 asleep, I guess.

10:14 21 Q. If that happens, if that happens, somebody will
10:14 22 wake them up. And they are very good lawyers, and I'm
10:14 23 not -- I'm only illustrating. I've got more respect for
10:14 24 them than you can imagine. So that's not a problem.

10:14 25 The defendant doesn't have to testify. He

10:14 1 may if he wishes, but he doesn't have to, and that's not
10:14 2 a circumstance against him. You can't be saying, why,
10:14 3 he must be hiding something. He didn't testify.

10:14 4 First of all, that might not be why he
10:14 5 doesn't testify. And secondly, if none of us can even
10:15 6 speculate into that. That's his Constitutional right,
10:15 7 and that's not evidence.

10:15 8 A. Right.

10:15 9 Q. And not evidence for him either. It's not -- I
10:15 10 mean, we can't say, gee, I bet he had great things to
10:15 11 say if only he told us. We can't speculate about any of
10:15 12 that, but it's okay. Lesser included offenses, it's
10:15 13 possible that the State would prove to you that a murder
10:15 14 occurred, but that you would have a reasonable doubt
10:15 15 that the murder occurred in the course of a burglary or
10:15 16 a robbery.

10:15 17 And if that were the case, there might be
10:15 18 instructions to the jury that, if you believe that a
10:15 19 murder occurred, an intentional murder, but you had a
10:15 20 reasonable doubt whether it was in the course of a
10:15 21 burglary or robbery for some reason, that your job would
10:15 22 be to return a verdict of simple murder. That means not
10:15 23 a capital murder.

10:15 24 Any problem philosophically in your mind
10:16 25 with doing that? If we failed to prove a burglary, find

10:16 1 him guilty of what he's guilty of and not something more
10:16 2 than that? Any problem?

10:16 3 A. No. I think one has to look at the law.

10:16 4 Q. What that might mean is, you might be hearing
10:16 5 that evidence and saying, well, this fellow needs to die
10:16 6 for what he's done. You might be feeling that in your
10:16 7 heart, but you know if you come back with a simple
10:16 8 murder verdict, he can't die for that because that has a
10:16 9 punishment range. Simple murder becomes noncapital
10:16 10 after that. And you could still do that, and you could
10:16 11 weigh the evidence. And if it's not there, let the
10:16 12 result be what the result from that is going to be. Any
10:16 13 problem?

10:16 14 A. No problem.

10:16 15 Q. And if that's the case, then we get into a
10:16 16 punishment range. And that range is, in a regular
10:16 17 murder case, from 5 years to 99 years or life. And
10:16 18 there's not anybody on this earth that knows the
10:16 19 difference in life and 99 years. Don't let anybody tell
10:16 20 you that because none of us do. Life might sound
10:17 21 longer, but then 99 might sound longer too, you know. I
10:17 22 don't know.

10:17 23 And then there's a fine that I don't want
10:17 24 to talk about. But 5 years to 99 years and, in some
10:17 25 cases -- and in some cases I told you before, defendants

10:17 1 are eligible for probation. That means even -- even in,
10:17 2 it may never happen. But like Timothy McVeigh, suppose
10:17 3 he had been tried down here in Texas, if he were
10:17 4 convicted of simple murder for some reason like we
10:17 5 couldn't prove it. I don't know, he would probably be
10:17 6 eligible for probation because the law says, if you have
10:17 7 never before been convicted of a felony offense in this
10:17 8 state or any other state, and he hadn't been apparently,
10:17 9 then he'd be eligible for probation.

10:17 10 Then that gets hard because the question
10:17 11 becomes: Could you, as a juror, not in this case or not
10:17 12 in McVeigh's case, but in a hypothetical murder case,
10:17 13 could you fairly consider the entire range of punishment
10:18 14 that the legislature's said juries should be able to
10:18 15 consider? Could you consider life for murder? Could
10:18 16 you consider 5 years for murder? Could you consider 5
10:18 17 years for probation, for murder?

10:18 18 And it's kind of like I said before, when
10:18 19 you first hear that question, you say to yourself, wow,
10:18 20 if I found somebody guilty of murder, how could I say
10:18 21 that -- how could there ever be a punishment as low as
10:18 22 5 years' probation? How could that be? Some people
10:18 23 would say that. I can't imagine such a circumstance.

10:18 24 Then other people say, well, I can't think
10:18 25 of an example of that right now in my mind. I'm sitting

10:18 1 up here, and I'm -- I think, I think it would be rare
 10:18 2 that I would ever vote 5 years' probation for murder.
 10:18 3 But maybe a Dr. Kevorkian situation.
 10:18 4 Maybe that's -- maybe that's a -- a probation case. And
 10:18 5 maybe not. Maybe I think he's going to do it again if
 10:18 6 we give him probation. We need to put him somewhere
 10:18 7 where he can't have patients. Maybe that's it. Maybe
 10:19 8 that parent murdering his child's killer used to be a
 10:19 9 good person. Maybe that's probation. You know, who
 10:19 10 knows? Who knows what that might all be? And do you
 10:19 11 see yourself being able to consider the entire range of
 10:19 12 punishment?
 10:19 13 A. I think looking at the lesser sentence will be
 10:19 14 very difficult. I don't put it out of the realm of
 10:19 15 possibility, but I can't think of circumstances where I
 10:19 16 would go for a light sentence.
 10:19 17 Q. Well, absolutely. And that's like saying I
 10:19 18 couldn't consider -- this charge for murdering 25
 10:19 19 people, let's say on the indictment like that, you might
 10:19 20 say, I can't imagine a case of mitigation for 25
 10:19 21 murders. You know, you might say that to yourself. The
 10:19 22 idea is: Do you have the kind of personality that's
 10:19 23 open to consider anything the law requires you to
 10:19 24 consider?
 10:19 25 A. Yes.

10:19 1 MR. SCHULTZ: A moment please, Judge.
 10:19 2 THE COURT: Yes.
 10:20 3 Q. Do you have any questions of me, Mr. Penhollow?
 10:20 4 A. No. I don't believe I have any. Thank you.
 10:20 5 MR. SCHULTZ: We'll pass the juror, Judge.
 10:20 6 THE COURT: All right. Mr. Goeller?
 10:20 7 MR. GOELLER: Thank you, Your Honor.
 10:20 8 VOIR DIRE EXAMINATION
 10:20 9 BY MR. GOELLER:
 10:20 10 Q. Good morning, Mr. Penhollow. Do you want to
 10:20 11 stand up for a second?
 10:20 12 A. Yes. As a matter of fact, I would like to.
 10:20 13 Q. Do you want to work it out a minute?
 10:20 14 MR. SCHULTZ: Some aerobics going on here?
 10:20 15 VENIREPERSON: Something like that.
 10:20 16 A. Thank you.
 10:20 17 Q. You bet. Mr. Penhollow, you probably remember,
 10:20 18 I guess it was a week ago where we all gathered up?
 10:20 19 A. Oh, yes.
 10:20 20 Q. What have you thought about since then, about
 10:20 21 crime and punishment and the criminal justice system? I
 10:20 22 just want to kind of hear your thoughts. I don't have
 10:20 23 real specific questions for you right now. But just
 10:20 24 tell me what's been going through Mr. Penhollow's mind
 10:20 25 the last seven days.

10:21 1 A. Oh, I think I thought a lot more about what
 10:21 2 capital murder really is and the punishment of it. I
 10:21 3 had not been schooled in the finer points, as I said
 10:21 4 earlier, of what this involved. But I have not been
 10:21 5 troubled in any way by what I heard or what I learned.
 10:21 6 It's just -- just a level of understanding that I didn't
 10:21 7 have before that I think I feel -- I feel like I know
 10:21 8 more about it now.
 10:21 9 Q. Yeah. We seem to have three types of people.
 10:21 10 We've had some people that have told us they've lost
 10:21 11 sleep. They dread this experience. We've had other
 10:21 12 people that say, I never gave it a second thought. You
 10:21 13 know, I just was worried about having to come back
 10:21 14 again. And then folks, such as yourselves, that have
 10:21 15 thought about it perhaps, but it hasn't caused you any
 10:22 16 great consternation or concern.
 10:22 17 A. I met all three types out there in the jury
 10:22 18 room.
 10:22 19 Q. And it was a pretty shocking experience, I
 10:22 20 imagine, coming up here and not knowing whether you are
 10:22 21 going to sit on a speeding ticket case, a DWI, a
 10:22 22 shoplifting, or a capital murder case?
 10:22 23 A. Yeah. I missed the word special when I --
 10:22 24 Q. What do you think about the death penalty?
 10:22 25 A. Well, as I said in the answers to my questions,

10:22 1 I believe there is a -- there is a place for it. I
 10:22 2 don't relish the idea that you put somebody to death
 10:22 3 over for a crime. But I am not yet, in my mind,
 10:22 4 convinced that there isn't some deterrence associated
 10:22 5 with that penalty.
 10:22 6 And I also believe there's some criminals,
 10:22 7 there are some people that do that sort of thing, that I
 10:22 8 think it's justified. It's justified based on the
 10:23 9 evidence. I don't feel that it ought to be done with
 10:23 10 impunity. I think that's -- I'm not one of these people
 10:23 11 that believes that just because a murder occurred
 10:23 12 automatically that person is put to death. I think
 10:23 13 that's -- that's far, far, far too simple. And there
 10:23 14 are too many cases, as I think we've just been through,
 10:23 15 lots of circumstances that can arise.
 10:23 16 On the other hand, I'm not in favor of
 10:23 17 saying, hey, we ought to do away with it. I know there
 10:23 18 are people that are -- do have those feelings. And it's
 10:23 19 been my observation from the -- my age which I hate to
 10:23 20 admit anymore, but there seems to be a growing tendency
 10:23 21 to feel more and more that way in the population as a
 10:23 22 whole, that there seems to be a tendency toward wanting
 10:24 23 to move away from the death penalty.
 10:24 24 I don't happen to be in that category.
 10:24 25 Maybe I could be persuaded someday, but I'm not likely

10:24 1 to be in the next few weeks or months. That's just the
 10:24 2 way I've seen it. But, again, I don't feel that it's
 10:24 3 something that's just (snaps fingers), it's not
 10:24 4 automatic.

10:24 5 Q. You are -- I hate to be the one to remind
 10:24 6 you -- I think you are 66, right?

10:24 7 A. Well, as a matter of fact, I'm now 67
 10:24 8 officially.

10:24 9 Q. When was your birthday?

10:24 10 A. The 26th.

10:24 11 Q. Of --

10:24 12 A. This month.

10:24 13 Q. Yesterday?

10:24 14 A. Or the day before yesterday.

10:24 15 Q. Well, happy birthday.

10:24 16 A. Yeah, thanks.

10:24 17 Q. 67. That's still young.

10:24 18 A. Talk to me about 99 years or life, I think I'll
 10:24 19 take 99.

10:24 20 Q. Why do you think people, say, 55 or over are
 10:25 21 moving away from -- the general population -- why do you
 10:25 22 think that folks 55 and over are moving away from the
 10:25 23 death penalty?

10:25 24 A. I don't know if the ones 55 and older are. You
 10:25 25 may be right, I don't know.

10:25 1 Q. No, no, I may have misread you.

10:25 2 A. No, no, no. I'm sort of the belief that they
 10:25 3 are -- the majority of the population, that if you take
 10:25 4 the, let's say the people who are of voting age that
 10:25 5 there is an increasing number of those people, as time
 10:25 6 passes, that would probably be in favor of eliminating
 10:25 7 the death penalty. I don't have a statistic. That's
 10:25 8 just my sense of what's going on, even though I don't
 10:25 9 happen to be of that persuasion.

10:25 10 Q. Right.

10:25 11 A. But I have the sense that that's happening.

10:25 12 Q. Why do you think that is? Why do you think
 10:25 13 people are moving away?

10:25 14 A. Oh, that's a very good question. Maybe because
 10:26 15 the number of people who are -- who have been close to
 10:26 16 or who have -- who have known somebody that was either
 10:26 17 killed and murdered in some way or because they felt
 10:26 18 that it -- it's just not a humane thing to do. I mean,
 10:26 19 we're not having -- we don't have -- the wars are
 10:26 20 receding more and more into the past. Even Vietnam is
 10:26 21 fading in a lot of people's memories.

10:26 22 The idea of somebody like a Hitler, even
 10:26 23 though, try as we will, Saddam Hussein was -- there was
 10:26 24 an attempt to paint him in that frame. I just don't
 10:26 25 think that those sorts of events that would make one

10:26 1 think that you got to literally execute somebody are
 10:26 2 near enough to the everyday lives of many of the people.
 10:27 3 And as a consequence, I think there's a tendency to say,
 10:27 4 well, you know, it's more of an accident. It was more a
 10:27 5 happenstance. It was maybe a consequence of a person's
 10:27 6 upbringing, of their environment, lack of education.
 10:27 7 All of the above.

10:27 8 And somehow or other I think that sort
 10:27 9 of -- that sort of thinking has more of a ring to it. I
 10:27 10 think we have far more people today who listen to
 10:27 11 psychiatrists, psychologists, sociologists, the
 10:27 12 government. There is a more of a liberal trend in the
 10:27 13 thought process. And some people will take that, and
 10:27 14 they take it to heart more than perhaps others do.

10:27 15 I think -- I may be wrong about that, but
 10:27 16 I sense that that's what's happening. And even though,
 10:28 17 as I say, I'm not on that, of that persuasion. No one
 10:28 18 has convinced me completely yet that that should be the
 10:28 19 way it is, but I see it happening.

10:28 20 Q. You are a double E, aren't you?

10:28 21 A. Yes.

10:28 22 Q. My dad was a double E. According to my father,
 10:28 23 the most intelligent people that walk this earth are
 10:28 24 double Es.

10:28 25 THE COURT: And according to you, they are

10:28 1 lawyers.

10:28 2 A. I don't think that's necessarily true.

10:28 3 Q. I struggle.

10:28 4 A. Or the double Es, either.

10:28 5 THE COURT: They are both overrated.

10:28 6 VENIREPERSON: They are both overrated.

10:28 7 Q. (BY MR. GOELLER) Well, my father used to say
 10:28 8 if you are a double E, you are never ever having to look
 10:28 9 for work.

10:28 10 A. Well --

10:28 11 Q. Work comes and finds you.

10:28 12 A. That's probably true.

10:28 13 Q. Where did you go to school, Mr. Penhollow?

10:28 14 A. Well, University of Iowa first four years.

10:29 15 University of Illinois is where I got my doctorate,
 10:29 16 which would really be called computer science today.

10:29 17 Q. Urbana or Champaign?

10:29 18 A. Urbana.

10:29 19 Q. Where are you originally from?

10:29 20 A. Iowa.

10:29 21 Q. Iowa. They say the most educated population in
 10:29 22 the country. Iowa state of minds, right?

10:29 23 A. Maybe. They have moved out all over the United
 10:29 24 States to make a living. I spent most of my life in New
 10:29 25 York City or near to it.

10:29 1 Q. In the questionnaire, Mr. Penhollow, I think
10:29 2 the way this questionnaire was designed, to kind of cut
10:29 3 to the chase with the first question. You favor the
10:29 4 death penalty? Your response was "yes." Explain. "If
10:29 5 the accused is proved to be guilty of capital murder
10:29 6 beyond a reasonable doubt, then I believe he/she should
10:29 7 be executed in accordance with the law."

10:30 8 I know that states the obvious, but you
10:30 9 probably understand what my role is, at least in this
10:30 10 part of the trial?

10:30 11 A. Of course.

10:30 12 Q. I've got to -- I've got to protect that young
10:30 13 man down there. I've got to seat a jury or attempt to
10:30 14 seat a jury where he has a fair shot at, you know, maybe
10:30 15 the ultimate issue in this case life or death.

10:30 16 A. Yes, I understand that.

10:30 17 Q. And I respect Mr. Schultz and Ms. Falco and
10:30 18 Ms. Lowry. They told you that -- or Mr. Schultz
10:30 19 certainly told you back last Tuesday exactly what he'd
10:30 20 like to do.

10:30 21 A. Yes.

10:30 22 Q. You know, there's a couple D.A.'s around the
10:30 23 state like the new guy in Houston, you know. He says,
10:30 24 well, we're just going to leave it up to a jury. Okay?
10:30 25 He doesn't want to come out and say they are seeking the

10:31 1 death penalty. I think he's playing a little song and
10:31 2 dance. Of course it's up to a jury.

10:31 3 We're not going to allow one local elected
10:31 4 official to make that decision, but, you know, you know
10:31 5 as you sit there right now, they would like to execute
10:31 6 that young man, and we want to save his life, if it
10:31 7 comes down, if he is found guilty of capital murder.

10:31 8 A. Yes.

10:31 9 Q. We don't know that. And this is a kind of an
10:31 10 odd question and a tough question, but a good question.
10:31 11 If you were sitting right here.

10:31 12 A. Uh-huh.

10:31 13 Q. If you were in my chair and you were asking
10:31 14 questions of you, would you, would the Mr. Penhollow
10:31 15 sitting at this chair want Mr. Penhollow on this jury?

10:31 16 A. Well, I don't know who -- I don't know that
10:31 17 much about the other people that you've got as a choice
10:32 18 to sit on this jury but -- as you do, but I think I
10:32 19 could be on this jury and be a very fair member of the
10:32 20 jury.

10:32 21 Q. Tell me why. Tell me why you say that.

10:32 22 A. Well, because I think I have been trained, and
10:32 23 I have tried all my life to listen to the evidence and
10:32 24 the facts of the case and make judgments accordingly.
10:32 25 Now, admittedly, they are not as black and white as when

10:32 1 you are dealing with physical laws.

10:32 2 Q. Right.

10:32 3 A. I realize that. And -- but if, if I were in
10:32 4 your chair and thinking about it, there may well be
10:32 5 people that you are going to interview that will be,
10:32 6 shall we say, less certain of their position with regard
10:32 7 to the death penalty.

10:32 8 Q. Right.

10:32 9 A. And if so, I would -- if I were in your shoes
10:33 10 and playing your role, I'm sure that I would favor those
10:33 11 over me.

10:33 12 Q. Right. You make an interesting point. Under
10:33 13 Texas law, and I guess U.S. Supreme Court law as well,
10:33 14 the State has a right to have every juror in this case,
10:33 15 all 12, be able to, in a proper case, vote death.

10:33 16 A. Uh-huh.

10:33 17 Q. They have that right. And those folks fall
10:33 18 into one or two categories. Either they are for the
10:33 19 death penalty, they are proponents of the death penalty,
10:33 20 such as yourself. Well, you were there Tuesday. You
10:33 21 saw the hands that went up. The vast majority of the
10:33 22 people in this county of voting age, I guess voting and
10:34 23 driver's license and water bills, and whatever they use
10:34 24 to poll jurors. And a lot of people fit into that first
10:34 25 category, prodeath penalty and, obviously, could give

10:34 1 it.

10:34 2 A. Right.

10:34 3 Q. The other type of person is either an opponent
10:34 4 of the death penalty, in other words, they don't really
10:34 5 believe in it, but they could give it.

10:34 6 A. Uh-huh.

10:34 7 Q. In the proper case.

10:34 8 A. Uh-huh.

10:34 9 Q. And I guess the third set of folks can never
10:34 10 get on this jury. And those are folks that don't
10:34 11 believe in it and could never, ever, ever give it, I
10:34 12 suppose. And they are just disqualified. So, and if
10:34 13 you look at the numbers statistically, the jury will be
10:34 14 made up of prodeath penalty folks, the majority of them.

10:34 15 A. Yeah.

10:34 16 Q. You can see that by the show of hands that went
10:34 17 up. So it's tough stuff. Now, Mr. Schultz makes --
10:35 18 gave you a lot of examples in his personal opinion of
10:35 19 people who fit into many facets of the law and how he
10:35 20 thinks those special issues played out. And one of his
10:35 21 common things is, as you well know, is Adolf Hitler,
10:35 22 Nazi Germany and genocide, you know, the extermination
10:35 23 of a race, really, is what we're talking about.

10:35 24 A. Uh-huh.

10:35 25 Q. That makes it difficult for me, you know, and I

10:35 1 can't say he's wrong. I can't tell the Judge, you know,
 10:35 2 that's not right. You know, he's allowed to make his
 10:35 3 examples like I'm allowed to make my examples. But you
 10:35 4 know, there are jurors that we run the risk--or at least
 10:35 5 I run the risk--of jurors who listen to Mr. Schultz's
 10:35 6 analogies by way of Hitler and, you know, all the -- all
 10:36 7 the Nazi atrocities and somehow try to parallel that to
 10:36 8 this case. Do you see the point I'm trying to make?

10:36 9 A. Oh, yes. I see it. Unfortunately, very often,
 10:36 10 and you probably do it yourself in maybe the opposite
 10:36 11 sense, to make certain points, you often go to the
 10:36 12 extreme so that there's less likelihood of
 10:36 13 misunderstanding, and it's a lot clearer.

10:36 14 Unfortunately, for all of us, life is not quite that
 10:36 15 black and white. Things always end up falling in the
 10:36 16 middle.

10:36 17 Q. Right.

10:36 18 A. And if you were to stand up and make a series
 10:36 19 of examples, I suspect you'd come up with a different
 10:36 20 set. And you might come up with a set that I would find
 10:36 21 easy to say, well, yeah, I think I could see that. But,
 10:36 22 in all likelihood, this case is not about either end of
 10:36 23 that.

10:36 24 Q. Yeah. I could, if my client -- if my client
 10:36 25 were a female.

10:36 1 A. Yes.

10:36 2 Q. And I guess I could make all my analogies to
 10:36 3 Mother Teresa.

10:37 4 A. Sure.

10:37 5 Q. Or Helen Keller or -- but somebody of your
 10:37 6 education is going to sit there and go, if she was
 10:37 7 Mother Teresa or Helen Keller, like, we probably
 10:37 8 wouldn't be here in the first place.

10:37 9 A. That's right. That's right.

10:37 10 Q. You can probably look at them and figure out
 10:37 11 he's not a war hero, just based on his age.

10:37 12 A. I -- well, okay, based on his age. Nothing
 10:37 13 more. You can't really say anything else, I don't
 10:37 14 think.

10:37 15 Q. But you certainly have the education and the
 10:37 16 wherewithal, because you are a little bit different.
 10:37 17 You are highly educated. I don't think we are going to
 10:37 18 interview any other Ph.D.'s, you know, people who have
 10:37 19 not only an engineering, but an electrical engineering
 10:37 20 background. But post work, post-graduate work even
 10:37 21 after that. So you are very unique in the fact that,
 10:37 22 you are probably the most educated person out of the 200
 10:37 23 that showed up last Tuesday, or very close to it, I can
 10:38 24 tell you that right now.

10:38 25 And I think you are -- you are fortunate

10:38 1 because you can -- you can draw the distinction and
 10:38 2 understand why Mr. Schultz will use Adolf Hitler and
 10:38 3 Nazi Germany. And maybe why somebody like me would be
 10:38 4 using Mother Teresa and Helen Keller and, you know,
 10:38 5 people like that.

10:38 6 In your comment -- Mr. Schultz touched on
 10:38 7 this a bit with you -- when the questionnaire asked you
 10:38 8 for, give a pro and give a con, both ways. And some
 10:38 9 people may serve some purpose in living in prison for
 10:38 10 the rest of their lives and may suffer an even greater
 10:38 11 punishment thereby.

10:38 12 And before I get into the specifics of
 10:39 13 that with you, I think Mr. Schultz has told you that, if
 10:39 14 someone were given a life sentence for capital murder,
 10:39 15 it's 40 years minimum. I mean, no parole. You got to
 10:39 16 do 40. How old -- how old do you think Ivan there is,
 10:39 17 just looking at him?

10:39 18 A. In his 20s, mid-20s?

10:39 19 Q. Mid to late 20s. I think you would be right.

10:39 20 A. Yeah.

10:39 21 Q. We're probably talking, if somebody like him
 10:39 22 would get a life sentence, would be about 70 when he got
 10:39 23 out.

10:39 24 A. He would be about my age.

10:39 25 Q. He would be about your age. Now, the thing

10:39 1 about it is, and Mr. Schultz is right, after the 40 we
 10:39 2 don't know what happens. First of all, most of us in
 10:39 3 this courtroom will probably, won't be around to know.
 10:39 4 I don't think you'll be around in 40 years, I may or may
 10:39 5 not be around in 40. Mr. Schultz may or may not be
 10:39 6 around in 40. Some of the younger folks in here. Ivan
 10:40 7 may. We don't know if somebody can live 40 years in the
 10:40 8 penitentiary, so...

10:40 9 A. Right.

10:40 10 Q. It's a relatively recent -- I guess Governor
 10:40 11 Bush in his first term enacted that law or signed off on
 10:40 12 that law, so we don't know what can -- we don't know
 10:40 13 what will happen after 40. Like Mr. Schultz said, it
 10:40 14 will be the governor 40 years from now and his or her
 10:40 15 pardon and parole board but --

10:40 16 A. That's a long time.

10:40 17 Q. With that in mind, does that cause you a
 10:40 18 problem? I'm sorry, you were going to say something.

10:40 19 A. I say, that's a long time.

10:40 20 Q. It is a long time.

10:40 21 A. I mean, I'm looking back on it, and I can tell
 10:40 22 you, it's a long time.

10:40 23 Q. Sure. I mean, these days, people are born,
 10:40 24 they go to school, maybe they go to college, maybe they
 10:40 25 get married once or twice. I mean, I know grandparents,

10:40 1 and I know great-grandparents that are in their 40s.
 10:40 2 A. Yeah.
 10:40 3 Q. I don't think it used to be that way years ago.
 10:41 4 Well, many years ago when it was common to get married,
 10:41 5 I suppose.
 10:41 6 A. Yes.
 10:41 7 Q. 14, 15, 16 years old, in the Old West, I
 10:41 8 suppose. It is a long time. Does that cause you, as a
 10:41 9 juror who could, who may ultimately have to decide
 10:41 10 between life and death, does the fact that somebody does
 10:41 11 40, instead of an actual life without parole, does that
 10:41 12 cause you any trouble?
 10:41 13 A. Oh, no. Again, it obviously depends on what
 10:41 14 the case and what the circumstances are that we're
 10:41 15 talking about.
 10:41 16 Q. Right.
 10:41 17 A. But, I mean, as opposed to a death penalty, I
 10:41 18 mean, in my view, it's better than the alternative.
 10:41 19 Q. Okay. There may be some people who, after
 10:41 20 hearing the facts and the evidence and looking at all
 10:41 21 the background and history and the offense and the
 10:42 22 relationships and motives and all that kind of thing,
 10:42 23 maybe that kind of juror would say, you know, in this
 10:42 24 case life confinement is appropriate. And I think that
 10:42 25 will be the right and proper thing to do. But, it's not

10:42 1 life. I can't be guaranteed that he will die in
 10:42 2 Huntsville, Texas, and be buried in the prison pauper
 10:42 3 cemetery out back. So I'm going to have to vote for
 10:42 4 death because I think he might get out after 40 years.
 10:42 5 A. No, no, I don't think.
 10:42 6 Q. You don't go that way?
 10:42 7 A. No.
 10:42 8 Q. All right.
 10:42 9 A. I figure after 40 years, in my opinion, that in
 10:42 10 all likelihood, he's either not alive or he's changed to
 10:42 11 a point that he's not going to be a threat to society.
 10:42 12 Q. Did you see *The Shawshank Redemption*?
 10:42 13 A. No. No, I didn't.
 10:43 14 Q. When you wrote down they still may serve some
 10:43 15 purpose for living in prison the rest of their lives,
 10:43 16 what did you mean by that?
 10:43 17 A. What purpose?
 10:43 18 Q. Yeah.
 10:43 19 A. Well, I was thinking in terms of -- I guess I
 10:43 20 was thinking more in terms of their family or if they
 10:43 21 had children or, you know, they might, they might
 10:43 22 actually be useful as counselors. I know that sounds
 10:43 23 strange, or they might be able to say things to their
 10:43 24 children or other relatives or other people that might
 10:43 25 do what I think is very important, and that is to try to

10:43 1 deter others from acting in the way they did. And they
 10:43 2 are obviously not going to do that if they are dead.
 10:44 3 I'm not sure that would happen. That's why I said
 10:44 4 "might."
 10:44 5 Q. Have you ever heard of that guy or read any of
 10:44 6 his books or articles? There's a guy on -- that got, I
 10:44 7 guess he got the death penalty in Louisiana. He was at
 10:44 8 Angola, their big maximum unit down there. And somehow
 10:44 9 he got committed to life, but he's a Pulitzer Prize
 10:44 10 winner now.
 10:44 11 A. I have not read anything of his, but I think I
 10:44 12 recall of the case.
 10:44 13 Q. Do you think that makes an argument that
 10:44 14 people, although they do life, may be somewhat
 10:44 15 productive?
 10:44 16 A. I think that --
 10:44 17 Q. At least as far as prison goes?
 10:44 18 A. I think that's certainly one way. And perhaps
 10:44 19 one of the -- for somebody that's serving a 40-year
 10:44 20 sentence or a very extended sentence, that may be the
 10:45 21 most effective way, if they have the knowledge and the
 10:45 22 gifts and the industry that it takes to produce a work
 10:45 23 like that.
 10:45 24 Q. Yeah.
 10:45 25 A. I mean, you are probably not going to be

10:45 1 interviewed by *60 Minutes*. So, if you are going to get
 10:45 2 the word out, you are probably going to have to write it
 10:45 3 in a book.
 10:45 4 Q. Right. One of -- in the just general comment
 10:45 5 section, the questionnaire asks you to just kind of
 10:45 6 shoot from the hip on about six or seven different
 10:45 7 topics. The biggest problem in the criminal justice
 10:45 8 system is. And I think you wrote, "The slowness by
 10:45 9 which it operates."
 10:45 10 A. Yeah.
 10:45 11 Q. Also there's too great a tendency to rely on
 10:45 12 expert testimony concerning the impact of the accused,
 10:46 13 background and circumstances that may or may not lead to
 10:46 14 the crime in question. Okay? Talk about the first --
 10:46 15 the first part of your answer. Slowness, does that
 10:46 16 cause you some concern?
 10:46 17 A. Yeah. Yeah, I think there have been too many
 10:46 18 instances, perhaps more now in the past than in the more
 10:46 19 recent future, but certainly cases where I think it's
 10:46 20 taken far too long to bring an accused to trial and
 10:46 21 resolve it, and one way or the other.
 10:46 22 I don't think it serves the accused or the
 10:46 23 State when that happens. And I don't know all of the
 10:46 24 reasons as to why that happens. I think in many cases
 10:46 25 it's probably because in the past the court systems were

10:46 1 totally overloaded. And there were probably not enough
 10:46 2 judges, probably not enough facilities, and that's
 10:46 3 probably why that happened.

10:46 4 I think that that has bothered me in the
 10:47 5 past. I'm not suggesting that they commit a crime
 10:47 6 yesterday, and they haul them into court tomorrow
 10:47 7 morning and with whatever evidence can be mustered, and
 10:47 8 they are either convicted or not. But when things can
 10:47 9 drag on for years or certainly many many months, if not
 10:47 10 years, sometimes I think that's -- that's too long.

10:47 11 As far as, I guess, the second part of
 10:47 12 that, tell me again what I said. I did shoot from the
 10:47 13 hip.

10:47 14 Q. I think you have, your comment speaks of too
 10:47 15 much reliance on quote unquote experts.

10:47 16 A. Oh, yeah. I know the words here that say that,
 10:47 17 you know, take into account the past of the accused, the
 10:47 18 environment, the childhood, how they were raised, this
 10:47 19 that and the other. And I think, I think that's
 10:47 20 appropriate. But I also sometimes get the feeling that
 10:48 21 there are cases where that part of it is over --
 10:48 22 overworked. And a great parade of experts are brought
 10:48 23 in with an attempt to prove that the individual was --
 10:48 24 maybe they are trying to show that they were insane at
 10:48 25 the time.

10:48 1 And I accept the fact that insanity is a
 10:48 2 reason why this crime might have been a crime, might
 10:48 3 have been committed. But I think when they overdo that
 10:48 4 to the point where they try to, shall we say, bull dog
 10:48 5 the -- bulldoze the jury into thinking that, I mean,
 10:48 6 this is the main thing to consider.

10:48 7 I mean, suddenly instead of the crime that
 10:48 8 they are being tried for being at the center, it's their
 10:48 9 life history and how they were mistreated as a child. I
 10:48 10 mean, the whole thing begins to take an inverted
 10:49 11 appearance.

10:49 12 Q. Right.

10:49 13 A. And I think sometimes the jurors -- some
 10:49 14 jurors, can be very very easily swayed by that.
 10:49 15 Particularly if they've ever had a case like this or
 10:49 16 have known people that they felt were mistreated as
 10:49 17 children. And that's not to say that that doesn't have
 10:49 18 some affect, but I think it gets -- gets the whole
 10:49 19 process out of focus.

10:49 20 Q. I think most people would agree with you that,
 10:49 21 well, that would just agree about the use of experts.
 10:49 22 Certainly maybe in the first part of a trial what we
 10:49 23 call the guilt-innocence phase. Unless somebody is
 10:49 24 claiming insanity, and by that very nature you
 10:49 25 probably -- most people would say, I maybe would like to

10:49 1 hear from a psychiatrist or a psychologist. And then
 10:49 2 maybe you do get into the battle of the experts; but,
 10:49 3 generally speaking, in most criminal trials, experts
 10:49 4 don't play much of a role in whether a person is guilty
 10:50 5 or not guilty in Texas. And you're right --

10:50 6 A. In Texas.

10:50 7 Q. A lot of other states --

10:50 8 A. That's not true.

10:50 9 Q. You are right.

10:50 10 A. And I have been in a lot of other states, and
 10:50 11 it's not true.

10:50 12 Q. We don't -- and insanity defenses, I can't even
 10:50 13 tell you the last time it was used in Collin County. I
 10:50 14 can't even think of a case, where somebody was found not
 10:50 15 guilty by reason of insanity. It's so rare in this
 10:50 16 state.

10:50 17 A. I think you require expert -- some sort of
 10:50 18 expert advice on such things as insanity. I mean,
 10:50 19 sometimes, I suppose, it's obvious upon just by
 10:50 20 everybody looking or knowing the individual, but
 10:50 21 sometimes it's not quite so obvious.

10:50 22 Q. Right. In the second part of a trial, though,
 10:50 23 in a capital murder case like this one where life or
 10:50 24 death is on the line, it's very common to have mental
 10:51 25 health experts try to assist the jury. And the good

10:51 1 thing under Texas law is a judge will normally tell a
 10:51 2 juror, you can believe everything a witness says, none
 10:51 3 of what a witness says.

10:51 4 In other words, how you perceive and take
 10:51 5 that evidence from a witness is expert or otherwise.
 10:51 6 It's totally up to you as an individual and then maybe
 10:51 7 collectively as a jury, but certainly individual first
 10:51 8 as a juror.

10:51 9 How would you receive expert psychiatric
 10:51 10 testimony? Not on whether somebody did it, so to speak,
 10:51 11 but whether they are guilty of capital murder. But on
 10:51 12 those special issues, the probability of future acts and
 10:51 13 that mitigation special issue?

10:51 14 A. Oh, I would have to say that I would listen to
 10:51 15 it and listen to it seriously. I mean, I don't believe
 10:51 16 that I or anyone else has the special ability to peer
 10:52 17 into the future, if you are talking about commit future
 10:52 18 acts and say with certainty.

10:52 19 I also don't think the expert can say that
 10:52 20 either. I think you would weigh that opinion, along
 10:52 21 with your own opinion, and whatever else may have been
 10:52 22 presented in the trial.

10:52 23 Q. Right. I wanted to talk to you about this one,
 10:52 24 about criminal defense attorneys.

10:52 25 A. Uh-huh. I knew you would get to that.

10:52 1 Q. Okay.
 10:52 2 (Laughter.)
 10:52 3 MR. SCHULTZ: So stipulated.
 10:52 4 Q. (BY MR. GOELLER) Mr. High and I are court
 10:52 5 appointed.
 10:52 6 A. I see, okay.
 10:52 7 Q. I don't know --
 10:52 8 A. Well, that does put you in a special category.
 10:53 9 Q. I don't know of a capital murder defendant in
 10:53 10 Texas that has the money to hire his own lawyer or her
 10:53 11 own lawyer. But I -- would you just trust me when I
 10:53 12 tell you we're not making a lot of money.
 10:53 13 A. Okay. I'll trust you.
 10:53 14 Q. Okay.
 10:53 15 A. I could ask you why you don't practice in
 10:53 16 another state. But with your persuasion, this is a
 10:53 17 tough state.
 10:53 18 Q. Yeah, it is.
 10:53 19 A. I think it's --
 10:53 20 Q. Maybe I should see some mental health experts.
 10:53 21 Okay. "What makes a person dangerous?" "A person who
 10:53 22 holds the law of society content is willing to take
 10:53 23 great risk to change the system or remedy a situation
 10:53 24 that prevents him or her from achieving the same
 10:53 25 objective."

10:53 1 I read that as your thinking along the
 10:53 2 lines of a McVeigh?
 10:53 3 A. Yes, or somebody who maybe commits murder in
 10:54 4 the process of robbing a bank or -- or something where
 10:54 5 they -- their objective is to acquire funds, maybe for
 10:54 6 drugs, maybe for something else. And, you know,
 10:54 7 somebody gets in their way, and they decide they'll
 10:54 8 eliminate the obstacle. And they -- they are willing to
 10:54 9 take that risk.
 10:54 10 I mean, certainly here in Texas, I think
 10:54 11 they -- most of them, I would think, no, that there is a
 10:54 12 great risk in associating with doing something like
 10:54 13 that. I don't know the circumstances of this case,
 10:54 14 obviously, but that's what I'm thinking about --
 10:54 15 Q. Yeah.
 10:54 16 A. -- when I answered that. And it could be a
 10:54 17 McVeigh. It could be for political reasons, or it could
 10:54 18 be for, I guess, quasi-political reasons. I'm not real
 10:54 19 sure I know why McVeigh did it. I'm not even sure he
 10:54 20 knows exactly why he did it.
 10:54 21 Q. I think you are right. I'm not even sure he
 10:54 22 knows. There's something about wanting to get back at
 10:55 23 the government for Waco?
 10:55 24 A. Yeah, yes. I mean, that's what's been stated.
 10:55 25 I mean --

10:55 1 Q. You, as a juror, would you be interested --
 10:55 2 would it be important to you that you know the why as to
 10:55 3 the offense? Why did somebody end up --
 10:55 4 A. Well, I think that could be very, very useful
 10:55 5 information. I mean, if you really knew why. If there
 10:55 6 was enough evidence to show why this was done, that it
 10:55 7 was not concocted in some sense.
 10:55 8 Q. Do you think drug dealers -- that drug dealers
 10:55 9 who end up dead, either they are murdered or a drug deal
 10:55 10 goes bad or something of that nature, do you think
 10:55 11 people who traffic in those type of substances and
 10:55 12 narcotics kind of know the risks going in or should be
 10:56 13 aware of the risks that something could go bad? I deal
 10:56 14 drugs. It's dangerous. I deal to people that may make
 10:56 15 them dangerous. We may get into disagreements over
 10:56 16 maybe large sums of money.
 10:56 17 I guess what I'm asking: Do you think
 10:56 18 that, as far as people that end up dying, maybe they are
 10:56 19 deceased. Maybe they are quote unquote a murder victim,
 10:56 20 even though they are a drug dealer.
 10:56 21 Do you think there is a certain amount of,
 10:56 22 you know, if you lay down with dogs, you are going to
 10:56 23 end up with fleas?
 10:56 24 A. Well, I dislike drugs. I dislike all of the
 10:56 25 effects of drugs, and I think it's a terrible scourge on

10:56 1 society. And I do think if you sleep with dogs, you are
 10:56 2 likely of getting fleas on you. But could you rephrase
 10:57 3 it? Exactly what it is you want me to respond to
 10:57 4 because I'm not absolutely sure I know what it is you
 10:57 5 want -- you are trying to get to here.
 10:57 6 Q. I'm not either. I see your comment in here
 10:57 7 about, you know, people who take great risks to change
 10:57 8 the system or remedy a situation. That, by definition,
 10:57 9 is probably anybody that's been found guilty of capital
 10:57 10 murder. Wouldn't you agree?
 10:57 11 A. I would hope that that would be true of anybody
 10:57 12 that was found guilty of capital murder.
 10:57 13 Q. And assume -- assume for a moment that you are
 10:57 14 a juror in a case that you found somebody guilty of
 10:57 15 capital murder, somebody that's killed two people or
 10:57 16 killed in the course of a burglary or a robbery.
 10:58 17 Because of the fact that you found them guilty of an
 10:58 18 intentional killing in the course of one of those other
 10:58 19 things or two people, are you able to look at that first
 10:58 20 special issue, that probability of criminal acts of
 10:58 21 violence? Because when I read your comment, I, in the
 10:58 22 back of my mind, I'm thinking, this may be automatic for
 10:58 23 you, you know.
 10:58 24 And I know Mr. Schultz used the example of
 10:58 25 the guy that had the stroke, the defendant, from his

10:58 1 scalp, Mr. Schultz, or eyes, I can't recall. That's a
 10:58 2 pretty extreme example. I'm trying to ascertain, based
 10:58 3 on your comment here, great risks. Do you really see
 10:58 4 yourself ever answering that question?

10:59 5 A. Well, as I said earlier, I think there's
 10:59 6 nothing in this world other than death and taxes that's
 10:59 7 certain. So, you know, it's the issue of probability
 10:59 8 that one has to weigh here. I think that, once an
 10:59 9 individual has committed a criminal act of violence,
 10:59 10 which in itself, I think if it's truly a criminal act of
 10:59 11 violence is, if committed again, would be a threat to
 10:59 12 society, whether it's prison society or society at
 10:59 13 large. The question is: Having done it once, you have
 10:59 14 to admit there is some probability that it could be done
 10:59 15 again.

10:59 16 Q. Right.

10:59 17 A. The question is: How big a probability is
 10:59 18 that? And that's going to have to be weighed. I mean,
 11:00 19 that takes into account background. It takes into
 11:00 20 account the propensity to take risks in order to do this
 11:00 21 sort of thing. There's a whole host of issues here that
 11:00 22 would need to be considered in deciding whether or not
 11:00 23 that probability, in my mind. Okay?

11:00 24 Q. Once -- and you are exactly on point -- once
 11:00 25 you considered all those things --

11:00 1 A. Yes.

11:00 2 Q. Is probability more in the line of, I think
 11:00 3 Mr. Schultz used the example of possibility?

11:00 4 A. Oh, I think it would be possible. I mean, to
 11:00 5 my way of thinking, possibility, hey, it's possible.
 11:00 6 We've got the famous case on trial right now here in
 11:00 7 Dallas about the breakout from prison. I mean, it's
 11:00 8 possible.

11:00 9 Q. Right.

11:00 10 A. It's really a question -- I think the word that
 11:00 11 was chosen by the legislature was right, probability,
 11:01 12 what the probability. And there, if you are asking me,
 11:01 13 could I ever conceive that the probability would be so
 11:01 14 low that I could answer that -- that no, that I think
 11:01 15 they wouldn't be a threat, the probability. I agree, I
 11:01 16 think I could think of cases where maybe that belief or
 11:01 17 probability was low enough. Not zero.

11:01 18 Q. Right. And you would agree that it doesn't
 11:01 19 mean zero?

11:01 20 A. No, it's not zero.

11:01 21 Q. But it could be -- and you are taking, when you
 11:01 22 look back at the Texas Seven and Mr. Rivas and those
 11:01 23 fellows --

11:01 24 A. Right.

11:01 25 Q. -- you believe the legislature, when they talk

11:01 1 about the word probability and having really a
 11:01 2 mathematical background that you do, engineering
 11:01 3 background, the most logical attachment to that word is
 11:02 4 possibility greater than zero, a possibility greater
 11:02 5 than zero. Because if it was zero, then we know the
 11:02 6 answer would have to be no.

11:02 7 A. Yeah. And I'm saying that I think it could be
 11:02 8 no without it being zero because I'm not sure that
 11:02 9 there's anyone on this earth that could guarantee that
 11:02 10 whether this individual were put in prison for 40 years
 11:02 11 that there wouldn't be some opportunity in all of those
 11:02 12 years or certainly maybe in the first half of those
 11:02 13 years that something could be done that would allow them
 11:02 14 to either escape, which would be a real bad case or --
 11:02 15 or simply do violence to other people within the prison
 11:02 16 system. Which, if you consider it, is a subset of a
 11:02 17 society as a whole.

11:02 18 So I think the chances that you'd -- you
 11:02 19 would say that it's zero, I just don't see it. I think
 11:02 20 the question is, at what is the threshold? And
 11:03 21 unfortunately, everybody's going to see that slightly
 11:03 22 differently. There may be people that would treat that
 11:03 23 as zero as the only. I don't, in answer to your
 11:03 24 question.

11:03 25 Q. You treat it as possibility?

11:03 1 A. Well, I treat it as a -- I treat it as
 11:03 2 probability. I agree, there is always, there is always
 11:03 3 the possibility that the defendant could commit a
 11:03 4 criminal act of violence. That's always possible, but I
 11:03 5 think the probability of that happening, which is, you
 11:03 6 know, somewhere between 0 and 100 percent, has got to be
 11:03 7 somewhere down near the lower end of that range.

11:03 8 Q. Really meaning possibility?

11:03 9 A. Yeah, well.

11:03 10 Q. I mean, what you're -- what you're telling me
 11:03 11 logically, probability means possibility, the way you
 11:03 12 view that question?

11:03 13 A. No. I don't really mean that. I mean --

11:03 14 Q. Possibility --

11:03 15 A. -- I understand the word probability. I'm
 11:04 16 telling you that I think it's always possible.

11:04 17 Q. Okay.

11:04 18 A. But it may not be very probable.

11:04 19 Q. I lost you.

11:04 20 A. I'm saying --

11:04 21 Q. You said for you that threshold is very low?

11:04 22 A. Low probability. I'm saying that I would
 11:04 23 expect that it would be a very low probability before I
 11:04 24 could answer that question as --

11:04 25 Q. Okay. I got you. But I think one of the

11:04 1 questions in the questionnaire talked about voluntary
 11:04 2 intoxication as another defense.
 11:05 3 A. Yeah.
 11:05 4 Q. Okay? If I get drunk, drunk driving,
 11:05 5 intoxicated, that's -- because I consumed the alcohol, I
 11:05 6 can't claim intoxication defense. And generally under,
 11:05 7 in Texas law, in the guilt-innocence phase, the first
 11:05 8 phase of the trial, the fact that a person may have been
 11:05 9 on drugs or alcohol will not figure into whether they
 11:05 10 are guilty or not guilty.
 11:05 11 A. All right.
 11:05 12 Q. But in the second phase of the trial, do you
 11:05 13 see yourself as the kind of person that -- that would
 11:05 14 listen to evidence regarding a person's state of mind
 11:05 15 due to substance abuse or being high on drugs or
 11:05 16 something like that?
 11:05 17 A. I think the person's state of mind is -- is
 11:05 18 important, but I think only in the sense of perhaps
 11:05 19 making this decision between death and -- and some long
 11:06 20 term in prison. I mean, I think that, you can't --
 11:06 21 well, I'll leave it at that. I mean, I think that
 11:06 22 that's the only -- only way that that would come into
 11:06 23 play in my mind.
 11:06 24 Q. And I think you'd be right. I mean, it
 11:06 25 can't -- it shouldn't come into play probably as to

11:06 1 whether or not a person is guilty or not guilty?
 11:06 2 A. Right.
 11:06 3 Q. But you could see it as, you -- you would keep
 11:06 4 an open mind as to whether that evidence might be
 11:06 5 mitigating?
 11:06 6 A. Yeah. I think that's the word that you
 11:06 7 would -- or the right word.
 11:06 8 Q. Do you drink?
 11:06 9 A. Very little.
 11:06 10 Q. Okay. Have you been pretty consistent that way
 11:06 11 throughout your life?
 11:06 12 A. Yes, yes, very consistent.
 11:06 13 Q. Have you ever known any friends or relatives or
 11:06 14 associates that drank more than they should?
 11:06 15 A. Yes, I have.
 11:07 16 Q. Do you see that or recognize that people do
 11:07 17 things and say things while maybe in some type of state
 11:07 18 of intoxication?
 11:07 19 A. Unfortunately.
 11:07 20 Q. And I think with you --
 11:07 21 A. Unfortunately, yes.
 11:07 22 Q. That you would know. And we're probably
 11:07 23 limiting it to alcohol.
 11:07 24 A. Yes, as far as I know they were.
 11:07 25 Q. Yeah. Have you ever been angry with somebody

11:07 1 because of what they said or what they did because they
 11:07 2 maybe had too much, maybe they had a snoutful?
 11:07 3 A. Oh, maybe once or twice in my life I can think
 11:07 4 of an instance or two. I wasn't sure sometimes how much
 11:07 5 of a snoutful they had. I have been called a lot of
 11:07 6 things.
 11:07 7 Q. Once a little -- some time passed and that
 11:07 8 person who may have offended you or said something to
 11:08 9 you that you didn't appreciate, but they either sobered
 11:08 10 up or -- and I'll throw it all, with you, I'm sure, the
 11:08 11 only people that you would ever have been associated
 11:08 12 with, as far as substance abuse, may have been alcohol.
 11:08 13 But in today's day and age --
 11:08 14 A. Oh, yeah, I understand.
 11:08 15 Q. Drugs, speed, pot, all that kind of thing.
 11:08 16 A. Right.
 11:08 17 Q. Once those type of people either sobered up or
 11:08 18 you saw them again at work or the next day, after a
 11:08 19 couple days after an office Christmas party or something
 11:08 20 like that, what did you think about what they had said
 11:08 21 with a snoutful but now seem okay?
 11:08 22 A. Well --
 11:08 23 Q. As far as human nature, the way human beings
 11:08 24 go?
 11:08 25 A. As far as I'm recalling the few instances, I

11:08 1 guess most of the -- I think in the cases I'm
 11:09 2 remembering, I figured they said what they really
 11:09 3 believed and might not have said otherwise.
 11:09 4 THE COURT: In vino veritas.
 11:09 5 VENTIREPERSON: I really wasn't. I wasn't
 11:09 6 overly shocked, nor did I really think much differently
 11:09 7 about them because I suspected they might have thought
 11:09 8 some of that anyway.
 11:09 9 THE COURT: Oh, by the way, that means "in
 11:09 10 wine there is truth." So when you get a little, you
 11:09 11 say what you think.
 11:09 12 Q. (BY MR. GOELLER) Sometimes, sometimes alcohol
 11:09 13 and drugs, they really lower our -- lower our
 11:09 14 inhibitions. Would you agree with me?
 11:09 15 A. Oh, yes.
 11:09 16 Q. I mean, sometimes saying things because they
 11:09 17 are truthful is not the right thing to do.
 11:09 18 A. That's true. That's right.
 11:09 19 Q. But you get a snoutful, and you say things you
 11:09 20 wish you hadn't said sometimes. But they certainly
 11:10 21 alter our thought process and our mind, would you agree,
 11:10 22 alcohol, drugs?
 11:10 23 A. Well, they do something, I think. I don't know
 11:10 24 about drugs. I certainly have not -- that's why I don't
 11:10 25 drink very much because I recognize that that sort of

11:10 1 thing can happen, and I've seen it in others.
 11:10 2 Q. Have you ever known any alcoholics?
 11:10 3 A. Oh, yes. Yes, I have.
 11:10 4 Q. Were they -- if you took the liquor and the
 11:10 5 booze away, would they be decent folks, you think?
 11:10 6 A. I would say.
 11:10 7 Q. I'm not saying an alcoholic is not decent.
 11:10 8 A. No, no, no, I know that. But, yes, I think in
 11:10 9 general, the cases I've known, I would say, yes. In
 11:10 10 some cases very much so. But yes, I'll just leave it at
 11:11 11 that. They would be. They just -- they couldn't stay
 11:11 12 away from it, that's all.
 11:11 13 Q. Why do you think that is? Why do you think
 11:11 14 some people can't put the bottle down or --
 11:11 15 A. Well --
 11:11 16 Q. -- when they know it hurts them?
 11:11 17 A. I don't know for sure, but from what I
 11:11 18 understand it's a chemical. There's a certain chemistry
 11:11 19 involved. And for some people it's like an addiction,
 11:11 20 other kinds of addiction, and they just crave it to the
 11:11 21 point where they can't -- they can't stand it. And
 11:11 22 they'll do sometimes fairly stupid things in the process
 11:11 23 of --
 11:11 24 Q. Yeah.
 11:11 25 A. -- trying to get to it. But, I don't --

11:11 1 unfortunately, it can lead them to do things that are
 11:11 2 really, really, pretty bad.
 11:11 3 Q. Yeah. People that do really bad things while
 11:11 4 maybe they are drunk or they are high, somehow they are
 11:12 5 under the influence of some type of controlled
 11:12 6 substance. It won't excuse their conduct under our law,
 11:12 7 you know, that voluntary intoxication.
 11:12 8 A. Uh-huh.
 11:12 9 Q. You may be addicted. You may can't put the
 11:12 10 bottle down. You may can't stop taking amphetamine or
 11:12 11 cocaine or whatever, but under our law, and I think most
 11:12 12 people would agree, as far as being guilty or not guilty
 11:12 13 of the crime, that's just -- that's tough. You cannot
 11:12 14 use that as a defense. But would you be receptive or
 11:12 15 open to those very types of things in a case involving
 11:12 16 the punishment of that crime, as far as, you know, maybe
 11:12 17 in this case life or death?
 11:12 18 A. Yeah. I think one has to be receptive to it.
 11:13 19 Q. We've had some jurors up to this point that
 11:13 20 have talked about, when I get to this topic, they say,
 11:13 21 well, there's no ex -- that's not going to be an excuse.
 11:13 22 You can't excuse that. I'm not going to look at that
 11:13 23 and excuse that. We shouldn't excuse that.
 11:13 24 And I've tried to maybe get them, maybe
 11:13 25 not so artfully, but I've tried to get them to

11:13 1 understand that, before we get to these special issues,
 11:13 2 that type of evidence, if there were some, is not an
 11:13 3 excuse. To get to those questions, you have already
 11:13 4 found somebody guilty of capital murder.
 11:13 5 A. Uh-huh.
 11:13 6 Q. We know, and I would say the way the system in
 11:13 7 Texas is set up, it's -- it's really an automatic life
 11:13 8 sentence for the punishment, for capital murder because
 11:13 9 to get death, other things have to happen. So I think,
 11:14 10 logically, we have a system that sets up life, and then
 11:14 11 extra steps need to be taken to get to death.
 11:14 12 And in dealing with those jurors that say,
 11:14 13 that's not an excuse, I'm not going to look at an
 11:14 14 excuse. We're not going to excuse those kind of things
 11:14 15 when we get to that first special issue. And we talked
 11:14 16 about continuing threat to society. We know before that
 11:14 17 question is answered, if it's not answered unanimously
 11:14 18 yes, we know a life sentence, at least 40 calendar years
 11:14 19 in the penitentiary is going to take place.
 11:14 20 Do you think that -- do you think that
 11:14 21 people that maybe commit very bad acts due to some type
 11:15 22 of substance abuse, mind-altering drugs or, you know, I
 11:15 23 guess there's two schools of thought: You don't do it
 11:15 24 because of those. The drugs don't make you pull the
 11:15 25 trigger, grab the knife or something like that, but

11:15 1 certainly you recognize they figure into a person's
 11:15 2 mental state.
 11:15 3 Do you think there's any -- any merit in
 11:15 4 the argument that, if you take the dope away -- well,
 11:15 5 let me ask you this: Sometimes we have to put drunk
 11:15 6 drivers in jail. Some judges say, and I've heard them
 11:15 7 say, Mr. So and So, I know you don't want this, but you
 11:15 8 haven't learned your lesson. I ordered you not to
 11:15 9 drink; you drank. I got to make sure you don't drink
 11:16 10 because you might hurt somebody when you cross the
 11:16 11 center stripe. I'm sending you to the penitentiary.
 11:16 12 And then that might be in a case where
 11:16 13 nobody has actually been hurt. There was no accident.
 11:16 14 Just an officer pulled somebody over on suspicion of
 11:16 15 drunk driving. But you see the merit of that judge's
 11:16 16 decision, where a judge would say, I've got to put you
 11:16 17 somewhere where you can't get Budweiser.
 11:16 18 Do you think that's a good argument or
 11:16 19 that's a good thing for a judge to do if it gets to the
 11:16 20 point where you've got to keep the substance away from
 11:16 21 the person?
 11:16 22 A. Well, as a short-term fix, I can see the merit
 11:16 23 in it. Unfortunately, in the case of some kinds of
 11:16 24 addiction or the kinds we're talking about, you know, I
 11:17 25 guess maybe if you wanted to really protect society, it

11:17 1 would be an awfully harsh thing to do, I suppose, for
 11:17 2 somebody that was just drunk and went over the center
 11:17 3 line once. But I suppose you would almost have to put
 11:17 4 them away for the rest of their life, unless there was
 11:17 5 some treatment that can be given that will more or less
 11:17 6 ensure that this individual is not going to have that
 11:17 7 kind of urge in the future or that it would not lead to
 11:17 8 that act of violence.

11:17 9 I mean, drunk driving is relatively simple
 11:17 10 compared with acts of violence that might be committed
 11:17 11 in other instances where there's something that's either
 11:17 12 in the background, the environment or the circumstances
 11:17 13 of that individual's life that would again maybe with
 11:17 14 just a little bit of alcohol or just a little bit of
 11:17 15 whatever the drug was that would allow the inhibition
 11:17 16 that would prevent him or her from picking up a gun or a
 11:18 17 knife or doing something and doing somebody in. I mean,
 11:18 18 it's -- you don't know what -- what kind of medication
 11:18 19 or treatment could be given --

11:18 20 Q. Right.

11:18 21 A. -- that would prevent that. Indeed, I would
 11:18 22 say that if it were -- if one were assured that such
 11:18 23 treatment or medication were available and could be
 11:18 24 given in a way that it was always taken or that it was
 11:18 25 done once and then never had to be done again like a

11:18 1 vaccine, then you might look at this whole thing
 11:18 2 differently.

11:18 3 Q. Right.

11:18 4 A. I think society has evolved to this point for
 11:18 5 the simple reason that they don't have any such
 11:18 6 treatment. I mean, you can't give somebody such a
 11:18 7 treatment and be assured that it's not going to happen.

11:18 8 Q. Right. Do you think that in the context of a
 11:18 9 capital murder case where life is at least 40 calendar
 11:18 10 years, do you think life, the argument could be made
 11:19 11 that life could be a good alternative to keep people
 11:19 12 away from drugs and the things they do while either on
 11:19 13 drugs or while connected with the drug business?

11:19 14 Do you think you might be receptive or
 11:19 15 keep an open mind to that that a life sentence might,
 11:19 16 you know, kind of like -- you are right, a short-order
 11:19 17 fix for an alcoholic? The Judge says, well, I got to
 11:19 18 put you in the penitentiary. It might not -- it might
 11:19 19 not be the ultimate fix. It may be a short-term fix.
 11:19 20 But in terms of 40 years, do you think that might be
 11:19 21 a --

11:19 22 A. Well, you know, I mean, a -- yes, I think I
 11:19 23 could be receptive. In answer to your question to that
 11:19 24 as a fix, is 40 years -- do I think that this, as a fix,
 11:19 25 is an efficient reasonable way to do it? Not really. I

11:19 1 mean, it's a very expensive way for the State. It puts
 11:20 2 a tremendous burden on the State, not to mention what it
 11:20 3 does to the individual.

11:20 4 Q. Yeah. I mean, in the context of capital
 11:20 5 murder.

11:20 6 A. What?

11:20 7 Q. Where you found somebody guilty of --

11:20 8 A. All right. Capital murder, yes. I'm not --
 11:20 9 you are not talking about just a drunk driver.

11:20 10 Q. No. Not just a run-of-the-mill drunk driver.
 11:20 11 God, I hope we wouldn't put somebody away for 40 years
 11:20 12 on --

11:20 13 A. I hope not either. But, I mean, long periods
 11:20 14 of incarceration are, you know, you reserve that for the
 11:20 15 situation such as capital murder and cases where you are
 11:20 16 really concerned there is no way to prevent this
 11:20 17 individual. Yet, for some reason you don't feel that
 11:20 18 execution is the appropriate thing to do.

11:20 19 Q. In regards to that special issue there,
 11:20 20 probability of future acts of violence, could you see
 11:20 21 where the argument might be made that if -- if most of
 11:21 22 the trouble a person buys themselves has to do with them
 11:21 23 being on drugs and being intoxicated or high, if you
 11:21 24 take that out of the equation and they are sent to the
 11:21 25 penitentiary and they would probably die or if they

11:21 1 could live 40 years, do you see how that might -- the
 11:21 2 argument might be made that the answer to that question
 11:21 3 might be no?

11:21 4 If you know they got to do life anyhow, no
 11:21 5 matter what, on a conviction of capital murder and you
 11:21 6 keep them away from cocaine, alcohol, pot, do you see
 11:21 7 how the argument could be made that that -- the answer
 11:21 8 to that question might be no?

11:21 9 A. I can see how it might be no.

11:21 10 Q. Tell me why you can see that.

11:21 11 A. Well, I mean, if I understand you correctly,
 11:21 12 it -- what, in my words I would say that I can see
 11:22 13 the -- I can see the possible -- I use the word
 11:22 14 possibility, not to be confused with probability -- the
 11:22 15 possibility that the probability that such a commission
 11:22 16 of a violent -- a criminal act would be sufficiently low
 11:22 17 that that's where it could go. Not to have a death
 11:22 18 penalty, but to have a life -- or 40 years in prison.

11:22 19 Q. Okay. I think you put in your questionnaire
 11:22 20 you attend religious services at a Methodist church here
 11:23 21 in McKinney?

11:23 22 A. Yes.

11:23 23 Q. How strong a Methodist are you or --

11:23 24 A. Not --

11:23 25 Q. How religiously active are you?

11:23 1 A. Not very at this point. I have been more so in
11:23 2 the past. But I haven't been since I moved here, I
11:23 3 don't know, because we haven't. I often go to another
11:23 4 church because we go visit our grandchildren over in
11:23 5 South Lake, and I sometimes go there.

11:23 6 Q. And would that be a Methodist church, as well?

11:23 7 A. Yes.

11:23 8 Q. Have you ever attended a sermon? I know you
11:23 9 put in here, you are not aware of the position, if there
11:23 10 is one, within the Methodist church.

11:23 11 A. No. I'm not aware of one.

11:23 12 Q. Okay. Do you know if there is one that you are
11:23 13 not aware of?

11:23 14 A. No.

11:23 15 THE COURT: I believe that's what he said.

11:24 16 Q. What a silly question.

11:24 17 A. Yes.

11:24 18 THE COURT: But what a good answer.

11:24 19 Q. (BY MR. GOELLER) Had you been aware of one,
11:24 20 but -- no.

11:24 21 A. Jeez.

11:24 22 Q. How does capital *funishment* -- capital
11:24 23 punishment -- how do you think that fits in with
11:24 24 religion, if you are a Christian? I know I'm asking the
11:24 25 questions that, you could live 200 years and lawyers are

11:24 1 always going to ask you, but --

11:24 2 A. I'm -- well, on one hand, I guess you can look
11:24 3 at it and say that it -- it's not something that you
11:24 4 should ever partake in in any form. But on the other
11:24 5 hand, I mean, you can find other spots in the Bible, not
11:25 6 necessarily in the Methodist religion which would say,
11:25 7 which I don't necessarily say is right in black and
11:25 8 white either, an eye for an eye.

11:25 9 Q. Kind of Old Testament kind of stuff?

11:25 10 A. Right. Old Testament stuff. And so I think in
11:25 11 some ways the Bible is a little ambivalent on that
11:25 12 point.

11:25 13 Q. Your favorite movie is *The Sound of Music*?

11:25 14 A. Well, that's -- I don't see many movies.

11:25 15 Q. Why does that one stick out?

11:25 16 A. Oh, I just like -- I just like the music
11:25 17 mostly. And I was shooting from the hip at that point.
11:25 18 It's a long questionnaire.

11:25 19 Q. We could make it longer.

11:25 20 A. Yes, I'm sure you could. It would get pretty
11:25 21 personal if you made it another ten pages.

11:26 22 Q. There was one question, Mr. Penhollow, that a
11:26 23 lot of people didn't answer for two different reasons.
11:26 24 And I was wondering if you just skipped this one over or
11:26 25 it asked you to put yourself in one of these four

11:26 1 categories.

11:26 2 A. I must have skipped over it.

11:26 3 Q. Could you --

11:26 4 A. Let me look at it. Just a minute.

11:26 5 Q. Yeah.

11:26 6 A. I'll answer it for you.

11:26 7 THE COURT: Which one is it, Mr. Goeller?

11:26 8 Q. (BY MR. GOELLER) It's --

11:26 9 A. I think I must have -- probably left it and was
11:26 10 going to come back.

11:26 11 Q. Page 9.

11:26 12 A. All these, well, the first one where you say:
11:26 13 Were you the foreperson on any of these juries? Of
11:26 14 course I wasn't on a jury, so that's why I didn't answer
11:26 15 that.

11:26 16 Q. Right. I understand that.

11:26 17 A. And it says, regarding your jury service, it
11:26 18 was a little confusing.

11:26 19 Q. These are two separate questions. I don't even
11:26 20 need to know the answer to that one.

11:26 21 A. When I make up my mind -- well, if it's with
11:27 22 regarding my jury service, I guess the reason I didn't
11:27 23 answer those because I never really sat on a jury.

11:27 24 Q. Right.

11:27 25 A. So since I didn't ever participate in a jury, I

11:27 1 just didn't answer them. If you want answers to those
11:27 2 questions sort of, whether I was in jury service or not,
11:27 3 if that's what you are asking --

11:27 4 Q. No. It's kind of independent of that. But you
11:27 5 make a good point. And next time we use this
11:27 6 questionnaire, we'll probably have to put that somewhere
11:27 7 else so that they don't link it.

11:27 8 A. You ought to put it someplace else because you
11:27 9 see it says: Regarding your jury service.

11:27 10 Q. Yeah.

11:27 11 A. And I didn't have any jury service, so I didn't
11:27 12 answer the question.

11:27 13 Q. Right.

11:27 14 A. I'm happy to respond if you want -- if you want
11:27 15 to ask those questions, and I'll respond.

11:27 16 Q. I think that may mean, if you are on a jury.

11:27 17 A. All right. If I --

11:27 18 Q. If you are on a jury.

11:27 19 A. Well, can I tell pretty easily when a person is
11:27 20 telling a lie? Well, I wouldn't want to hold up my hand
11:28 21 and say, "yes." I've met some pretty good liars in my
11:28 22 lifetime.

11:28 23 Q. Okay.

11:28 24 A. "When I make up my mind, I rarely change it."
11:28 25 Well, I don't think the word *rarely* would apply. I do

11:28 1 change my mind if I'm presented with enough evidence.
 11:28 2 I'm not so hardheaded that I can't change it. Although,
 11:28 3 I have pretty strong opinions on some things where --
 11:28 4 where I do hold to a position. "I can frequently be
 11:28 5 influenced by the opinion of others." Uh, I can be
 11:28 6 influenced. I wouldn't say frequently.

11:28 7 Q. Right.

11:28 8 A. But, again, it has to be based on something
 11:28 9 that I -- it has to be a good argument. Maybe something
 11:28 10 I haven't thought about. Maybe some evidence I didn't
 11:28 11 know or facts I didn't know. If I believe they are
 11:28 12 facts, and they are not being -- concocted in some way.

11:28 13 "I always follow my own ideas rather than
 11:29 14 do what others expect of me." No. I mean, that's not
 11:29 15 necessarily true. I mean, I do follow my own ideas a
 11:29 16 lot. But I often do things that others or in this case
 11:29 17 the State might expect of me, regardless of whether I
 11:29 18 might want to do it or not.

11:29 19 Q. Right.

11:29 20 A. I have a lot of my own ideas. And very clearly
 11:29 21 I'm -- I've always been that way.

11:29 22 Q. Okay.

11:29 23 A. For what it's worth, I was a manager for like
 11:29 24 30 some years. I was a consultant. I've done a lot of
 11:29 25 things, including work with a lot of attorneys in the

11:29 1 Securities and Exchange Commission for five and a half
 11:29 2 years, which taught me a lot about the legal profession
 11:29 3 that I didn't know. In that it says, you got this one
 11:30 4 other question, I guess I answered that. Anyway, I have
 11:30 5 my own ideas about a lot of things, but I do follow.

11:30 6 Q. You've got two children, Steven and Cheryl?

11:30 7 A. Yes.

11:30 8 Q. How would you say they turned out?

11:30 9 A. I think pretty well.

11:30 10 Q. One is a custom home builder?

11:30 11 A. Right.

11:30 12 Q. Do you have any grandchildren?

11:30 13 A. Yes; eight.

11:30 14 Q. How many?

11:30 15 A. Eight.

11:30 16 Q. Some by Steven and some by Cheryl?

11:30 17 A. Two by Steven, six by Cheryl. The youngest
 11:30 18 being about two -- one month. The oldest being about
 11:30 19 13.

11:30 20 Q. I assume they are not the kind of kids that
 11:30 21 have ever been in the penitentiary?

11:30 22 A. No.

11:30 23 Q. Or been in serious trouble?

11:30 24 A. No, no.

11:31 25 Q. How do you think they turned out so well?

11:31 1 A. Oh, I don't know. Some people might say luck,
 11:31 2 but --

11:31 3 Q. You don't believe that, though?

11:31 4 A. No. I think we -- my wife and I tried to
 11:31 5 instill in them the right -- right things. They were
 11:31 6 certainly exposed to a lot of things. Although, they
 11:31 7 had a childhood that was a little unusual. So perhaps
 11:31 8 they were shielded from some of the influences. I
 11:31 9 worked overseas for four and a half years.

11:31 10 Q. You have been married 42 years?

11:31 11 A. Right.

11:31 12 Q. Congratulations. There aren't many people that
 11:31 13 can say that anymore.

11:31 14 A. Right.

11:31 15 Q. Do you think that was an important part of the
 11:31 16 equation that Steven and Cheryl turned out pretty good?
 11:31 17 Solid home, solid values?

11:31 18 A. Well, I like to think so, yes. I think so.

11:32 19 Q. I imagine, just from what you've said here
 11:32 20 today, in the couple hours we have had you here,
 11:32 21 you've -- you seem like the kind of man, regarding his
 11:32 22 children, that would have led by example.

11:32 23 A. I definitely tried to do that.

11:32 24 Q. I think you worked hard. You didn't smoke pot,
 11:32 25 and you tried to -- you must have considered that --

11:32 1 some people do it because that's just what they are. I
 11:32 2 guess a lot of parents don't get up everyday and say,
 11:32 3 I'm going to show my children, by example today, what a
 11:32 4 man ought to be. I don't think it's that conscious, but
 11:32 5 probably subconsciously, it's just a part of you.
 11:32 6 Here's how a man acts around his children and his wife.
 11:32 7 And here is how you conduct yourself. And you get up
 11:32 8 and you go to work and you do the best you can do for
 11:32 9 your wife and your children.

11:33 10 Do you think that, in the overall equation
 11:33 11 of how Steven and Cheryl turned out to be, turned out to
 11:33 12 be good and the fact that you are very proud of them, do
 11:33 13 you think that you and -- you and Yvonne had a lot to do
 11:33 14 with it?

11:33 15 A. Oh, I think we had a lot to do with it. I
 11:33 16 think they -- we were -- we were always conscious of --
 11:33 17 of that all the while they were being raised. Always
 11:33 18 conscious of the example, and the company we kept. The
 11:33 19 people we knew, the friends they had. Although, you
 11:33 20 cannot control all of that.

11:33 21 Q. No guarantees.

11:33 22 A. There's no guarantees. We have friends where
 11:33 23 it didn't work so well. We have friends where it worked
 11:33 24 well, and they were not necessarily as conscious. So, I
 11:34 25 don't -- I'm not -- I don't have a strong absolute

11:34 1 certainty that our influence did it all, but it
 11:34 2 certainly did a lot of it, I think.
 11:34 3 Q. But you wouldn't chance it, though. Somebody
 11:34 4 like you wouldn't have chanced it?
 11:34 5 A. I would not want to chance it.
 11:34 6 Q. Right.
 11:34 7 A. I certainly wouldn't want to chance doing it
 11:34 8 another way. But absolutely not, because I -- I know
 11:34 9 that there's a good chance it could go some other way.
 11:34 10 It can happen even if you don't do those things.
 11:34 11 Q. Right. But certainly, I guess, getting back to
 11:34 12 that probability --
 11:34 13 A. I think the probability of them going astray
 11:34 14 was far lower, closer to zero, by doing it the way we
 11:34 15 did than if we hadn't. I wish I could draw the curve
 11:34 16 for you. I can't.
 11:35 17 Q. If you could, you would be a multi-
 11:35 18 trillionaire.
 11:35 19 A. Right.
 11:35 20 Q. When did you get your Ph.D.?
 11:35 21 A. 1962.
 11:35 22 Q. And it was in computers?
 11:35 23 A. Yeah, computer science. It was actually still
 11:35 24 called double E in those days because computers were
 11:35 25 still back in the Neanderthal age. I've seen so much

11:35 1 change in that area, I don't even like to talk about it.
 11:35 2 I can't believe it, but I won't go off on that. But
 11:35 3 yeah, it was '62.
 11:36 4 MR. GOELLER: Judge, I have no further
 11:36 5 questions at this time, and I'd ask for a sub rosa
 11:36 6 hearing.
 11:36 7 THE COURT: I'm going to ask you to step
 11:36 8 down for a moment, please.
 11:36 9 VENIREPERSON: Thank you.
 11:36 10 THE COURT: Thank you, sir.
 11:36 11 (Venireperson Penhollow not present.)
 11:36 12 THE COURT: All right. The juror is
 11:36 13 outside.
 11:36 14 MR. GOELLER: If we could just converse
 11:36 15 here, Judge.
 11:36 16 THE COURT: All right.
 11:40 17 MR. GOELLER: May I address the Court,
 11:40 18 Your Honor?
 11:40 19 THE COURT: Yes.
 11:40 20 MR. GOELLER: We move to challenge this
 11:40 21 juror, Mr. Penhollow, for cause and -- we had to have,
 11:41 22 I'm not trying to waste the Court's time. We had to
 11:41 23 have our discussion first. But I understand the State
 11:41 24 has not had a chance to rehabilitate yet, if they choose
 11:41 25 to. But for now, I'd like to challenge, not for now, I

11:41 1 do challenge this juror for cause in accordance with
 11:41 2 *Hughes v. State, 878, S.W.2d 142 Texas Court of Criminal*
 11:41 3 *Appeals in 1993.* And what that case stands for, Your
 11:41 4 Honor, the trial court abuses its discretion in denying
 11:41 5 the defendant's challenge for cause to a venireperson
 11:41 6 who believed that probability meant no more than
 11:41 7 possibility.
 11:41 8 I think that's exactly where Mr. Penhollow
 11:41 9 falls in. His probability is possibly. If the Court
 11:41 10 takes his voir dire as a whole, he's only willing to
 11:41 11 assign probability as something greater than zero, and
 11:42 12 he said it's very low for me. Others, it may be higher.
 11:42 13 But that's very low for me, and that's a possibility.
 11:42 14 And, therefore, he's biased against that phase of the
 11:42 15 law. And under *Hughes v. State* I move to strike him.
 11:42 16 THE COURT: What says the State?
 11:42 17 MR. SCHULTZ: I'm sorry, did you rule on
 11:42 18 that?
 11:42 19 THE COURT: Yes. Denied.
 11:42 20 MR. SCHULTZ: He's acceptable to the
 11:42 21 State.
 11:42 22 MR. GOELLER: We'd exercise our third
 11:42 23 peremptory strike.
 11:42 24 THE COURT: All right.
 11:42 25 THE COURT: Would you ask Mr. Penhollow

11:42 1 just to step in for just a moment?
 11:42 2 THE BAILIFF: Yes, Your Honor.
 11:43 3 (Venireperson Penhollow present.)
 11:43 4 THE COURT: Mr. Penhollow, I want to thank
 11:43 5 you for your service. It was very interesting talking
 11:43 6 to you.
 11:43 7 VENIREPERSON: Thank you.
 11:43 8 THE COURT: You are one of the few fellows
 11:43 9 that I remember who did six months on active duty who
 11:43 10 had one of those really double barrel good deals.
 11:43 11 VENIREPERSON: Yes.
 11:43 12 THE COURT: So I suppose you had five and
 11:43 13 a half years?
 11:43 14 VENIREPERSON: Yes, I did, all of that.
 11:43 15 THE COURT: But anyway, it was a pleasure
 11:43 16 listening to your questions and the answers. And I want
 11:43 17 to thank you for your service. You are finally excused.
 11:43 18 VENIREPERSON: Okay. Thank you.
 11:43 19 MR. SCHULTZ: Bye, sir.
 11:43 20 MR. GOELLER: Thank you. Bye.
 11:43 21 (Venireperson Penhollow excused.)
 11:43 22 THE COURT: We're going to take 45 minutes
 11:43 23 for lunch. And we'll be back at 12:30 to take up the
 11:43 24 next juror, and that's going to be -- oh, there's one
 11:43 25 left over from yesterday. Let's see, Mr. McKinney,

11:43 1 Michael McKinney, No. 24.
 11:44 2 THE BAILIFF: All rise.
 11:56 3 (Lunch recess.)
 12:36 4 THE COURT: All right. Both sides ready
 12:36 5 to bring in Michael McKinney? Let's bring in Michael
 12:36 6 McKinney.
 12:36 7 THE BAILIFF: Yes, Your Honor.
 12:36 8 (Venireperson McKinney present.)
 12:37 9 THE COURT: Are you Michael McKinney?
 12:37 10 VENIREPERSON: Yes.
 12:37 11 THE COURT: I want to ask you, do you
 12:37 12 remember last Tuesday I asked everybody to swear that
 12:37 13 they would tell the truth to the questions that were
 12:37 14 asked?
 12:37 15 VENIREPERSON: Yes.
 12:37 16 THE COURT: And I want to remind you that
 12:37 17 you are still under oath, and both sides will be asking
 12:37 18 you questions.
 12:37 19 VENIREPERSON: Okay.
 12:37 20 THE COURT: Thank you. Please be seated.
 12:37 21 All right, Mr. Schultz.
 12:37 22 MR. SCHULTZ: Thank you, Judge.
 12:37 23 VOIR DIRE EXAMINATION
 12:37 24 BY MR. SCHULTZ:
 12:37 25 Q. Good afternoon, Mr. McKinney.

12:37 1 A. Good afternoon.
 12:37 2 Q. You --
 12:37 3 THE COURT: Say, Mr. Schultz, on this
 12:37 4 case, I'm going to ask you to take 20 minutes and then
 12:37 5 pass the witness. I didn't realize that Mr. McKinney
 12:38 6 was a No. 1. And we've also got a No. 5 coming up
 12:38 7 pretty quick, and the other side will go first on that.
 12:38 8 So take 20 minutes. Do what you can in 20 minutes and
 12:38 9 pass the witness. If you are ready, by all means make a
 12:38 10 motion at that time.
 12:38 11 MR. SCHULTZ: Okay. I'm not sure that I
 12:38 12 will be. As long as I'm getting back some additional
 12:38 13 time, if necessary.
 12:38 14 THE COURT: All right.
 12:38 15 Q. (BY MR. SCHULTZ) You probably thought you
 12:38 16 heard enough of me back last Tuesday, but I've got some
 12:38 17 more questions to ask you. And kind of the approach
 12:38 18 that I took on Tuesday and, I mean, sometimes people
 12:38 19 think it is a little brusque, and perhaps it is. I got
 12:38 20 to say in my own defense, the things that I said I
 12:38 21 really believe. I believe this is extremely important
 12:38 22 stuff.
 12:38 23 And despite the fact that I represent the
 12:38 24 State in a capital prosecution of the defendant, in my
 12:38 25 mind his life has value, as do all of our lives. And

12:39 1 when I talked very graphically at the end of the
 12:39 2 process, that's kind of for me -- that's after having
 12:39 3 come to the realization that what I do is the real
 12:39 4 thing, and I'm actively involved in this whole thing
 12:39 5 that our society does.
 12:39 6 And so, all of that having been said, when
 12:39 7 I asked everybody to take a moment and look at the
 12:39 8 defendant and realize that what we were seeking was to
 12:39 9 cause his death in a lawful way and in a societally
 12:39 10 sanctioned way, I was sincere, and I hope you didn't
 12:39 11 think that I was trying to be amusing or that I was
 12:39 12 trying to be entertaining or I'm taking it lightly.
 12:39 13 Because I can promise you, none of us take this lightly.
 12:39 14 You understand that from the panel, didn't you?
 12:39 15 A. Sure.
 12:39 16 Q. I mean, I suppose there are some people who
 12:39 17 wake up in the morning, and say, gee, aren't I lucky to
 12:40 18 be able to go to court and be a prosecutor in a case
 12:40 19 where maybe I can get somebody killed and think that's
 12:40 20 thrilling. And maybe some jurors might say, aren't I
 12:40 21 lucky I'm going to have a chance to go up and maybe vote
 12:40 22 some guy's death.
 12:40 23 And maybe some judges would say, it's kind
 12:40 24 of neat to be able to preside over a case, and maybe
 12:40 25 I'll be able to give a death sentence. But I think

12:40 1 that's rare, and I don't think people are that way, in
 12:40 2 general. And so some of the questions that I wish to
 12:40 3 ask you relate really to what you put on your
 12:40 4 questionnaire. And it's not a -- it's not a challenge
 12:40 5 to any of the things that you said, but just an effort
 12:40 6 on my part to see where you are coming from and what you
 12:40 7 think.
 12:40 8 Now, you indicated on your questionnaire
 12:40 9 and, really, that was before we talked about how the law
 12:40 10 might apply. But you indicate on your questionnaire
 12:40 11 that you are in favor of the death penalty. And your
 12:40 12 explanation was that, anyone who commits this serious an
 12:40 13 offense or crime deserves to be given a death penalty.
 12:41 14 And even after we talked on Tuesday and anything that
 12:41 15 you may either have thought about since that time or a
 12:41 16 little bit that we've talked about here now, is there
 12:41 17 anything that you can think of that's changed your mind
 12:41 18 about that proposition, being in favor of the death
 12:41 19 penalty?
 12:41 20 A. Not that I can think of.
 12:41 21 Q. Okay. Okay. You were also asked a question,
 12:41 22 which best explains your view on the death penalty. I
 12:41 23 think you said that you believe the death penalty should
 12:41 24 be imposed in all capital cases. And a lot of times
 12:41 25 jurors will answer that question that way, not

12:41 1 understanding that, if you are convicted of capital
12:41 2 murder, you may get life, you may get death, at least
12:41 3 according to what the law requires.

12:41 4 And other people just say, no, I believe
12:41 5 if you commit a capital murder, you ought to receive
12:41 6 capital punishment. That's what I believe. I'm
12:41 7 curious, how do you see that question now, now that
12:42 8 we've talked a little bit about capital murder? Now,
12:42 9 that it's not automatic. There's still a punishment
12:42 10 phase.

12:42 11 A. Well, I was surprised to know that it wasn't an
12:42 12 automatic thing, and that there was a possibility that
12:42 13 there could be life imprisonment.

12:42 14 Q. And so having said you were surprised, do you
12:42 15 disagree with that, or is that all right with you that
12:42 16 it's not automatic?

12:42 17 A. I really don't have an opinion about it, so...

12:42 18 Q. Okay. Now, you put down that you believe that
12:42 19 life confinement in prison is never appropriate in any
12:42 20 capital murder case. Is that still your view?

12:42 21 A. On the seriousness of the offense of a capital
12:42 22 murder, I think that the death penalty should apply.

12:43 23 MR. SCHULTZ: May I have a moment to
12:43 24 confer with Mr. Goeller, Judge?

12:43 25 THE COURT: Yes.

12:43 1 MR. GOELLER: Judge, I think we reached an
12:43 2 agreement regarding this particular juror.

12:43 3 THE COURT: All right. And is it in
12:43 4 concurrence with your client?

12:44 5 MR. GOELLER: Yes, Your Honor, it is.

12:44 6 MR. COURT: And I would assume that this
12:44 7 juror can be finally excused?

12:44 8 MR. SCHULTZ: Yes, sir, by consent.

12:44 9 THE COURT: Sir, you are finally excused.

12:44 10 VENIREPERSON: Thank you.

12:44 11 THE COURT: Okay. Let's see.

12:44 12 MR. SCHULTZ: Judge, I hope you'll keep
12:44 13 our efficiency in mind when you start chiding us about
12:44 14 time because we --

12:44 15 THE COURT: Yes. I'll say that was good.
12:44 16 Let's see, the next juror is Beth Johnston, No. 41. Oh,
12:44 17 wait a minute.

12:44 18 MR. GOELLER: I thought you said, "death
12:44 19 Johnson."

12:44 20 THE COURT: Before you bring them in, let
12:44 21 me tell you--all something. The bailiff gave me a note
12:44 22 on Beth Johnston a few minutes ago. It's a note from a
12:44 23 doctor, a Plano orthopedic and sports medicine with
12:45 24 regard to Beth Johnston. "Patient is unable to attend
12:45 25 jury duty due to foot something, foot slash something

12:45 1 surgery and inability to drive for 4 to 6 weeks." And
12:45 2 it's signed by, I suppose it's Dr. Barber.

12:45 3 But anyway, let me show this to both
12:45 4 sides. Take a look at it. And so, let's invite her in
12:45 5 and see what's going on here.

12:45 6 THE BAILIFF: Yes, Your Honor.

12:46 7 THE COURT: Are you Beth Johnston?

12:46 8 VENIREPERSON: I am.

12:46 9 THE COURT: Do you recall last Tuesday
12:46 10 that I swore everybody in and made them swear that they
12:46 11 would tell the truth with regard to questions that they
12:46 12 were asked?

12:46 13 VENIREPERSON: Yes.

12:46 14 THE COURT: I just want to remind you that
12:46 15 you are still under oath, and let me ask you to please
12:46 16 have a seat. Ma'am, I have a note. It appears to be
12:46 17 from Dr. Barber.

12:46 18 VENIREPERSON: No. It is from Dr. Michael
12:46 19 Simpson.

12:46 20 THE COURT: Okay, I couldn't read it.

12:46 21 VENIREPERSON: You can't read his writing.

12:46 22 THE COURT: I suppose like most doctors.

12:46 23 It indicates that you are due to have foot surgery of
12:46 24 some kind. What kind of surgery?

12:46 25 VENIREPERSON: I'm having a right ankle

12:46 1 arthroscopy and a tendon repaired tomorrow morning at
12:46 2 7:30. I'm also having another kind of surgery at the
12:46 3 same time, some bladder surgery. But what would affect
12:46 4 my driving is the right foot being in an immobilizer
12:46 5 boot is why he wrote this for me.

12:46 6 THE COURT: Do I understand that you will
12:46 7 be unable to drive for four to six weeks?

12:47 8 VENIREPERSON: Right. Probably less than
12:47 9 that.

12:47 10 THE COURT: How long do you expect your
12:47 11 hospital stay to be?

12:47 12 VENIREPERSON: Oh, it's just overnight.

12:47 13 THE COURT: Just overnight?

12:47 14 VENIREPERSON: Yes.

12:47 15 THE COURT: Is this elective surgery?

12:47 16 VENIREPERSON: Yes.

12:47 17 THE COURT: And I suppose it could be
12:47 18 rescheduled, right?

12:47 19 VENIREPERSON: The coordination of two
12:47 20 physicians, two surgery rooms, and an anesthesiologist
12:47 21 would be very difficult. But, yes, it could be. It
12:47 22 would be possible.

12:47 23 THE COURT: All right. That's all I
12:47 24 wanted to ask you. Do you fellows want to confer, or do
12:47 25 you want to just start asking questions, or how do you

12:47 1 want to do it?
 12:47 2 MR. GOELLER: Judge, may I ask her just
 12:47 3 one question. I'm not trying to go ahead of
 12:47 4 Mr. Schultz.
 12:47 5 VOIR DIRE EXAMINATION
 12:47 6 BY MR. GOELLER:
 12:47 7 Q. When was your surgery scheduled for, ma'am?
 12:47 8 A. Tomorrow morning 7:30. It's been scheduled for
 12:48 9 six weeks.
 12:48 10 Q. When the Judge said, elective surgery, I
 12:48 11 usually think of, you know, like cosmetic surgery. This
 12:48 12 has to do with your foot?
 12:48 13 A. Uh-huh.
 12:48 14 Q. Is it truly elective? It sounds more than
 12:48 15 elective.
 12:48 16 A. Do you want the history?
 12:48 17 Q. It's not my place or business to pry into your
 12:48 18 personal affairs.
 12:48 19 A. It's okay.
 12:48 20 Q. Did you understand what the Judge meant when he
 12:48 21 said "elective"?
 12:48 22 A. Yes, sir.
 12:48 23 Q. Elective to me is, I want to do it purely
 12:48 24 because I think I look better.
 12:48 25 A. No.

12:48 1 Q. You are a nurse?
 12:48 2 A. Yes. I'm an RN.
 12:48 3 Q. All right.
 12:48 4 A. Elective surgery means I have had -- I have the
 12:48 5 choice to have surgery. When you have any kind of
 12:48 6 surgery that's nonelective, that means it's an emergency
 12:48 7 situation or it's at risk to your life. Okay.
 12:48 8 Q. In my over simplistic way, that's how I think
 12:49 9 about it. It is probably how most lay people think
 12:49 10 about it and not a medical professional.
 12:49 11 MR. GOELLER: Can we have just a few
 12:49 12 moments, Judge?
 12:49 13 THE COURT: Yes. Say, let me ask you,
 12:49 14 while they are looking at that, and I don't mean to pry,
 12:49 15 but that's not my purpose in asking, but let me ask you
 12:49 16 for why you take Vioxx.
 12:50 17 VENIREPERSON: For the ankle. I have
 12:50 18 synovitis of the right ankle as a result of a sprain, a
 12:50 19 bad sprain last December that did not heal adequately.
 12:50 20 They feel I have scar tissue in the ankle which would
 12:50 21 benefit from the arthroscopy, and then I also have the
 12:50 22 tendon that was torn at the time.
 12:50 23 THE COURT: Do you remember how many
 12:50 24 milligrams you take?
 12:50 25 VENIREPERSON: 25.

12:50 1 THE COURT: That's plenty, isn't it?
 12:50 2 VENIREPERSON: For my stomach, yes.
 12:50 3 MR. GOELLER: Judge, may Mr. Schultz and I
 12:50 4 address you?
 12:50 5 THE COURT: Yes.
 12:50 6 MR. SCHULTZ: Excused by consent.
 12:50 7 THE COURT: Both sides are in agreement
 12:50 8 and by agreement of are client also?
 12:50 9 MR. GOELLER: Yes, Your Honor.
 12:50 10 THE COURT: All right. Ms. Johnston, you
 12:50 11 are finally excused. Do you need your little piece of
 12:50 12 paper?
 12:50 13 VENIREPERSON: No, that was for you.
 12:50 14 MR. GOELLER: Good luck.
 12:50 15 (Venireperson Johnston excused.)
 12:51 16 MR. SCHULTZ: There was a juror in the
 12:51 17 room. Did anyone notice how long?
 12:51 18 MR. GOELLER: He just walked in the door.
 12:51 19 MR. SCHULTZ: Who's next?
 12:51 20 THE COURT: Let's see, the next one that I
 12:51 21 have is Nancy Ballard, No. 13.
 12:52 22 THE BAILIFF: Yes, Your Honor.
 12:52 23 (Venireperson Ballard present.)
 12:52 24 THE COURT: Ma'am, are you Nancy Ballard?
 12:52 25 VENIREPERSON: I certainly am. I just

12:52 1 want to remind you that last Tuesday I administered an
 12:52 2 oath to everybody. And they swore that they would give
 12:52 3 truthful answers to the questions that they were asked
 12:52 4 by both sides.
 12:52 5 VENIREPERSON: Uh-huh, I'll do it.
 12:52 6 THE COURT: Mr. Schultz?
 12:52 7 VOIR DIRE EXAMINATION
 12:52 8 BY MR. SCHULTZ:
 12:52 9 Q. Good afternoon.
 12:52 10 A. Hi.
 12:52 11 Q. Ms. Ballard, my name is Bill Schultz. You
 12:52 12 recall that I spoke for a fair amount of time on Tuesday
 12:52 13 with you as a group?
 12:52 14 A. Uh-huh.
 12:52 15 Q. You may not remember the names of the other
 12:52 16 lawyers or the defendant, so I'll refresh your memory on
 12:53 17 that. Immediately to my left is Ms. Gail Falco, who is
 12:53 18 the chief felony prosecutor in the 199th Judicial
 12:53 19 District Court on loan to us for this trial. And on her
 12:53 20 left is Ms. Jami Lowry, a felony prosecutor, ordinarily
 12:53 21 assigned to this particular district court to do the
 12:53 22 State's business here.
 12:53 23 To your right, at the other table, is the
 12:53 24 defendant in this case, Mr. Ivan Cantu, who is charged
 12:53 25 with a capital murder and his two attorneys. Moving

12:53 1 further to your right are first, Mr. Don Neely High, and
 12:53 2 then Mr. Matthew Goeller, both of whom are very fine
 12:53 3 practicing attorneys in Plano, Texas. And I believe the
 12:53 4 answer to my questions and maybe the Judge's were that
 12:53 5 you don't know any of us personally; is that right?

12:53 6 A. No.

12:53 7 Q. I note that you work for Dr. Ashworth, and my
 12:53 8 daughter used to be one of her patients. But that's
 12:53 9 been -- she's been moved on from pediatrics longer than
 12:53 10 before you got there, so.

12:53 11 A. Oh, yeah.

12:53 12 Q. So there would be no reason for you to know
 12:53 13 her. Are you still located, let me think a second, in
 12:54 14 that one-story building just a little bit --

12:54 15 A. West.

12:54 16 Q. East of the hospital?

12:54 17 A. Yes, uh-huh, east.

12:54 18 Q. And I guess Dr. Sheer is just across the
 12:54 19 breezeway there?

12:54 20 A. Uh-huh.

12:54 21 Q. And I guess they are still married?

12:54 22 A. No.

12:54 23 Q. Really?

12:54 24 A. No.

12:54 25 Q. When did that happen?

12:54 1 A. No. They have been divorced for over a year.

12:54 2 Q. Time marches on. We would sometimes use them
 12:54 3 interchangeably kind of thing. And we got to know
 12:54 4 Arlene. Is she still there?

12:54 5 A. Yes. And Mary.

12:54 6 Q. I guess they are not feuding too much if they
 12:54 7 still have their offices near each other.

12:54 8 A. No. They are very civil to one another, and
 12:54 9 she's remarried, in fact.

12:54 10 Q. Wow.

12:54 11 A. Uh-huh.

12:54 12 Q. Okay. Well, you might remember that portion of
 12:54 13 my talk when I asked everybody to take a moment to look
 12:54 14 at the defendant and to actually think, not the way we
 12:55 15 think in our living room, about how we need to have
 12:55 16 death penalties for people who do horrible crimes, but
 12:55 17 realize that every one of us that ends up in this
 12:55 18 courtroom once the trial begins will have some part in
 12:55 19 deciding whether or not that happens to the defendant.
 12:55 20 And I'm sure hoping that you didn't understand how I did
 12:55 21 that to be that I was trying to be funny or
 12:55 22 entertaining --

12:55 23 A. No.

12:55 24 Q. -- or amusing to anybody because I -- I don't
 12:55 25 even need to ask you this question that I've asked

12:55 1 myself a lot of times and that is, is it a thrilling
 12:55 2 thing to have to go to court in the morning and realize
 12:55 3 that you are part of a process that may cause somebody
 12:55 4 to be killed? And my answer is, no, it's not a real
 12:55 5 thrill. I don't -- I don't take delight in it.

12:55 6 I don't apologize for it because I
 12:55 7 represent the people of the State. And there is a death
 12:55 8 penalty, and I present the evidence the best way I know
 12:55 9 how to do, and I argue for it as forcefully as I know
 12:55 10 how to do. But that's different from saying that I'm
 12:56 11 thrilled with it.

12:56 12 Just like if we were in the military. I'd
 12:56 13 go fight if the country needed me to go fight, but I
 12:56 14 wouldn't be thrilled at doing that. It's something that
 12:56 15 you wish didn't have to be the case. And I suspect that
 12:56 16 even though you indicated that you are in favor of the
 12:56 17 death penalty, you seem to me to be the kind of person
 12:56 18 that would have much the same view on it?

12:56 19 A. Oh.

12:56 20 Q. That you wish we didn't have to have such a
 12:56 21 thing?

12:56 22 A. Uh-huh.

12:56 23 Q. Is that fair?

12:56 24 A. Oh, oh, yes, definitely.

12:56 25 Q. Well, then, if that's the case, and we all --

12:56 1 every one of us wishes that we didn't have to have that,
 12:56 2 if I were to say to you: Do you want to be on this
 12:56 3 jury? Is it your personal wish to have this opportunity
 12:56 4 to serve and be on this jury and make this choice? What
 12:56 5 would your answer to that be? Would you want to be on
 12:56 6 it?

12:57 7 A. I have sort of mixed emotions. I would like to
 12:57 8 help, but I'd rather be at home.

12:57 9 Q. I'm with you; I'm with you. That's probably
 12:57 10 true of sailors and soldiers that have protected this
 12:57 11 country, don't you bet?

12:57 12 A. Yeah, uh-huh. I would think so.

12:57 13 Q. They would rather have been at home than where
 12:57 14 they had to be?

12:57 15 MR. SCHULTZ: Are you okay?

12:57 16 MR. GOELLER: (Coughing.) It's been a
 12:57 17 long day.

12:57 18 Q. (BY MR. SCHULTZ) Well, I also feel this way,
 12:57 19 if I were sitting where you are sitting, it might be
 12:57 20 that I'd be saying, you know, I don't know what the
 12:57 21 evidence is going to be in this case. I'm going to hear
 12:57 22 all of it. And I might be sitting where you are saying,
 12:57 23 you know, I can't control what the evidence is going to
 12:57 24 be. It's going to be what it is, but I would feel a
 12:57 25 whole lot better leaving this trial knowing that I

12:57 1 believe a life sentence was the right thing under the
 12:57 2 evidence and voted that way, not so much because I know
 12:58 3 the defendant or know the defense lawyers because I love
 12:58 4 criminals, not that way, but rather just because there's
 12:58 5 something about us that as a society prizes human life,
 12:58 6 and we fight for anything to save it.

12:58 7 A. Uh-huh.

12:58 8 Q. You are not in an area of medical practice that
 12:58 9 deals directly with life and death situations, I don't
 12:58 10 think, in general?

12:58 11 A. Huh-uh.

12:58 12 Q. Now, I know there may be occasions, for
 12:58 13 example, I bet Dr. Ashworth gets called to the emergency
 12:58 14 room from time to time on some of her patients perhaps.
 12:58 15 But medicine is so specialized that usually, even if
 12:58 16 it's one of her 3-year-old patients that gets run over
 12:58 17 by a car, most likely they wouldn't call her to attend.
 12:58 18 They have got specialists to do that. Do you know what
 12:58 19 I mean?

12:58 20 A. Yes, uh-huh.

12:58 21 Q. So you probably have some patients there, and
 12:58 22 it's ghastly, but you probably got some terminally ill
 12:58 23 children that she's helping?

12:59 24 A. Uh-huh.

12:59 25 Q. But you don't deal directly with life and

12:59 1 death, but you still feel it because that's the kind of
 12:59 2 work that you do because you are involved in that?

12:59 3 A. Uh-huh.

12:59 4 Q. Since you indicated that you do favor the death
 12:59 5 penalty, tell me why it is that you think we should have
 12:59 6 a death penalty in Texas?

12:59 7 A. Well, if there's someone that just continues to
 12:59 8 murder people or misbehave and things that they
 12:59 9 shouldn't be doing, what else can we do? I mean, we
 12:59 10 can't put them all in prison. And I just -- I don't
 12:59 11 know why, but I just feel like that that would be better
 12:59 12 than just letting them out and repeat and out and
 12:59 13 repeat, or putting them in prison for so long and --

12:59 14 Q. Okay. Let's talk about that for a second. The
 12:59 15 questions I'm going to be asking you are going to assume
 12:59 16 the defendant has been found guilty of capital murder.
 13:00 17 Okay?

13:00 18 A. Uh-huh.

13:00 19 Q. Now, I'm not -- I'm not assuming if it in the
 13:00 20 sense that I'm saying that it's not important, or I'm
 13:00 21 not concerned about our obligation to prove that to the
 13:00 22 jury; but, rather, I want to focus more on the second
 13:00 23 part of the trial. And I'm aware that I have a huge
 13:00 24 burden of proof on the first part of the trial, but I
 13:00 25 think I will be there. I think I'll convince 12 people

13:00 1 of the evidence that our defendant is guilty of capital
 13:00 2 murder. Okay?

13:00 3 A. Uh-huh.

13:00 4 Q. So we get to the punishment phase, and really
 13:00 5 the question before you is not going to be: Do we
 13:00 6 release the defendant or do we give him a death
 13:00 7 sentence, because either way his punishment is going to
 13:00 8 be large.

13:00 9 Now, how large is large, I guess, may
 13:00 10 depend. But he will get one of two sentences at the
 13:00 11 punishment phase. Do you know what those two sentences
 13:01 12 will be?

13:01 13 A. Well, life or death.

13:01 14 Q. Or death, exactly. And while we might wish
 13:01 15 that we have such a thing as life with no possibility of
 13:01 16 parole, there is no such thing in Texas, is there.

13:01 17 A. Uh-huh.

13:01 18 Q. And many people already know that and some
 13:01 19 people don't. But I'm free to tell you that because the
 13:01 20 Judge, at a proper time, will give you that instruction.
 13:01 21 He will instruct you that for the offense of capital
 13:01 22 murder, a person becomes quote eligible for parole after
 13:01 23 having served 40 years of the life sentence. And that
 13:01 24 doesn't mean that that person will be released in 40
 13:01 25 years after beginning the service. It just means

13:01 1 eligibility.

13:01 2 And because that's not an automatic thing,
 13:01 3 then the jury gets instructed not to consider how long
 13:01 4 this particular defendant would serve on a life
 13:01 5 sentence. And they just -- it seems a little odd to me
 13:01 6 that we would instruct them on something and say, now
 13:01 7 that we told you about that, don't consider it.

13:02 8 A. Uh-huh.

13:02 9 Q. But the notion -- the notion it was a
 13:02 10 compromise to be somewhat fair to the jury by saying,
 13:02 11 yes, there is something like parole. But at the same
 13:02 12 time did not give the jury, try to, with a pen and
 13:02 13 pencil, figure out how old he will be exactly when he
 13:02 14 gets out or those kinds of things.

13:02 15 So what I'm saying to you is that you,
 13:02 16 when say that the death penalty should be used for
 13:02 17 people who keep getting out and killing again, most
 13:02 18 likely, unless a capital murderer escapes or gets a
 13:02 19 governor's pardon, I don't know a governor ever to
 13:02 20 pardon a capital murderer, I guess, a person will not be
 13:02 21 able to quote keep getting out.

13:02 22 A. Yeah.

13:02 23 Q. Unless he escapes?

13:02 24 A. Yeah.

13:02 25 Q. Are you with me on that?

13:02 1 A. Yes, I understand that.
 13:02 2 Q. So, and there are no right or wrong answers on
 13:02 3 this, but I want to make sure that -- I want to find out
 13:02 4 whether you are saying that capital murder -- the death
 13:03 5 penalty should only be imposed when somebody has killed
 13:03 6 before and is going to kill again unless you kill them.
 13:03 7 Are you limiting its application only to somebody that's
 13:03 8 either killed before the trial that he's on trial for
 13:03 9 now?
 13:03 10 A. I think it's the circumstances, you know, why
 13:03 11 he killed.
 13:03 12 Q. Okay. Let's talk about it. Let me give you an
 13:03 13 example. Everybody in this country probably knows about
 13:03 14 Timothy McVeigh, the guy that's been executed for
 13:03 15 blowing up the federal courthouse?
 13:03 16 A. Uh-huh.
 13:03 17 Q. And you've heard about that, and you know
 13:03 18 something about that case?
 13:03 19 A. Uh-huh.
 13:03 20 Q. First of all, in your judgment does it seem to
 13:03 21 you fitting that he would have been executed for that?
 13:03 22 Does that seem right to you?
 13:03 23 A. Oh, it does.
 13:03 24 Q. Well, see, here's why I asked that question,
 13:03 25 because nearly as we can tell, he never killed anybody

13:03 1 before that event. Do you follow what I'm saying?
 13:03 2 A. Yes. I see what you are saying.
 13:03 3 Q. And it's possible that a jury could have found
 13:04 4 he was never going to kill anybody again. And the
 13:04 5 federal government has a life without parole. He was
 13:04 6 going to be locked up forever. And so I'm --
 13:04 7 A. He had no remorse.
 13:04 8 Q. Okay, okay. Is remorse important to you?
 13:04 9 A. It is, uh-huh.
 13:04 10 Q. Tell me why. Tell me why remorse is important.
 13:04 11 A. Well, you have to know that you did something
 13:04 12 wrong. I meant, his attitude was, you know, this was
 13:04 13 necessary and, you know, it's all right that I did it.
 13:04 14 Q. Okay. Let's talk about what capital murder is.
 13:04 15 And we -- I talked a little bit about it during the
 13:04 16 first part of our trial. Capital murder is the
 13:04 17 intentional, not accidental, not self-defense, not
 13:04 18 mistaken, but the intentional causing of the death of
 13:05 19 two or more people.
 13:05 20 A. Uh-huh.
 13:05 21 Q. In this case we've alleged two people were
 13:05 22 killed in the same criminal transaction.
 13:05 23 A. Uh-huh.
 13:05 24 Q. And what that means is, to do a capital murder,
 13:05 25 one must intend to kill, that means form the intent to

13:05 1 kill.
 13:05 2 A. Uh-huh.
 13:05 3 Q. And one must do the things necessary to cause
 13:05 4 that killing and one must know, consciously desire, that
 13:05 5 the killing occurred.
 13:05 6 A. Uh-huh.
 13:05 7 Q. So, for example, if I'm cleaning my gun one
 13:05 8 night, and I make some mistake and leave it loaded and
 13:05 9 I'm sticking things down in it to clean it out and
 13:05 10 polish it up and it goes off and it kills somebody, if
 13:05 11 that's the truth. If that's not just my story to cover
 13:05 12 up a murder. If that's the truth, that would not be an
 13:05 13 intentional murder.
 13:06 14 A. No.
 13:06 15 Q. Because it was not my conscious objective to
 13:06 16 kill somebody. Now, that may be a crime. It may be,
 13:06 17 that may be criminal in nature. That might be so
 13:06 18 careless that I ought to have some kind of crime charged
 13:06 19 against me, but it can never be murder.
 13:06 20 A. No.
 13:06 21 Q. Do you understand me?
 13:06 22 A. Yes, uh-huh.
 13:06 23 Q. So when you do a capital murder, that means you
 13:06 24 have intentionally caused the death of another person.
 13:06 25 You thought about it.

13:06 1 A. Yeah.
 13:06 2 Q. You did what you had to do to achieve it and
 13:06 3 you did it.
 13:06 4 A. Yeah.
 13:06 5 Q. Because I guess at the time, it seemed to you
 13:06 6 to be the right thing to do because you thought about it
 13:06 7 and did it.
 13:06 8 A. Uh-huh.
 13:06 9 Q. Are you with me?
 13:06 10 A. Uh-huh.
 13:06 11 Q. Now, do you think that people in our society
 13:06 12 know that it's wrong to kill?
 13:06 13 A. Sure.
 13:06 14 Q. And if people in our society know that killing
 13:07 15 is wrong, if you think about it and you do it, why does
 13:07 16 remorse afterward make any difference, really, when you
 13:07 17 start thinking about it? It's not like -- it's not like
 13:07 18 you were just careless, and I wish I'd pay better
 13:07 19 attention to how I was driving. I wish, I didn't look
 13:07 20 back behind me when I ran into those people because you
 13:07 21 would have remorse over that.
 13:07 22 A. Yeah.
 13:07 23 Q. But if someone says, I have remorse for
 13:07 24 intentionally causing the death of these people because
 13:07 25 I plan to do it and I did it, why is that important to

13:07 1 you that they are remorseful?

13:07 2 A. Well, I think -- well, like you say, though, he
13:07 3 knew. Like McVeigh, he knew that was wrong. So really
13:07 4 there's not an excuse there, I guess, really. He knew
13:07 5 what he was doing, and he killed all those people and,
13:07 6 oh -- I don't know how to answer that.

13:08 7 Q. I mean, this is just tough stuff.

13:08 8 A. Uh-huh.

13:08 9 Q. And in some ways, I probably have -- I have the
13:08 10 advantage that you don't have, and that's that I do this
13:08 11 for a living and so, I mean, I talk about this -- I talk
13:08 12 about this as much as you might talk about insurance
13:08 13 copayments and things like that. That's just part of
13:08 14 what I deal with in my work. But I guess I'm thinking
13:08 15 to myself, well, and trying to understand how you feel
13:08 16 about all these issues --

13:08 17 A. Uh-huh.

13:08 18 Q. -- suppose instead of saying I'm glad I did it
13:08 19 because it was a good thing, suppose McVeigh's position
13:08 20 had been, I've now thought about what I did. I found
13:08 21 religion. I'm real sorry about all of this. And if you
13:08 22 give me a life sentence, I'll do the best I can to be,
13:08 23 one, a model prisoner. Two, to try to tell other people
13:09 24 my sad story. And, three, to try to be an inspiration
13:09 25 to other people. When someone is willing -- he had that

13:09 1 ability to be thinking that way before he did that to
13:09 2 those people. Do you know what I mean?

13:09 3 A. Uh-huh, he did.

13:09 4 Q. And I'm just trying to get an understanding of
13:09 5 you about how -- what remorse means to you. Do you
13:09 6 know?

13:09 7 A. Well, in his case I guess remorse would not
13:09 8 really -- I mean, he should -- he should die because of
13:09 9 what he did. There's no remorse there because he -- all
13:09 10 the people he killed, innocent people. Maybe that's
13:09 11 what I get down to, someone innocent. I think, when we
13:09 12 talked about that the other day, you know, if there's
13:09 13 two people that are bad and they have -- that's their
13:09 14 little war. It is hard. You have to think a lot about
13:10 15 this, don't you?

13:10 16 Q. Well, I hope so. Because what I hope is, if
13:10 17 you are seated on this jury, whatever your results are,
13:10 18 I hope you, I can't imagine how you are going to go out
13:10 19 of here happy no matter what you --

13:10 20 A. No, no.

13:10 21 Q. But I hope you go out with pride in that you
13:10 22 know you did the good thing, whatever that ends up
13:10 23 being.

13:10 24 A. Oh, yes.

13:10 25 Q. Just like military people. I doubt they may be

13:10 1 proud of the fact that they serve, and I hope that
13:10 2 jurors can do that. They may well not be proud of all
13:10 3 the things that was required -- that were required of
13:10 4 them while they were there.

13:10 5 A. Uh-huh.

13:10 6 Q. Does that make sense?

13:10 7 A. Yes.

13:10 8 Q. That's what I want for you and 11 other people.
13:10 9 Much more than a particular outcome, I want people that
13:10 10 will give all this a completely fair shot --

13:10 11 A. Yeah.

13:10 12 Q. -- and will come back with a right verdict and
13:10 13 then I -- that makes my job easy because I've done my
13:10 14 best, and you can do the same thing. But I guess my
13:10 15 point is, and I think you understand what I'm saying, it
13:11 16 may be that some crimes by themselves are so bad that
13:11 17 things like remorse may not have that big a factor?

13:11 18 A. That's true.

13:11 19 Q. There comes a point where it's just too much.
13:11 20 But that's my thinking. That may not be yours.

13:11 21 A. No. That's true because, like, I did say,
13:11 22 McVeigh, all the remorse in the world is not going to
13:11 23 bring those people back, and he knew what he was doing,
13:11 24 so. It just depends on the circumstances. It's hard to
13:11 25 say, you know, because I wasn't on that jury. But I

13:11 1 meant just as a bystander, I think he was so wrong in
13:11 2 what he did, and he should suffer.

13:11 3 Q. Sure. Have you ever heard -- have you ever
13:11 4 heard the expression that there are no atheists in war?
13:11 5 Have you heard that expression?

13:11 6 A. No, I've never heard that.

13:11 7 Q. I think the notion is, that when people -- tell
13:11 8 me what you think that means. There are no atheists in
13:11 9 a war.

13:11 10 A. Well, you've got to have something to believe
13:12 11 in, I would think, if you are in war. You've got to
13:12 12 turn your eyes and heart to someone else. I mean, it's
13:12 13 got to be so terrible.

13:12 14 Q. Is that because you are facing your own
13:12 15 impending death? Do you think that's probably a big
13:12 16 part?

13:12 17 A. Oh, yes, yes. And what you are going to do.

13:12 18 Q. Sure. And then maybe if you make it through
13:12 19 the war and you come back, maybe that's not so important
13:12 20 to you then. You might kind of go back to your regular
13:12 21 way of doing this. Would that make sense to you? Maybe
13:12 22 you would, maybe you wouldn't?

13:12 23 A. Well, yes, uh-huh.

13:12 24 Q. A lot of people do their best praying when
13:12 25 things are going really bad for them.

13:12 1 A. Yes, that's true, uh-huh.
 13:12 2 Q. Do you think that might apply to somebody
 13:12 3 that's being -- that's facing the dealt penalty?
 13:12 4 A. Yes.
 13:12 5 Q. I know it never would be, but suppose, for
 13:12 6 example, you were in the jail and you were charged with
 13:12 7 capital murder, and you knew you had your trial coming.
 13:12 8 A. Yeah.
 13:13 9 Q. First of all, you might truly become religious.
 13:13 10 Is that possible?
 13:13 11 A. Uh-huh.
 13:13 12 Q. Instead of becoming religious, do you think
 13:13 13 there might be any reason you would act like you were
 13:13 14 becoming religious even if you weren't? Can you think
 13:13 15 of a reason?
 13:13 16 A. So I could get off. People that would think,
 13:13 17 you know, they've turned their life around.
 13:13 18 Q. And that's kind of what I'm talking about with
 13:13 19 this idea of remorse. And however you see it is your
 13:13 20 business. But if remorse is -- if remorse is going to
 13:13 21 be the dividing line between whether somebody gets a
 13:13 22 life sentence or a death sentence for a crime, that's
 13:13 23 the dividing line we use. We better be really sure for
 13:13 24 starters if it's true remorse.
 13:13 25 A. Yeah, yeah.

13:13 1 Q. And number two, we better be sure that that's
 13:13 2 not going to end -- kind of like the soldier's religion
 13:13 3 might end when he comes back over here. Do you follow
 13:13 4 what I am saying?
 13:13 5 A. I know exactly what you mean.
 13:14 6 Q. Now, I want to talk a little bit about this
 13:14 7 notion of -- and I brought it up, and I did for a real
 13:14 8 purpose. And that is for -- if you kill the drug
 13:14 9 dealer, is that somehow different from killing somebody
 13:14 10 that we think is better for our society?
 13:14 11 A. Not really. It's a life that has been taken.
 13:14 12 Q. But, I tell you how I think and maybe this
 13:14 13 applies to you and maybe it doesn't. If you and I were
 13:14 14 taking a walk down -- down to the railroad tracks, let's
 13:14 15 say for some reason. We were going somewhere, and we
 13:14 16 bump into each other after this trial. And I say, hi,
 13:14 17 do you remember me? I was the lawyer. Yeah. I am the
 13:14 18 juror who works for Dr. Ashworth. How is her new
 13:14 19 husband? And we do that kind of talking.
 13:14 20 And then we see a fellow up on the
 13:14 21 railroad tracks, maybe a quarter mile up those tracks
 13:14 22 and we think, you know, what's that guy doing standing
 13:15 23 on the railroad tracks? And the next thing we hear, we
 13:15 24 hear a big old freight train coming down the tracks in
 13:15 25 the other direction. And we yell, "Watch out. Here

13:15 1 comes the train."
 13:15 2 He doesn't hear us or doesn't pay
 13:15 3 attention or whatever, and he gets run over by the
 13:15 4 train. And you and I would be shocked, and we would
 13:15 5 probably be crying and upset. It would be a horrible
 13:15 6 thing to have to watch. I don't know why, but we'd go
 13:15 7 over and see if we can help him.
 13:15 8 A. Uh-huh.
 13:15 9 Q. But there is not going to be help for somebody
 13:15 10 getting run over by a train. We know that.
 13:15 11 A. Uh-huh.
 13:15 12 Q. And we call the police, or we use a cell phone
 13:15 13 and the police and the ambulance say: Well, we checked
 13:15 14 in his wallet, and it turns out he's a drug dealer.
 13:15 15 We've been after him for six months trying to arrest
 13:15 16 him. We got warrants on him. He's a drug dealer.
 13:15 17 It might not be right, but I'll bet you
 13:15 18 and I wouldn't be quite as concerned in our hearts as if
 13:15 19 it turned out he was a somebody that helped children in
 13:15 20 the Special Olympics and was just an all-around good,
 13:16 21 charitable person that did good for our society. Can
 13:16 22 you see how maybe we would feel that way? Maybe we
 13:16 23 shouldn't because life is life.
 13:16 24 A. Yeah.
 13:16 25 Q. But I think that might be human to say, that's

13:16 1 not as bad because that was a drug dealer.
 13:16 2 A. Yeah, it might be, yeah.
 13:16 3 Q. I'd like to think I'm a better person. I'd
 13:16 4 like to not think that way, but I got that in me, you
 13:16 5 know?
 13:16 6 A. Yeah.
 13:16 7 Q. Maybe the engineer feels better, and maybe he
 13:16 8 doesn't. You know, the guy that ran that train. Maybe
 13:16 9 he -- and maybe he is out driving down the tracks. The
 13:16 10 guy shouldn't have been there, but I'll bet he might
 13:16 11 feel a little better that it wasn't -- it was the bad
 13:16 12 guy instead of the good guy, and that's all human. And
 13:16 13 that's how we all react in general.
 13:16 14 But if you stop and think about it for a
 13:16 15 minute, the defendant is not on trial for the -- for the
 13:16 16 quality of the person that he killed. He's on trial for
 13:16 17 being a murderer.
 13:17 18 A. Yeah.
 13:17 19 Q. When we get to these questions here, which
 13:17 20 there are really two, there's nothing in this first
 13:17 21 question that asks you: Do you find that the defendant
 13:17 22 killed somebody that we don't think was all that good?
 13:17 23 There's not a word in there about the victim and whether
 13:17 24 the victim is good or bad. And probably when we get to
 13:17 25 the second question, that's the mitigation question,

13:17 1 there's really nothing in there about the character of
13:17 2 the victim. You might be able to weave that in some
13:17 3 because that might have something to do with the
13:17 4 consideration of all the evidence.

13:17 5 A. Uh-huh.

13:17 6 Q. But you are never going to be asked a question,
13:17 7 Ms. Ballard, do you find that the guy that got murdered
13:17 8 was a good man or a bad man?

13:17 9 A. No.

13:17 10 Q. Do you know what I'm saying?

13:17 11 A. Uh-huh.

13:17 12 Q. And that's probably for a lot of reasons.
13:17 13 First of all, there might be somebody out there who
13:17 14 would think you or I wasn't a good person.

13:17 15 A. Uh-huh.

13:17 16 Q. If the test of whether we should be murdered or
13:17 17 not or whether our murder is important or not is what
13:18 18 the killer thinks about us, that's a tough one because
13:18 19 usually -- usually killers kill people that they don't
13:18 20 think are too important. I don't know many killers that
13:18 21 kill people they like a lot. That's kind of why they
13:18 22 kill, it's because for some reason they don't like the
13:18 23 person that they killed.

13:18 24 And so we don't want everybody out there
13:18 25 being judge, jury and executioner on us, and that's kind

13:18 1 of why we do that. That's kind of why I say, even if
13:18 2 the victim is a bad person, that doesn't make the
13:18 3 defendant one bit better for killing that bad person.

13:18 4 A. No. Because that person has loved ones, and
13:18 5 he's hurting the loved ones, too.

13:18 6 Q. Sure, sure. And furthermore, other things can
13:18 7 happen. I mean, you take a shot at one guy you don't
13:18 8 like and maybe you miss him and hit somebody that's
13:18 9 good.

13:18 10 A. I know that happens.

13:19 11 Q. And then what is it? Is that good or bad? He
13:19 12 is trying to kill the bad guy, but he kills the good
13:19 13 guy. Which is it? And it gets kind of wild if you do
13:19 14 that.

13:19 15 A. Uh-huh.

13:19 16 Q. And then further, you got other questions to
13:19 17 ask because, even if you are killing somebody that's not
13:19 18 so good, what if somebody good comes along and you got
13:19 19 to kill them because they might be a witness, you know,
13:19 20 those kinds of things?

13:19 21 A. Oh, yeah.

13:19 22 Q. You might kill the bad guy and then you got to
13:19 23 kill somebody good too just to cover up for killing the
13:19 24 bad guy. Do you know what I mean?

13:19 25 A. Yes.

13:19 1 Q. And the other part is, if we start doing that,
13:19 2 if we start saying somebody needs to be killed or
13:19 3 somebody's death isn't so important, what if the
13:19 4 defendant that you end up being a juror on ends up being
13:19 5 a drug dealer, too? Do you say, well, we don't give
13:19 6 this defendant -- we're not going to worry about whether
13:19 7 we execute him so much because he's a drug dealer. And
13:19 8 drug dealers we don't care about anyway. Do you see how
13:19 9 that all works?

13:20 10 A. Uh-huh.

13:20 11 Q. You've just got to look at the defendant and
13:20 12 his character.

13:20 13 A. Yeah.

13:20 14 Q. And his responsibility.

13:20 15 A. Uh-huh.

13:20 16 Q. That's kind of how this question is directing
13:20 17 you to look. Now, I want to talk about families with
13:20 18 you for a minute. Do you have children?

13:20 19 A. Yes, I do.

13:20 20 Q. Can you tell me how many and what their ages
13:20 21 are?

13:20 22 A. I have three children. My daughter is 36. I
13:20 23 have a son 34, and a son 25.

13:20 24 Q. Out of those three, do you have any
13:20 25 grandchildren?

13:20 1 A. Uh-huh, I have three grandchildren.

13:20 2 Q. What are their ages?

13:20 3 A. Six years old, a little girl, and a
13:20 4 four-year-old boy, and a seven-month-old little boy.

13:20 5 Q. Do any of them go to Dr. Ashworth?

13:20 6 A. No.

13:20 7 Q. Okay. I don't know you well, but I get
13:20 8 impressions really quickly of people. And I can see the
13:20 9 mom and grandmom in you. I can see it clearly as you
13:20 10 are sitting there. And so I understand lots, I think,
13:20 11 about you. And I believe you are the kind of person
13:20 12 that, even if your children are scattered in states
13:21 13 1,500 miles away from here, you are still in touch with
13:21 14 them. And if you call them at nine o'clock at night and
13:21 15 they don't answer the phone, you start worrying like a
13:21 16 mom. Thirty-six years old, it doesn't matter. It's
13:21 17 still a little girl to you.

13:21 18 A. No. It's my baby.

13:21 19 Q. Of course. And I'm thinking to myself, oh, my
13:21 20 goodness, what if Ms. Ballard ends up with a child
13:21 21 charged with an awful crime and, you know I know that
13:21 22 would never happen. But what if it did? What if one of
13:21 23 your children got charged with capital murder? And
13:21 24 somewhere in this land the State was trying to cause the
13:21 25 execution of one of your children. I'm thinking, what

13:21 1 would that be like for you?
 13:21 2 A. It would break my heart.
 13:21 3 Q. Of course, of course it would. And I'm moving
 13:21 4 along to a point that, if you haven't sensed it yet, I'm
 13:21 5 moving to a point that you can understand really well.
 13:21 6 It wouldn't even matter to you if they were guilty. It
 13:21 7 wouldn't -- you wouldn't -- you wouldn't have one ounce
 13:21 8 of love less for them?
 13:22 9 A. No.
 13:22 10 Q. You wouldn't -- you wouldn't be one more -- one
 13:22 11 bit more willing to let them be executed because they
 13:22 12 were guilty than otherwise?
 13:22 13 A. Uh-huh.
 13:22 14 Q. You would be at the jail everyday when it was
 13:22 15 visiting time for them. You would write them letters.
 13:22 16 You'd be helping their lawyers in any way that you could
 13:22 17 think of to find witnesses to find evidence, anything
 13:22 18 you can think of. You'd write your congressman. You'd
 13:22 19 write the church. No telling what you would do, to try
 13:22 20 to help your child that you love and adore.
 13:22 21 If the time came in the trial when you
 13:22 22 were to come in and testify, I know you'd be there and
 13:22 23 you would -- you would testify. And you would say
 13:22 24 anything you could to try to spare your child's life
 13:22 25 because you are a loving, caring kind of person. Are we

13:22 1 right so far?
 13:22 2 A. Right.
 13:22 3 Q. Me too. I mean, I would do it. I don't care
 13:22 4 if I'm a lawyer. I would forget the lawyer part. I
 13:22 5 would come in and do whatever I can for my child, or my
 13:23 6 children because I love them. I love them both very
 13:23 7 much.
 13:23 8 A. Uh-huh.
 13:23 9 Q. I anticipate jurors in this case are going to
 13:23 10 see something like that.
 13:23 11 A. (Moving head up and down).
 13:23 12 Q. I anticipate, and it's frequent -- I anticipate
 13:23 13 that the defendant has a mother that loves him. A
 13:23 14 mother that would do what she could for him, that would
 13:23 15 say things that she could think of to help him, that
 13:23 16 would help his lawyers. That she is going to miss him
 13:23 17 terribly and never get over any of this, and certainly
 13:23 18 never going to get over the fact that he gets executed.
 13:23 19 I would anticipate she might testify to
 13:23 20 those things and some other things, the background, the
 13:23 21 evidence on the defendant. And I would be very
 13:23 22 surprised if she doesn't come into court and start
 13:23 23 crying. Maybe crying a lot, and I suspect those would
 13:23 24 be genuine tears.
 13:23 25 A. Uh-huh.

13:23 1 Q. I don't expect they are going to be staged for
 13:24 2 the jury or that she's gone into some kind of class,
 13:24 3 like crying class, how to cry convincingly. I don't
 13:24 4 suspect that for a minute. Okay?
 13:24 5 A. Yeah.
 13:24 6 Q. How do you think you are going to react to
 13:24 7 something like that if that would happen?
 13:24 8 A. Well, my heart would go out to her because I
 13:24 9 would know how she felt. Or I would think I would know
 13:24 10 how she felt, but that is her, and I would have to look
 13:24 11 at what her child did really. And I would not be so
 13:24 12 sympathetic that I wouldn't judge him like I should, I
 13:24 13 don't believe, at all.
 13:24 14 Q. Because the argument could be made, I don't
 13:24 15 know if it would in this case, but the argument could be
 13:24 16 made, don't do this to his mother.
 13:24 17 A. Well --
 13:24 18 Q. What do you think of that?
 13:24 19 A. Well, I know, but I have to think too about
 13:24 20 what -- about him. And more than his mother, but -- but
 13:25 21 I would hurt for her.
 13:25 22 Q. Okay. I think we all would. People that I
 13:25 23 would like to see on this jury, I think they would feel
 13:25 24 that way.
 13:25 25 A. Yeah.

13:25 1 Q. I want to make sure you are that way also. I
 13:25 2 don't know about the ages of your kids. I think it
 13:25 3 probably might or might not fit. Drugs were different
 13:25 4 as your children were in those drug-prone years as they
 13:25 5 are now. Not only the variety of the drugs, but
 13:25 6 probably in many ways the intensity of them. Do you
 13:25 7 recall, as a parent with teen-age children, do you
 13:25 8 recall being worried about drug usage as they were
 13:25 9 growing up?
 13:25 10 A. Sure.
 13:25 11 Q. Kind of tell me how -- tell me what your
 13:25 12 worries were and what -- what you thought about all of
 13:25 13 that and what -- what you tried to do to spare all that?
 13:26 14 A. Well, we tried to talk to them and, you know,
 13:26 15 teach them what was right and wrong for themselves,
 13:26 16 their bodies. And but, you know, teenagers go through
 13:26 17 these periods. You don't know what they are thinking
 13:26 18 really. And we did, we were concerned a time or two.
 13:26 19 And I think maybe my daughter at one time did try
 13:26 20 something, but we caught her, but we didn't catch her
 13:26 21 anymore. And our sons I really don't believe ever even
 13:26 22 tried any drugs so, but it's a very much a concern
 13:26 23 because you can ruin your life.
 13:26 24 Q. And I think you touched on something that's
 13:26 25 interesting. I mentioned it on Tuesday. It doesn't

13:26 1 matter how much we tell children or -- they probably
 13:26 2 start telling patients that you all are dealing with,
 13:26 3 don't do drugs. Don't let anybody give you drugs. You
 13:26 4 see these little children shows now, and they always
 13:26 5 have these little cartoons of the bad guy trying to
 13:27 6 offer drugs and those -- and those kinds of things. And
 13:27 7 yet kids do that anyway sometimes.

13:27 8 A. Sometimes.

13:27 9 Q. And when they do it, I mean, it may not be a
 13:27 10 wise choice, but do you view them, after having had all
 13:27 11 that education, do you view that as a choice they know
 13:27 12 they are making and they are making a conscious decision
 13:27 13 when they do that?

13:27 14 A. Uh-huh, uh-huh. Well, it depends on the age.
 13:27 15 You know, of course a little child wouldn't know. But
 13:27 16 as a teenager, they are certainly exposed, and they know
 13:27 17 what they are doing. But hopefully they'll come back
 13:27 18 around and listen to mom and dad.

13:27 19 Q. And most of them perhaps do.

13:27 20 A. Uh-huh.

13:27 21 Q. Most of them do and, you know, as a parent you
 13:27 22 look at them and maybe say to yourself, you know, as
 13:27 23 long as they don't get something really really bad and
 13:27 24 as long as they don't do some bad crime connected with
 13:27 25 it, it may not be my first choice but, I mean, there are

13:28 1 probably those of us in this room that had a little beer
 13:28 2 now and then when we were their same age. It may be a
 13:28 3 little different and most of us got through it. We
 13:28 4 don't get a snoutful every chance that we get.

13:28 5 A. Yeah.

13:28 6 Q. Suppose a person says, I started out on drugs.
 13:28 7 I guess I knew it was wrong, but I was aimless. I was
 13:28 8 hopeless. I was looking for adventure. I didn't have
 13:28 9 any good modeling. I didn't like school very much,
 13:28 10 whatever, and I started doing marijuana. And I
 13:28 11 graduated from marijuana to this, to that and the other.

13:28 12 And the next thing I know, I'm doing
 13:28 13 something that is often violence inducing. And that is
 13:28 14 I'm doing speed, methamphetamine. And suppose the story
 13:28 15 is, yes, I did a horrible crime. It was a capital
 13:28 16 murder, and it doesn't fit the insanity definition, and
 13:29 17 it doesn't fit the accident definition. But I was doing
 13:29 18 a lot of drugs back then. Maybe I was hooked, maybe I
 13:29 19 wasn't.

13:29 20 So my crime was not as bad as if I had
 13:29 21 done it stone cold sober because these drugs I was
 13:29 22 taking made me more aggressive or made me more irritable
 13:29 23 or made me more paranoid. I got the idea that people
 13:29 24 were after me and stuff like that if they weren't. Does
 13:29 25 that make sense to you as a concept?

13:29 1 A. I know it happens, but I don't think it's right
 13:29 2 at all. You should know that there's a possibility of
 13:29 3 that happening before you take those drugs.

13:29 4 Q. Well, the reason I ask that is because I don't
 13:29 5 know about this case, but I know many cases, people will
 13:29 6 have explanations. They don't have to offer any
 13:29 7 evidence, but the defendants will have explanations for
 13:30 8 why they do the crimes they do. And certainly drugs
 13:30 9 might be one, an unhappy upbringing might be one.
 13:30 10 Poverty might be one. Lack of education, busted
 13:30 11 romance. Some people maybe saw atrocities in the
 13:30 12 military.

13:30 13 Like if they were in the Navy and served
 13:30 14 with gallantry, but as a result of all of that, ended up
 13:30 15 with, you know, kind of deformed in their personality or
 13:30 16 their character kind of thing. Everybody will offer,
 13:30 17 like, explanations for how they -- for how they got the
 13:30 18 way they are, that is, being a capital murderer.

13:30 19 And I'm curious about that. Other people
 13:30 20 say, well, you are talking to the wrong people about
 13:30 21 this drug stuff because that's a crime in itself. You
 13:30 22 had warnings like everybody else. And don't come crying
 13:30 23 to me now when -- when the chickens have come home to
 13:31 24 roost. And that is, because you did all that stuff, you
 13:31 25 ended up becoming more violent and doing all this stuff.

13:31 1 How do you feel about that issue?

13:31 2 A. I think if you've tried to help someone and
 13:31 3 they just refused the help, well, they have to be
 13:31 4 responsible for their own actions. And I don't really
 13:31 5 feel -- I'm sorry, but I don't have a lot of sympathy
 13:31 6 for someone that just goes on and on with their drugs.

13:31 7 Q. You go to Hunters Glen Baptist Church; is that
 13:31 8 right?

13:31 9 A. Uh-huh.

13:31 10 Q. And I believe the new sanctuary is open now?

13:31 11 A. Oh, yeah. It's beautiful.

13:31 12 Q. I'm curious about that, because I know my
 13:31 13 church is building a new sanctuary. And some of us have
 13:31 14 worries that when you build a big new sanctuary, it
 13:31 15 changes -- it changes the feel of the church somehow.
 13:31 16 Do you notice any difference that way?

13:31 17 A. Well, a little bit. I kind of liked it when it
 13:31 18 was small, but yet it's very nice still. We still have
 13:31 19 the same friends, and I love our minister. He is so
 13:31 20 good.

13:31 21 Q. Do you have a place that you always sit when
 13:31 22 you go to service? Do you have an area?

13:32 23 A. Basically, uh-huh.

13:32 24 Q. Where do you sit?

13:32 25 A. Well, we usually sit on the -- well, facing the

13:32 1 minister, we are usually over on the right-hand side.
 13:32 2 Q. I sing in the choir. So I'm up in the choir
 13:32 3 loft, and I had a benefit that I didn't know about when
 13:32 4 I first started doing that. They don't pass the
 13:32 5 collection plate up in the choir loft.
 13:32 6 A. I'll have to get up there. (Laughter.)
 13:32 7 Q. You probably have never discussed capital
 13:32 8 punishment there in Hunters Glen, or have you? Have you
 13:32 9 ever discussed that, like in Sunday School class
 13:32 10 perhaps?
 13:32 11 A. Not really.
 13:32 12 Q. I don't know that the Baptist church has a
 13:32 13 strong position. I know that the Baptist church does
 13:32 14 not have a position denouncing the death penalty like
 13:33 15 some faiths do.
 13:33 16 A. Huh-uh.
 13:33 17 Q. I don't think they have taken the official
 13:33 18 position of approving it or --
 13:33 19 A. I don't think so.
 13:33 20 Q. I think they probably view that as the
 13:33 21 individual work of the members. Just kind of like they
 13:33 22 don't have a job that -- that you are supposed to do or
 13:33 23 can't do. They just -- they leave that up to you. Do
 13:33 24 you see any conflict between your view on the death
 13:33 25 penalty and your Christian values?

13:33 1 A. No.
 13:33 2 Q. And why I ask that is because some people of
 13:33 3 faith that are very strong in their beliefs say, you
 13:33 4 know, when I read that, "Thou shalt not kill," I don't
 13:33 5 see anything in there that says, thou shalt not kill
 13:33 6 except in executions or time of war. It just says,
 13:33 7 "Thou shalt not kill."
 13:33 8 And other people say, well, that has to
 13:33 9 mean murder because they had executions going on back
 13:33 10 then and nobody thought anything wrong with that. It
 13:34 11 was part of the law that you get executed for certain
 13:34 12 things. What do you think about that? Do you think
 13:34 13 "thou shalt not kill" applies to executions?
 13:34 14 A. Well, you know, you have to look at all of it.
 13:34 15 If someone has killed someone else, they've got to be
 13:34 16 punished. God punishes. He will punish us very bad one
 13:34 17 of these days, and he's not going to blink an eye over
 13:34 18 that. Because we've had warnings. We've known how to
 13:34 19 act and so --
 13:34 20 Q. So you don't -- you don't feel that that's what
 13:34 21 it's talking about executions when it says, "Thou shalt
 13:34 22 not kill"?
 13:34 23 A. No.
 13:34 24 Q. Now, you were raised in the Christian church?
 13:34 25 A. Uh-huh.

13:34 1 Q. Would that be Disciples of Christ?
 13:35 2 A. Uh-huh, yes.
 13:35 3 Q. Where are you from originally?
 13:35 4 A. Dallas. Well, I was born in McKinney. And, of
 13:35 5 course, as a baby we moved to Dallas and... And one
 13:35 6 thing I wanted to tell you all, too. I said I had been
 13:35 7 to college for one year. It was one semester, and I
 13:35 8 didn't want to tell you wrong. My husband and I, we
 13:35 9 broke up for good. So we were dating, so I came home.
 13:35 10 Q. Funny how that happens. When you looked at the
 13:35 11 defendant, tell me what observations you made of him.
 13:35 12 And it's -- you can look at him all you want here.
 13:35 13 There's nothing wrong with that. What things occur to
 13:35 14 you?
 13:35 15 A. That he's a nice looking young man.
 13:35 16 Q. Let's talk about -- let's talk about the -- the
 13:36 17 young man concept for a second. That's probably --
 13:36 18 there are probably a number of things we notice when we
 13:36 19 notice a person. We probably notice height, and we
 13:36 20 notice age. We notice how people are dressed and all
 13:36 21 those things. And, yeah, I certainly agree with you.
 13:36 22 He appears to be young. As you get older, lots more
 13:36 23 people seem to look younger than they used to. I'm sure
 13:36 24 you understand how that is, too.
 13:36 25 A. Oh, yes.

13:36 1 Q. How does the fact that he looks young seem to
 13:36 2 affect your jury service, if it does? Does that have
 13:36 3 any affect on any of the way you approach things?
 13:36 4 A. I don't think so.
 13:36 5 Q. Well, the reason I say that is, sometimes we
 13:36 6 have more hope for young people in rehabilitation and
 13:36 7 remorse --
 13:37 8 A. Yes.
 13:37 9 Q. -- than other people that are more set in their
 13:37 10 ways, and maybe that's true. I mean, maybe that's
 13:37 11 right, and maybe it isn't. I don't know about that
 13:37 12 part. I know, I guess if I look back on my life when I
 13:37 13 was 27, like his age, for example, I guess I could say,
 13:37 14 you know, I probably was doing some things and thinking
 13:37 15 some things that I probably wouldn't think now. And I
 13:37 16 like to think I'm better for that.
 13:37 17 A. Uh-huh.
 13:37 18 Q. I wasn't doing anything all that exciting, that
 13:37 19 I can remember, when I was 27.
 13:37 20 A. Uh-huh, yeah.
 13:37 21 Q. I probably had a different view about life than
 13:37 22 I do now.
 13:37 23 A. Sure.
 13:37 24 Q. And if that's the case, then I think all of us
 13:37 25 would probably say, if you are younger you have a better

13:37 1 chance of changing because we're all changing --
 13:37 2 A. Uh-huh, sure.
 13:37 3 Q. -- than otherwise. And I guess what I'm
 13:37 4 thinking of is, I want to make sure that you are not the
 13:37 5 kind of person that says, "Well, I could never vote
 13:37 6 death for a young person." Are you that way?
 13:37 7 A. I don't think so.
 13:37 8 Q. And why that's important is, you know, it's one
 13:38 9 thing, when you are a young person to drive fast, too
 13:38 10 fast. I wish they didn't, and maybe your kids didn't,
 13:38 11 but most kids they seem like, thank goodness, their
 13:38 12 reflexes are good because if they are driving, if they
 13:38 13 are driving pretty reckless sometimes.
 13:38 14 A. Yes.
 13:38 15 Q. You go out some Friday night in Plano. You go
 13:38 16 down Parker Road, for example, you will know exactly
 13:38 17 what I mean. You see all the kids with the stereos.
 13:38 18 They are nice kids. They are just kids, and they are
 13:38 19 driving, and it's dangerous. They are going fast. It's
 13:38 20 one thing to say, let's give somebody a break because
 13:38 21 they are not -- they are just being kids driving too
 13:38 22 fast, even though you and I know that's a dangerous
 13:38 23 thing to be doing. And that's another thing to say,
 13:38 24 well, let's give them a break on a capital murder case
 13:38 25 for killing a couple people because they are just kids.

13:38 1 Do you follow what I'm saying?
 13:38 2 A. Uh-huh.
 13:38 3 Q. There probably was a time when your children
 13:38 4 might have been just like those kids out there driving
 13:38 5 too fast, yours, mine and everybody else's. There was
 13:39 6 never a time when your children were ever going to go
 13:39 7 out and kill two people. Do you follow what I'm saying?
 13:39 8 A. Uh-huh.
 13:39 9 Q. And to look at extreme behavior, look at awful,
 13:39 10 horrific murderous, savage kind of behavior and to say,
 13:39 11 oh, well, that's just something. That's an incident of
 13:39 12 youth. It's not an incident of youth. It's an incident
 13:39 13 of really really bad people doing those kinds of crimes.
 13:39 14 Does that make sense to you?
 13:39 15 A. Yes.
 13:39 16 Q. And that doesn't mean they'll consider the fact
 13:39 17 that he's young because you can consider that in many
 13:39 18 different ways. But rather it's -- it's saying young or
 13:39 19 old --
 13:39 20 MR. HIGH: Judge, I'm going to object at
 13:39 21 this point. I believe he's injecting facts before this
 13:39 22 juror that haven't been admitted into evidence. And
 13:39 23 he's personalizing his question with our client. In
 13:39 24 other words, he's injecting facts that are not in
 13:39 25 evidence at this point by personalizing this conduct

13:40 1 with our client.
 13:40 2 THE COURT: Okay. Well, I didn't get that
 13:40 3 impression, so I understood it to be general. So I'll
 13:40 4 overrule the objection. But if that could be the case,
 13:40 5 just stay away from it.
 13:40 6 MR. SCHULTZ: Okay.
 13:40 7 Q. (BY MR. SCHULTZ) Let's talk about having a bad
 13:40 8 upbringing as a child for a minute.
 13:40 9 A. Uh-huh.
 13:40 10 Q. I don't know you, but you speak of your husband
 13:40 11 with affection. And you speak of breaking up and
 13:40 12 getting married and all that stuff with affection. And
 13:40 13 I get a sense from you that you and your husband
 13:40 14 probably share a lot of core values, and he's probably
 13:40 15 just as worried about his children as you are --
 13:40 16 A. Uh-huh.
 13:40 17 Q. -- about the children. I get that sense. And
 13:40 18 I think you and I would agree that maybe the ideal way
 13:40 19 to raise children might be for parents to stay together,
 13:40 20 work with a common purpose, disagree if they disagree
 13:41 21 sometimes, but put forth an effort of family life and
 13:41 22 make things evolve around that as much as you can. That
 13:41 23 means the church. That means Plano sports. That means
 13:41 24 all the kinds of thing. That means dance lessons. I
 13:41 25 bet you had dance lessons for your kids growing up --

13:41 1 A. Uh-huh.
 13:41 2 Q. -- and that kind of stuff. And that's ideal.
 13:41 3 And then if we're real real lucky, we do an okay job at
 13:41 4 it, and they turn out okay, and they pass it on to their
 13:41 5 kids. Like, your grandkids might be benefited from like
 13:41 6 we did, just like you are benefited from what your mom
 13:41 7 did. Do you know that kind of idea?
 13:41 8 A. Oh, yeah.
 13:41 9 Q. And yet not everybody in our society has, has
 13:41 10 that. There are divorces. There are dads that run
 13:41 11 away. There is violence in the home growing up. There
 13:41 12 is poverty. There is sexual abuse of children. I mean,
 13:41 13 you and I don't even know what it means to grow up that
 13:42 14 way, but it happens to people. They understand it, and
 13:42 15 we understand it, sort of. And then when they get to
 13:42 16 adulthood, we expect them to obey the basic rules of
 13:42 17 adulthood. And maybe your kids had better tools to
 13:42 18 perform well in our society than other kids who didn't
 13:42 19 have all that love that we're talking about.
 13:42 20 A. Uh-huh.
 13:42 21 Q. Would you agree with that?
 13:42 22 A. Oh, yes.
 13:42 23 Q. And yet, if you stop and think about it for a
 13:42 24 minute, we don't ask a whole lot of people in our
 13:42 25 society. You know, we don't ask them to go to college

13:42 1 or become famous engineers or to make a lot of money or
13:42 2 have a big house.

13:42 3 We ask about three things of people in our
13:42 4 society. We ask -- we ask them to obey the laws and not
13:42 5 go around hurting us. Not taking out their frustrations
13:42 6 on us by hurting us or people that we love.

13:42 7 A. Uh-huh.

13:43 8 Q. And we ask them to stay free from real serious
13:43 9 diseases that can affect us. Because we can quarantine
13:43 10 people. If they have TB or smallpox, we say, go get
13:43 11 treatment or we're going to put you somewhere where you
13:43 12 can't make us sick. And we probably ask them -- we
13:43 13 probably will ask them to go to school for a while
13:43 14 because they don't have a choice about that.

13:43 15 A. Yeah.

13:43 16 Q. And other than that, they don't have to do much
13:43 17 of anything in our society. They don't have to pay
13:43 18 taxes if they don't work because they don't make any
13:43 19 money. So we don't say, pay our taxes. We don't say
13:43 20 work. We don't say -- we don't say take care of
13:43 21 yourself because if we take sick, you and me will pay
13:43 22 for it in a charity hospital. We're that way. We
13:43 23 don't -- we'll take care of their children if they don't
13:43 24 have money. I bet Dr. Ashworth still does some free
13:43 25 work for children that are poor, doesn't she? Does she

13:43 1 do any of that?

13:43 2 A. Well, I'm not sure that she does.

13:43 3 THE COURT: Say, Mr. Schultz, I'm going to
13:44 4 ask you to pass the witness in about seven minutes.

13:44 5 MR. SCHULTZ: Okay, Judge.

13:44 6 Q. (BY MR. SCHULTZ) We don't ask a whole lot from
13:44 7 people in our society other than, just don't cause
13:44 8 trouble. And that's pretty simple to do. Don't violate
13:44 9 our laws. Don't spread TB, and don't -- go to school
13:44 10 until you are 16. That's about all we ask. Do you
13:44 11 agree?

13:44 12 A. Uh-huh.

13:44 13 Q. And so what do you say to the argument, when
13:44 14 somebody goes out and does a capital murder or a
13:44 15 terrible crime and says, I have a terrible upbringing
13:44 16 and nobody instilled the values in me that Mr. and Ms.
13:44 17 Ballard instilled in their children. What do you say to
13:44 18 that argument?

13:44 19 A. I think as you get older, though, you are going
13:44 20 to know right from wrong. And you should be accountable
13:44 21 for your actions. And, I mean, I know it's true that
13:44 22 people look at things differently because of the way
13:44 23 they are raised, but you still should be responsible
13:45 24 or -- why not be a better person than your parents were
13:45 25 or --

13:45 1 Q. Okay. First question, if the defendant is
13:45 2 found guilty of capital murder, the first question you
13:45 3 get is whether there is a probability that the defendant
13:45 4 would commit criminal acts of violence that would
13:45 5 constitute a continuing threat to society. We sometimes
13:45 6 call that the future danger question.

13:45 7 A. Uh-huh.

13:45 8 Q. When it talks about society, of course it can
13:45 9 include our society that you and I live in right now.
13:45 10 Of course it includes, would the defendant be a threat
13:45 11 if he walked into the sanctuary of your church or walked
13:45 12 into the ice cream store. But it can also include
13:45 13 prison society. And it's not limited to either one.
13:45 14 One of the reasons it includes prison society is because
13:45 15 we anticipate that's where he will be going if he gets a
13:45 16 life sentence.

13:45 17 And another reason it includes prison
13:45 18 society is because, trying to evaluate his character,
13:46 19 you might want to test it in different places. How
13:46 20 would he be in this place? How would he be in that
13:46 21 place? And so you can just consider any of the possible
13:46 22 places he might ever be. The reason it includes our
13:46 23 society because, first of all, it doesn't say otherwise.
13:46 24 And, secondly, there are such things as escape. There
13:46 25 are such things as pardons. And in evaluating his

13:46 1 personality, we also consider our society too.

13:46 2 A. Uh-huh.

13:46 3 Q. A lot of ways we can do that, we can use
13:46 4 psychiatric evidence. We can use prior actions of a
13:46 5 defendant. Like, find out other crimes that may have
13:46 6 been committed, those sorts of things. Do you think you
13:46 7 could answer that question, based on evidence presented
13:46 8 to you beyond a reasonable doubt. Do you have the
13:46 9 ability to answer such a question?

13:46 10 A. Yes.

13:46 11 Q. And that's not an expert question. That's not
13:46 12 asking you to find if he had a brain tumor or a flat
13:46 13 brain wave someplace. That's just asking you, is there
13:46 14 a probability that violence would ensue? Then we have
13:46 15 the second question over here which is the mitigating
13:47 16 question.

13:47 17 And that says, even if you find the first
13:47 18 question should be answered, yes, do you find that
13:47 19 because of the background of the defendant and the
13:47 20 circumstances, do you find that there is sufficient
13:47 21 mitigating evidence, sufficient mitigating evidence to
13:47 22 warrant a life sentence? Does that concept make sense
13:47 23 to you?

13:47 24 A. Yes, uh-huh.

13:47 25 Q. Now, what sufficient means, you probably have

13:47 1 to balance the mitigating evidence against the crime
 13:47 2 itself.
 13:47 3 A. Uh-huh.
 13:47 4 Q. And here's what I mean. How am I doing on
 13:47 5 time?
 13:47 6 THE COURT: Let's see, you have about five
 13:47 7 minutes.
 13:47 8 MR. SCHULTZ: All right. I'm hustling.
 13:47 9 THE COURT: All right.
 13:47 10 Q. (BY MR. SCHULTZ) And why I say that because,
 13:47 11 to be sufficient, that invites you to look at the
 13:47 12 circumstances of the crime and other sorts of things and
 13:47 13 says, is there sufficient mitigating evidence that a
 13:47 14 life sentence is warranted? I will absolutely guarantee
 13:47 15 you, although I can't tell you what, I guarantee that
 13:48 16 there will be presented in this case, evidence that
 13:48 17 everybody will say is mitigating, mitigating evidence.
 13:48 18 I mean, it may -- I don't know what form
 13:48 19 it may take. It may take a lot of forms. But I think,
 13:48 20 I think there will be evidence that if you ask me, is
 13:48 21 that mitigating evidence? I might say, yeah. You know,
 13:48 22 not -- all kinds of stuff might be mitigating evidence.
 13:48 23 All that really means is that perhaps stuff that's sad
 13:48 24 about a defendant's background or things that happen.
 13:48 25 You and I have mitigating evidence, if we ever get

13:48 1 charged. You and I have that walking around with us
 13:48 2 right now.
 13:48 3 If we get charged with a capital murder,
 13:48 4 you've got things that didn't go right in your life, and
 13:48 5 I have things that I can point to that didn't go right
 13:48 6 in my life. And everybody else in this courtroom, we
 13:48 7 all walk around with a sack full of mitigating evidence
 13:48 8 that we can use, if we ever get charged with capital
 13:48 9 murder. Does that make sense to you?
 13:49 10 A. Sure.
 13:49 11 Q. And then what you do is, you look at that
 13:49 12 question and you say, look at what the person's done.
 13:49 13 Is the sack full of mitigating evidence that we all
 13:49 14 carry with us, every single one of us, is that enough?
 13:49 15 Is that sufficient to make a death sentence a life
 13:49 16 sentence; what ought to be a death sentence? Is that
 13:49 17 sufficient to make a life sentence the right thing to
 13:49 18 do? Do you know what I mean?
 13:49 19 A. Yes, uh-huh.
 13:49 20 Q. Timothy McVeigh, I guarantee you, had some
 13:49 21 mitigating evidence in his sack that he walked around
 13:49 22 with like you and me and everybody else.
 13:49 23 A. Sure.
 13:49 24 Q. Probably there isn't a sack big enough to hold
 13:49 25 enough mitigating evidence to overcome what he did to

13:49 1 convince a jury. Do you know what I mean?
 13:49 2 A. Yes.
 13:49 3 Q. The worse the crime, perhaps the more evidence
 13:49 4 is required to be sufficient.
 13:49 5 A. Uh-huh.
 13:49 6 Q. Because that's what you are invited to look at
 13:49 7 in your question.
 13:49 8 A. Uh-huh.
 13:49 9 Q. Adolf Hitler, it doesn't matter what he had to
 13:50 10 say. He never could have mitigated what he did. Do you
 13:50 11 follow me?
 13:50 12 A. Yes.
 13:50 13 Q. Do you agree with me that everybody has
 13:50 14 mitigating evidence that they could fall back on if they
 13:50 15 wanted to?
 13:50 16 A. Sure.
 13:50 17 Q. I want to ask you one question about your
 13:50 18 questionnaire.
 13:50 19 MR. SCHULTZ: May I approach the juror?
 13:50 20 THE COURT: Yes.
 13:50 21 Q. (BY MR. SCHULTZ) This is not a criticism.
 13:50 22 Just want to make sure -- I want to clear it up. On
 13:50 23 page 3, question is, the burden of proof in a criminal
 13:50 24 case. Read that and your answer. About the burden of
 13:51 25 proof is on?

13:51 1 A. Well, I think the defendant -- you have to
 13:51 2 prove that he is innocent. So --
 13:51 3 Q. Well, let's do it this way. You know I
 13:51 4 never --
 13:51 5 MR. GOELLER: I'm sorry. She was about to
 13:51 6 say something else.
 13:51 7 MR. SCHULTZ: I didn't mean to interrupt
 13:51 8 you.
 13:51 9 MR. GOELLER: What were you going to say?
 13:51 10 VENIREPERSON: Go ahead.
 13:51 11 MR. GOELLER: You were going to say
 13:51 12 something else.
 13:51 13 VENIREPERSON: Well, I did put on the
 13:51 14 juror -- but I don't -- I guess I should say that would
 13:51 15 be the defense lawyer is going to have to prove. The
 13:51 16 burden of proof is on you, right?
 13:52 17 MR. GOELLER: Okay.
 13:52 18 VENIREPERSON: And they are going to have
 13:52 19 to prove that he's innocent. And of course the burden
 13:52 20 of proof -- you have to prove he's guilty. So is that
 13:52 21 what you mean?
 13:52 22 MR. SCHULTZ: Yes.
 13:52 23 VENIREPERSON: I don't know why I put on
 13:52 24 the juror.
 13:52 25 Q. (BY MR. SCHULTZ) I understand how you might

13:52 1 say the burden is on the jury to figure out.
 13:52 2 A. Yeah, uh-huh.
 13:52 3 Q. The burden of proof at the first part of the
 13:52 4 trial, that's the -- that's the guilt-innocence phase of
 13:52 5 the trial.
 13:52 6 A. Yeah.
 13:52 7 Q. Is clearly on the State.
 13:52 8 A. Yeah, yeah.
 13:52 9 Q. They don't have to do anything.
 13:52 10 A. Oh.
 13:52 11 Q. The defense lawyers don't have to present any
 13:52 12 evidence. And I understand you answered these questions
 13:52 13 before anybody talked to you.
 13:52 14 A. Uh-huh.
 13:52 15 Q. Okay. They don't have to prove anything to you
 13:52 16 at all.
 13:52 17 A. Oh.
 13:52 18 Q. They can refuse -- they can refuse to even
 13:52 19 participate in the trial, if they want to.
 13:52 20 A. Oh, yeah.
 13:52 21 Q. That means the defense lawyers and the
 13:52 22 defendant.
 13:52 23 A. Oh.
 13:52 24 Q. And that doesn't change -- that doesn't make my
 13:52 25 job one bit easier.

13:52 1 A. Uh-huh.
 13:52 2 Q. I still have the burden of proving to you --
 13:52 3 A. Yes.
 13:52 4 Q. -- beyond a reasonable doubt the defendant's
 13:53 5 guilty. Any problem with that?
 13:53 6 A. No.
 13:53 7 THE COURT: Mr. Schultz, your time has
 13:53 8 expired. All right.
 13:53 9 MR. SCHULTZ: May I approach? May I
 13:53 10 approach the Bench?
 13:53 11 THE COURT: Oh, yes. You need to get your
 13:53 12 paper back.
 13:53 13 MR. SCHULTZ: No. May I approach for a
 13:53 14 conference with the Court.
 13:53 15 THE COURT: Oh, yes.
 13:53 16 (At the Bench.)
 13:53 17 Q. (BY MR. SCHULTZ) I had to go to the Judge
 13:53 18 because I had to beg for a little more time. At the
 13:53 19 punishment phase of the trial, the burden is still on
 13:54 20 the State. It never changes. The burden is never on
 13:54 21 the defense to do anything at all. At most, the only
 13:54 22 burden they are ever going to have is the same burden as
 13:54 23 we do on mitigation, but they still don't have to do
 13:54 24 anything.
 13:54 25 A. Oh, okay.

13:54 1 Q. This question, we've got to prove he's
 13:54 2 dangerous beyond a reasonable doubt. They don't have to
 13:54 3 prove anything.
 13:54 4 A. Okay.
 13:54 5 Q. Do you have a problem with that, if that's our
 13:54 6 system?
 13:54 7 A. No, no problem.
 13:54 8 Q. And if we don't prove that question should be
 13:54 9 answered yes, beyond a reasonable doubt, then the answer
 13:54 10 to that question has to be no.
 13:54 11 A. Uh-huh.
 13:54 12 Q. So you wouldn't shift the burden of proof then?
 13:54 13 You wouldn't be a burden shifter and put on the defense
 13:54 14 to prove his innocence?
 13:54 15 A. No, no. I just thought that the defense lawyer
 13:54 16 had to prove he was innocent, and you had to prove he
 13:54 17 was guilty. I didn't know that he could just --
 13:54 18 Q. You are half right. I've got to prove he's
 13:54 19 guilty.
 13:54 20 A. I didn't know.
 13:54 21 Q. But in fairness to you, you filled out that
 13:54 22 questionnaire before anybody talked to you.
 13:54 23 A. Oh, yes.
 13:54 24 Q. That was just kind of a, like the woman off the
 13:55 25 street kind of a questionnaire.

13:55 1 A. Yes.
 13:55 2 MR. SCHULTZ: Judge, I'll pass the juror.
 13:55 3 THE COURT: All right.
 13:55 4 VOIR DIRE EXAMINATION
 13:55 5 BY MR. HIGH:
 13:55 6 Q. Good afternoon, Ms. Ballard. My name is Don
 13:55 7 High.
 13:55 8 A. Hi, Don. How are you?
 13:55 9 Q. How are you? Nice to see you.
 13:55 10 A. Thank you.
 13:55 11 Q. My name is spelled just like it sounds like
 13:55 12 high in the air, H-I-G-H.
 13:55 13 A. Oh, H-I-G-H, okay.
 13:55 14 Q. So you don't have to guess at it. And my
 13:55 15 partner here, Mr. Goeller, and we're partners in a law
 13:55 16 practice in Plano --
 13:55 17 A. Oh.
 13:55 18 Q. -- which is not too far from your church. Our
 13:55 19 office is at Park and Central on the west side.
 13:55 20 A. Oh, okay.
 13:55 21 Q. So we know that area pretty well, and I live in
 13:55 22 that area, too.
 13:55 23 A. Uh-huh.
 13:55 24 Q. And the reason I mention that is, you know, I
 13:55 25 walk around in that area and ride my bike in that area

13:55 1 and fill my car with gas in that area. Have we ever met
 13:55 2 or --
 13:55 3 A. No, not that I know of.
 13:56 4 Q. Okay. Great. I also knew one of your fellow
 13:56 5 church members. I think he went to your church, Officer
 13:56 6 McQuery, Mike McQuery? Did he go to your church?
 13:56 7 A. I know the name. I've heard the name, but I
 13:56 8 don't know him in church. But I've heard the name.
 13:56 9 Q. He's a super guy, and he passed away three or
 13:56 10 four years ago. And they named a park after him on the
 13:56 11 east side of Plano, McQuery Field. So he was well
 13:56 12 thought of, and I know that he was a pretty avid member
 13:56 13 of your church. He would be real proud of your
 13:56 14 sanctuary. I'm sure he would be.
 13:56 15 A. Oh, yeah.
 13:56 16 Q. We have a few questions. Mr. Goeller and I
 13:56 17 have a hard job to do. We've been appointed to
 13:56 18 represent this young man here, and we got to do it
 13:56 19 whether we like it or not. You understand that.
 13:56 20 A. Uh-huh.
 13:56 21 Q. And we've got to make sure that he gets a fair
 13:56 22 shake --
 13:57 23 A. Sure.
 13:57 24 Q. -- in the trial and also in the event he's
 13:57 25 convicted, when and if he's sentenced. And we're not --

13:57 1 we're not agreeing -- do you understand we're not
 13:57 2 agreeing at this point that he's guilty. But the way
 13:57 3 the law anticipates picking a jury, we have to discuss
 13:57 4 death penalty issues with you --
 13:57 5 A. Sure.
 13:57 6 Q. -- because it would be too late if you were
 13:57 7 already on the jury. We have to do it in advance. Do
 13:57 8 you understand that?
 13:57 9 A. Uh-huh.
 13:57 10 Q. And I hope -- I hope you understand that.
 13:57 11 A. I do.
 13:57 12 Q. If we're not sitting here telling you he's
 13:57 13 guilty because we're not taking that position at all.
 13:57 14 But we're going to ask you questions, assuming that we
 13:57 15 get to the punishment phase. We may or may not. Do you
 13:57 16 understand that?
 13:57 17 A. Uh-huh.
 13:57 18 Q. Okay. And I -- as I ask you questions, I don't
 13:57 19 mean to pry too much, but I say that, I'm going to be
 13:57 20 prying some, and I don't mean to be personal or hurt
 13:58 21 your feelings or insulting or anything like that. By
 13:58 22 all means tell me if I to.
 13:58 23 A. Okay.
 13:58 24 Q. But this case is the most serious case that
 13:58 25 Mr. Goeller and I could handle. Do you understand that?

13:58 1 A. Oh, yes.
 13:58 2 Q. And are you a little bit surprised that we go
 13:58 3 into so much detail in terms of selecting a jury?
 13:58 4 A. But I respect it. I think that's wonderful. I
 13:58 5 never knew.
 13:58 6 Q. Okay. All right. Very good. There's an
 13:58 7 answer in your questionnaire. We'll just talk about the
 13:58 8 death penalty. It says, "Are you in favor of the death
 13:58 9 penalty?" And you say, "yes." And "Please explain your
 13:58 10 answer." "Depending on the circumstances, why and how."
 13:58 11 And I suppose you're asking for more
 13:58 12 information like tell me when. Tell me when it's
 13:58 13 appropriate, that sort of thing?
 13:58 14 A. Yeah, yeah. I'm new at this.
 13:59 15 Q. Okay. And believe it or not, this is my first
 13:59 16 death penalty case. So I'm fairly new at it, too.
 13:59 17 A. Okay.
 13:59 18 Q. If you were to think of -- let's just use your
 13:59 19 imagination. If you were to think of the perfect case
 13:59 20 that would be appropriate for the assessment of the
 13:59 21 death penalty, what kind of case would that be?
 13:59 22 A. Well, like Timothy McVeigh. There was no
 13:59 23 excuse for what he did.
 13:59 24 Q. It's hard to think of a case any better than
 13:59 25 Timothy McVeigh. I agree with you. Any other type of

13:59 1 case that comes to mind?
 13:59 2 A. Well, is a crime of passion, is that a --
 13:59 3 there's an excuse for that, I guess. I mean, there's no
 14:00 4 excuse for murder, but -- I don't know. I just can't
 14:00 5 think right now. I'm nervous.
 14:00 6 Q. I understand. Crime of passion?
 14:00 7 A. That's --
 14:00 8 Q. You've done -- you've obviously done some
 14:00 9 reading over the years. Do you read mystery novels?
 14:00 10 A. Yes. I like Mary Higgins Clark. She has good
 14:00 11 mysteries, and I do enjoy a mystery.
 14:00 12 Q. When you mention a crime of passion, you are
 14:00 13 talking about a situation like the heat of the moment?
 14:00 14 A. Like this, recently this man that shot his
 14:00 15 family, you know. Is that a crime of passion, you know?
 14:00 16 Well, that's terrible, but there's so many different
 14:00 17 kind of murders, you know, that you -- there's not
 14:00 18 excuses for some. But you can be more lenient on some
 14:00 19 than others. Depends on all the circumstances.
 14:00 20 Q. That's right. Let's say -- let's say that I
 14:01 21 come home one afternoon, and I'm tired from being in the
 14:01 22 courthouse all day. And I've had all these heavy issues
 14:01 23 on my mind, and I'm a little bit grouchy, a little bit
 14:01 24 irritated. And I get upstairs, and I find my wife in
 14:01 25 bed with another man.

14:01 1 A. Uh-huh.
 14:01 2 Q. And everybody in here pretty well knows my
 14:01 3 wife. They can't imagine that scenario, but let's say I
 14:01 4 encountered that. And I grabbed a gun and shot him and
 14:01 5 her. Do you figure that would be a type of case where I
 14:01 6 should face the death penalty, or would you factor in
 14:01 7 some passion on my part?
 14:01 8 A. Well, it would be some passion if your wife had
 14:01 9 been throwing things like that in your face for a while
 14:02 10 maybe. But still, you should be a big enough person to
 14:02 11 walk away from it, but I've never been there.
 14:02 12 Q. But you've heard of situations like that, and
 14:02 13 you've probably read novels like that?
 14:02 14 A. Oh, sure. Yeah, uh-huh.
 14:02 15 Q. And obviously, I would be enraged with that
 14:02 16 situation to be confronted with that?
 14:02 17 A. But you wouldn't go scot-free.
 14:02 18 Q. I understand that. Especially with you, if you
 14:02 19 were sitting on my jury you -- you'd be rather upset
 14:02 20 with me because, after all, I'm a trained attorney, and
 14:02 21 I should know better than that --
 14:02 22 A. Sure.
 14:02 23 Q. -- first of all. And also know, being a lawyer
 14:02 24 that's handled a capital case, if I killed two or more
 14:02 25 people then that, that makes me --

14:02 1 A. Pretty bad.
 14:02 2 Q. Well, and that subjects me to the death
 14:02 3 penalty, right?
 14:02 4 A. Uh-huh.
 14:02 5 Q. Okay. In that instance, would you consider my
 14:02 6 bag of mitigating evidence that I'm carrying around with
 14:02 7 me, or would it be more likely with you as a juror that,
 14:03 8 that I would be looking at the death penalty?
 14:03 9 A. Well, you know, I might look at what your -- if
 14:03 10 she was throwing this sort of thing in your face all the
 14:03 11 time and how -- what state of mind you were in because
 14:03 12 of her.
 14:03 13 Q. Uh-huh. Well, I'm just -- I'm just talking
 14:03 14 about the situation like this afternoon. I go home
 14:03 15 after work this evening and --
 14:03 16 A. No. I don't think.
 14:03 17 Q. I'm tired and hot and walk up the stairs, and I
 14:03 18 find this situation and boom, boom, they are gone.
 14:03 19 A. No.
 14:03 20 Q. That's what I'm talking about.
 14:03 21 A. No. You can't do that.
 14:03 22 Q. You can't do that?
 14:03 23 A. No.
 14:03 24 Q. Would I be looking at the death penalty with
 14:03 25 you? Is that a good likelihood?

14:03 1 A. Oh, gosh, I don't know. I would have to hear
 14:04 2 all the facts. Because it would be so hard for me to --
 14:04 3 I don't think you'd go out and do it again.
 14:04 4 Q. Now, obviously that's a situation that involves
 14:04 5 extreme --
 14:04 6 A. Yes.
 14:04 7 Q. -- emotion on my part?
 14:04 8 A. Sure.
 14:04 9 Q. And it's also a situation that happened off the
 14:04 10 cuff. You know, I certainly didn't plan to do that, and
 14:04 11 I sure didn't know what I was going to confront this
 14:04 12 afternoon. Unlike Timothy McVeigh who planned it for
 14:04 13 months.
 14:04 14 A. Uh-huh.
 14:04 15 Q. And bought the fertilizer and got the timing
 14:04 16 devices and rented the truck and planned out his escape
 14:04 17 route, that sort of thing?
 14:04 18 A. Uh-huh.
 14:04 19 Q. And thought it through completely. It's a
 14:04 20 totally different type situation, wouldn't you think?
 14:04 21 A. Uh-huh.
 14:04 22 Q. And it seems to me that you are struggling with
 14:05 23 the difference. It seems to me that passion really
 14:05 24 doesn't matter as much to you as you thought it might.
 14:05 25 A. No. I guess not.

14:05 1 Q. Is that right?
 14:05 2 A. Well, yeah. There has -- it depends on all the
 14:05 3 circumstances whether I would want you in prison or --
 14:05 4 because I don't think you would go out and shoot
 14:05 5 somebody else. But there's so much -- I would have to
 14:05 6 have so much evidence as why you did it and maybe your
 14:05 7 background, but I don't know.
 14:05 8 Q. Well, I think it's a given for me to be sitting
 14:05 9 here practicing law. And I probably don't have a felony
 14:05 10 conviction, and I probably don't have much of a criminal
 14:05 11 history.
 14:05 12 A. No, That's right.
 14:05 13 Q. In fact, I can tell you I don't have a criminal
 14:05 14 history.
 14:05 15 A. Well, I might send you to prison.
 14:05 16 Q. And you might give me the death penalty?
 14:05 17 A. Well, probably not like I would Timothy
 14:06 18 McVeigh.
 14:06 19 Q. So passion matters somewhat but -- but not a
 14:06 20 whole lot?
 14:06 21 A. Yeah. It's still not an excuse because --
 14:06 22 Q. You say that, "I believe the death penalty is
 14:06 23 appropriate in some capital murder cases, and I could
 14:06 24 return a verdict resulting in death in a proper case."
 14:06 25 And I suppose if you were sitting on McVeigh's jury, you

14:06 1 could have done that no problem.
 14:06 2 A. Uh-huh.
 14:06 3 Q. And I suppose if you were sitting on my jury,
 14:06 4 could you return a death penalty no problem?
 14:06 5 A. I might have a little problem.
 14:06 6 Q. But you might still do it? It would still be a
 14:06 7 possibility with you?
 14:07 8 A. I think it would be very hard for me to because
 14:07 9 you had been done wrong, and you are innocent. You are
 14:07 10 a good person, so I might send you to prison.
 14:07 11 Q. And we talk about life confinement in prison,
 14:07 12 and you say, "I believe that life confinement in prison
 14:07 13 is appropriate in some murder cases, and I could return
 14:07 14 a verdict resulting in life in a proper case."
 14:07 15 A. Uh-huh.
 14:07 16 Q. Okay. Would you say that you fall, in terms of
 14:07 17 life and death, in terms of the options that you would
 14:07 18 have in a capital scenario, would you be more likely to
 14:07 19 assess death, or would you be more likely to assess
 14:07 20 life, or do you know?
 14:07 21 A. Well, to me, I'd rather be dead than go to
 14:07 22 prison. That's the way I look at it.
 14:07 23 Q. If you were having to get the sentence?
 14:08 24 A. If I were going to be sentenced because I think
 14:08 25 prison is terrible. So that's why it would, either one

14:08 1 would be very hard. You would really have to -- I think
 14:08 2 there's some cases I could say, yes, they deserve the
 14:08 3 death penalty. But there would be some that I could
 14:08 4 say, you know, spend the rest of your life in prison.
 14:08 5 But I know I'm kind of sitting on the fence there.
 14:08 6 Q. I understand. And it seems to me, and that's
 14:08 7 kind of a new thought. We hadn't heard that in the
 14:08 8 courtroom in the last week or so, and that's the
 14:08 9 perspective from the defendant. And it sounds to me
 14:08 10 like you are factoring in your own concept of mercy in
 14:08 11 terms of which would be more merciful, to spend your
 14:08 12 life in prison or --
 14:08 13 A. Yeah, they are both awful.
 14:08 14 Q. -- to be executed.
 14:08 15 A. I can't think of either one of them. Well, of
 14:08 16 course the thing about going to prison, you do have a
 14:09 17 chance to maybe repent and become a Christian. So
 14:09 18 that's, you know, like a young person. You could think,
 14:09 19 well, maybe they will change.
 14:09 20 But yet, there are circumstances too that
 14:09 21 you think, well, if they won't change and so give them
 14:09 22 the death penalty. So that's why, I guess, I think I
 14:09 23 could be fair. I really think I could, but it would be
 14:09 24 hard either way. I don't think prison is that much
 14:09 25 better than death, myself, but...

14:09 1 Q. Now, I understand a whole lot of what you are
 14:09 2 talking about because I'm also a Baptist and a born-
 14:09 3 again believer.
 14:09 4 A. Yeah.
 14:09 5 Q. And I go to First Baptist in downtown Dallas.
 14:09 6 A. Oh, yeah.
 14:09 7 Q. Are you familiar with that country church?
 14:09 8 A. My husband grew up in that church.
 14:09 9 Q. What's his name?
 14:09 10 A. Ballard, David Ballard.
 14:09 11 Q. David Ballard. Okay. Was he under
 14:09 12 Dr. Criswell?
 14:09 13 A. Uh-huh.
 14:09 14 Q. 54 years' ministry. That's unbelievable.
 14:10 15 A. Isn't that something, yeah.
 14:10 16 Q. And he still -- he still, sometimes preaches.
 14:10 17 In fact, he preached about a month or two ago.
 14:10 18 A. Yeah. Isn't that something?
 14:10 19 Q. 90 something years old. Our faith -- how long
 14:10 20 have you been in the Baptist church?
 14:10 21 A. Well, for probably about maybe altogether 15
 14:10 22 years. Because we started, you know, my husband was
 14:10 23 Baptist. I was Christian church. So we went to the
 14:10 24 Methodist church, and then we went to the Christian
 14:10 25 church and then Baptist.

14:10 1 Q. Are you comfortable with the Baptist faith?
 14:10 2 A. Yes, yes. And they are so good for my
 14:10 3 children. They loved it, and they learned more in the
 14:10 4 Baptist church, I think, than any.
 14:10 5 Q. You would agree that in the Baptist church and
 14:10 6 Baptist faith, especially with respect to Dr. Criswell,
 14:10 7 there's the concept of redemption and the concept of
 14:11 8 becoming a Christian and expressing faith in Jesus
 14:11 9 Christ, et cetera. And you just mentioned changing.
 14:11 10 A. Uh-huh.
 14:11 11 Q. And especially if you are in prison, you know,
 14:11 12 becoming a Christian, changing, trying to change. And I
 14:11 13 think this was touched upon when Mr. Schultz was asking
 14:11 14 you questions. Would the fact that a person who is in
 14:11 15 jail and awaiting trial, and there's evidence that they
 14:11 16 have expressed faith in God and are trying to change,
 14:11 17 would you view that with skepticism, or would you try to
 14:11 18 keep an open mind about it and -- I guess, I guess
 14:11 19 listen to it and try to give them the benefit of the
 14:12 20 doubt? I guess that's what I'm trying to say. I
 14:12 21 realize that's important to you. That's why I'm asking
 14:12 22 you about it.
 14:12 23 A. Yeah. Well, it -- there's so many
 14:12 24 circumstances. I mean, like we were saying, I think
 14:12 25 that they are going to tell you that they've changed.

14:12 1 They are going to, so you have to not be so gullible.
 14:12 2 But you can at least listen too, and you know how you
 14:12 3 feel in your heart about it. You can't -- there's just
 14:12 4 no black and white in something like that. But I know
 14:12 5 that's what they are all going to say.

14:12 6 Q. I understand. I understand that.

14:12 7 A. Yeah.

14:12 8 Q. And please don't think that I'm gullible either
 14:12 9 because I've been working in this line of work for a
 14:12 10 long time. Probably, probably 15 years, and I know
 14:12 11 exactly what you are saying. By the same token, I mean,
 14:12 12 you mentioned that it was important to you with respect
 14:13 13 to whether or not we take their life or spare their
 14:13 14 life. But I think I got that from you, that that would
 14:13 15 be kind of a factor that you would consider, you know
 14:13 16 whether -- whether they could change or thought about
 14:13 17 changing or tried to change. You know, did I get that
 14:13 18 from you?

14:13 19 A. Well, it depends on the person and the crime,
 14:13 20 you know. If it's -- I guess a capital murder is --
 14:13 21 it's as bad as you are going to get, but it would be
 14:13 22 hard for me to probably think that they would change. I
 14:13 23 don't know.

14:13 24 Q. Okay. Now, you've heard of some ministers
 14:13 25 preach. Let's talk about Dr. Criswell. I'm sure that

14:13 1 Dr. Criswell and some of the leaders in the Baptist
 14:13 2 faith would say that even a murderer or capital murderer
 14:13 3 is -- could still accept Jesus Christ as their personal
 14:13 4 Lord and Savior, and God's Grace is freely given. I'm
 14:14 5 sure that the concept of redemption is freely available
 14:14 6 to even those people, wouldn't you say?

14:14 7 A. Yes. And I would like to hear that, and I
 14:14 8 would like to believe it, especially if I sentence them
 14:14 9 to death because I would want to know that they are
 14:14 10 going to a better place. I wouldn't want to feel that I
 14:14 11 am taking something like that away from their life where
 14:14 12 they could repent. But I wouldn't say I'm going to give
 14:14 13 this person the prison hoping that they will change,
 14:14 14 really.

14:14 15 Q. Okay. You understand why I'm not really clear
 14:14 16 on where you are coming from?

14:14 17 A. I know because I am -- I know I'm --

14:14 18 Q. Does the concept of change really matter to
 14:14 19 you, I mean?

14:14 20 A. I guess in my heart I hope that they change
 14:15 21 themselves so that they will be in a better place. But,
 14:15 22 I mean, I have no problem with sending someone to the
 14:15 23 death penalty, you know, if they actually -- if I feel
 14:15 24 in my heart they deserve it.

14:15 25 Q. They deserve the death penalty.

14:15 1 A. Yes.

14:15 2 Q. So really whether or not they change awaiting
 14:15 3 trial or even after the trial, that really is of no
 14:15 4 consequence with respect to assessing the death penalty
 14:15 5 or giving them life?

14:15 6 A. I guess all I can say is, it depends on the
 14:15 7 person, the crime and how the evidence is presented to
 14:15 8 me.

14:16 9 Q. There's a question in here about midway
 14:16 10 through. It says, "The law in the State of Texas says
 14:16 11 that a person convicted of capital murder can receive
 14:16 12 the death penalty solely because of the facts and
 14:16 13 circumstances of the crime." And that's what we just
 14:16 14 talked about.

14:16 15 A. Uh-huh.

14:16 16 Q. "Even if he has committed no other crimes, do
 14:16 17 you agree with this law? "Yes." "Please explain." "If
 14:16 18 you feel without a doubt and the circumstances are all
 14:16 19 there, but you must be very certain. Life is precious."

14:16 20 Okay. Now, that last thought there is
 14:16 21 kind of a parenthetical add on. "Life is precious."
 14:16 22 And I don't understand that comment. Are we talking
 14:16 23 about the defendant's life is precious or the victim's
 14:16 24 life?

14:16 25 A. The victim's life is very precious and, well,

14:17 1 the one that's committed the murder, his life is
 14:17 2 precious too. But he needs to be more responsible for
 14:17 3 his actions maybe, too.

14:17 4 Q. And then shortly thereafter it says, "If you
 14:17 5 believe in using the death penalty, how strongly on a
 14:17 6 scale of 1 to 10, do you hold that belief? "1 being the
 14:17 7 least, and 10 being the strongest."

14:17 8 And at the time you filled this out, you
 14:17 9 said you were a 7, which meant you were fairly strong
 14:17 10 with respect to the death penalty.

14:17 11 A. Yes.

14:17 12 Q. Is that still the same, or has it changed? Has
 14:17 13 it gone up? Has it been adjusted in the last week since
 14:17 14 you had some time to think?

14:17 15 A. Well, I really thought about it an awful lot.
 14:17 16 It's really bothered me.

14:17 17 Q. I bet it has.

14:17 18 A. And maybe 5 would be better. But I mean, if
 14:17 19 you know, I think I could go either way depending on the
 14:17 20 circumstances. Am I not clear, really?

14:18 21 Q. No, that's clear. So you think you backed off
 14:18 22 a little from --

14:18 23 A. Yeah.

14:18 24 Q. -- being strong on the death penalty?

14:18 25 A. Yeah, but --

14:18 1 Q. You talked to a lot about remorse with
14:18 2 Mr. Schultz about an hour ago, and I want to address
14:18 3 that. It's mentioned in the top of your questionnaire.
14:18 4 "In your opinion, what does the death penalty say about
14:18 5 the American culture?"

14:18 6 And your answer is, "Hopefully that we
14:18 7 will not stand for people hurting or murdering others
14:18 8 with no remorse."

14:18 9 A. Uh-huh.

14:18 10 Q. Now, is remorse -- how important is remorse to
14:18 11 you in this context?

14:18 12 A. Maybe if it's not the remorse for what they
14:19 13 did, you know, as far as we go. But for God, hopefully
14:19 14 they can have remorse because I do believe in God, and
14:19 15 maybe he would forgive them, but --

14:19 16 Q. So you are saying that.

14:19 17 A. A hardened criminal, I would think, would have
14:19 18 no remorse. And so they should probably have the death
14:19 19 penalty.

14:19 20 Q. Okay. So you are saying even -- even if there
14:19 21 is remorse with respect to sentencing, it's probably not
14:19 22 going to affect your decision? You would be mostly
14:19 23 concerned about a conversion experience and remorse that
14:19 24 they personally feel so that in the life hereafter God
14:19 25 would be merciful to them?

14:19 1 A. Unless, in my heart, I know that they are going
14:19 2 to be a help to the society some. I know they would be
14:19 3 in prison, but unless they could be of help to someone
14:19 4 else in --

14:20 5 Q. Please don't let me put words in your mouth.
14:20 6 I'm trying to figure out how you feel, not how I feel.

14:20 7 A. Well --

14:20 8 Q. Would remorse -- remorse really wouldn't play a
14:20 9 factor in your sentencing decision, would it, ma'am?

14:20 10 A. No. If they were just a cold-blooded killer,
14:20 11 you know, I can't see them telling me, "I'm sorry." And
14:20 12 me saying, "Well, that's okay." Because they've not
14:20 13 only hurt and killed those people, they've hurt their
14:20 14 families.

14:20 15 Q. Let's go back to my situation, and I go
14:20 16 upstairs. I pull the trigger. I killed two people.
14:20 17 And we come to my trial, and I say, "Gee, it's a
14:20 18 horrible thing I did. I wish I hadn't done it. Of
14:20 19 course I was awfully mad at the time.

14:20 20 A. Yeah.

14:20 21 Q. And I don't know, you know, even if I was faced
14:20 22 with the same situation. I can't say that I would have
14:20 23 acted differently. I'm truthful. Okay? I wish I
14:21 24 hadn't done it, though, because here I am. I'm on trial
14:21 25 for my life, number one. And, number two, I miss her.

14:21 1 A. Yeah.

14:21 2 Q. And my family misses her. Okay? In my
14:21 3 situation, would you consider my remorse or would you
14:21 4 instead leave that up to God and --

14:21 5 A. Well, that has to be left up to God, I think.
14:21 6 But are you saying like the death penalty or --

14:21 7 Q. Correct.

14:21 8 A. Well, I might send you to prison because I
14:21 9 don't think you are a cold-blooded murderer. I know you
14:21 10 killed someone and that life was precious even though
14:21 11 they were hurting you, but I might send you to prison.

14:21 12 Q. Let's change the facts a little bit. Let's say
14:21 13 I came home drunk one night. And instead of it being
14:22 14 somebody else, another lover with my wife, it was her
14:22 15 brother. And I thought it was -- I thought it was
14:22 16 another man, but it was just -- they were just watching
14:22 17 TV.

14:22 18 A. Oh.

14:22 19 Q. Does that affect your view of me? I'm now on
14:22 20 trial for my life, and I've committed a double homicide.
14:22 21 And I've voluntarily drank too much. I voluntarily had
14:22 22 too much to drink.

14:22 23 A. You shouldn't have done that.

14:22 24 Q. Shouldn't have done it.

14:22 25 A. Huh-uh.

14:22 1 Q. But I've -- I've clearly got remorse. I'm
14:22 2 saying I shouldn't have done it. And I shouldn't have
14:22 3 had that much to drink.

14:22 4 A. But I have to figure out.

14:22 5 Q. And I shouldn't have acted so hastily. That's
14:22 6 a little bit different situation, isn't it?

14:23 7 A. Yeah.

14:23 8 Q. Would that be deserving of the death penalty,
14:23 9 do you think?

14:23 10 MR. SCHULTZ: Excuse me, Mr. High. Judge,
14:23 11 we're going to try to object to him trying to commit the
14:23 12 juror to a particular vote in a particular fact
14:23 13 situation.

14:23 14 THE COURT: Sustained.

14:23 15 Q. (BY MR. HIGH) How important would remorse
14:23 16 figure in that situation? When I say, gee, I'm sorry.
14:23 17 I shouldn't have had so much to drink. And I'm sorry,
14:23 18 ladies and gentlemen of the jury, I'm sorry I put y'all
14:23 19 in this situation.

14:23 20 A. I would think you reached for that gun and you
14:23 21 knew -- you knew what you were doing. Maybe if that was
14:23 22 just her brother.

14:23 23 Q. Yeah.

14:23 24 A. But I don't know what I would do, except maybe,
14:23 25 I would think, if you had been a good citizen always,

14:23 1 like this, I don't see how I could really give you the
14:23 2 death -- I don't know. That's just terrible.

14:24 3 Q. There's a sequence of questions on page nine.
14:24 4 And I don't know, perhaps you overlooked it.

14:24 5 MR. HIGH: I'm going to approach the
14:24 6 juror, Judge.

14:24 7 Q. Oh, you have your questionnaire in front of
14:24 8 you?

14:24 9 A. Uh-huh.

14:24 10 Q. Excellent. Look at the top of page nine. It
14:25 11 says, I don't, "Have you ever served on a jury before?"

14:25 12 A. No, I haven't.

14:25 13 Q. Okay. Let's assume that you had or let's or
14:25 14 let's take -- let's say this situation, working with a
14:25 15 group of people. Look at that next line there where it
14:25 16 says, regarding your jury service, circle the numbers
14:25 17 which apply to you. "No. 1, I can tell pretty easily
14:25 18 when a person is telling a lie." Does that apply to
14:25 19 you?

14:25 20 A. Well, I think you can tell a lot of the time,
14:25 21 yeah.

14:25 22 Q. "No. 2, when I make up my mind, I rarely change
14:25 23 it."

14:25 24 A. No. I can be swayed.

14:26 25 Q. "No. 3, I can frequently be influenced by the

14:26 1 opinion of others."

14:26 2 A. Well, I try not to let other people influence
14:26 3 me, but I know that's almost like it's contradicting,
14:26 4 though, 2 and 3. But I don't -- I won't let other
14:26 5 people influence my opinion. But if you can give me
14:26 6 some facts, I will change my mind.

14:26 7 Q. I think you told me what I need to know, thank
14:26 8 you. And "No. 4, I always follow my own ideas rather
14:26 9 than do what others expect of me."

14:26 10 A. Uh-huh. I do.

14:26 11 Q. You follow your own ideas?

14:26 12 A. Uh-huh, I think so.

14:26 13 Q. Okay. So the only one there would be No. 1
14:26 14 that applies to you?

14:26 15 A. Uh-huh.

14:27 16 Q. Okay. If you want to follow along with me, go
14:27 17 to page 14, which is at the very end. You don't have to
14:27 18 look at this, but you can if you want to. The very last
14:27 19 question, it says, "Do you want to serve as a juror in
14:27 20 this case?" And it doesn't say "yes" or "no," but it
14:27 21 says, "I have mixed emotions." Tell me about the mixed
14:27 22 emotions. Tell me about that.

14:27 23 A. Well, I don't want to have to sentence someone
14:27 24 to the death penalty. But I will, if, you know, if it's
14:27 25 proven to be what needs to be done, and I want to help,

14:27 1 but I want to be home, too. I'd rather be at home than
14:27 2 here, of course. So that's my mixed emotions.

14:28 3 Q. I'm going to talk some about the issues that
14:28 4 you are going to have to deal with. And I think they
14:28 5 were pretty well reviewed with you by the State. That
14:28 6 first questionnaire and, again, we're not going to get
14:28 7 to these issues unless you've convicted this young man
14:28 8 of capital murder.

14:28 9 So we're assuming that the jury has found
14:28 10 him guilty of capital murder, and now we're trying to
14:28 11 decide whether he lives or dies. And the first question
14:28 12 there is the future dangerousness question, whether
14:28 13 there is a probability that the defendant would commit
14:28 14 criminal acts of violence that would constitute a
14:28 15 continuing threat to society. And what does the word
14:28 16 "probability" mean to you, Ms. Ballard?

14:28 17 A. More than likely that he would.

14:28 18 Q. Fair enough. That's what it means to me. And
14:28 19 obviously you are going to hear, by this time you would
14:29 20 have heard about the facts of the case, what actually
14:29 21 went on and --

14:29 22 A. Uh-huh.

14:29 23 Q. And you'll know all about the case, and so that
14:29 24 will shed a lot of light on this question. But I
14:29 25 suppose you'll hear some psychiatric evidence either

14:29 1 from the State or from us. And then you are going to
14:29 2 have to make a decision about the future. Would you
14:29 3 feel comfortable making that sort of decision, trying to
14:29 4 determine what's going to happen in the future?

14:29 5 A. You mean as far as sentencing him?

14:29 6 Q. That's right. This is part of the sentencing
14:29 7 phase in a capital murder scenario.

14:29 8 A. Well, I think I -- I don't think I would have
14:30 9 any trouble.

14:30 10 Q. Let me ask you this: If you were to find him
14:30 11 guilty of capital murder, and obviously you have,
14:30 12 because we're talking about this question here, the mere
14:30 13 fact that he's been convicted --

14:30 14 A. Uh-huh.

14:30 15 Q. -- of murdering. Well, actually, the
14:30 16 indictment charges two people. You've heard about that.
14:30 17 We're talking about a multiple murder situation. The
14:30 18 mere fact that he's been convicted of that, is that
14:30 19 going to automatically cause you, as a juror, to find
14:30 20 that this -- the answer to this question is, yes, he's a
14:30 21 continuing threat to society?

14:31 22 A. I would have to be convinced that he would be a
14:31 23 threat to society. And if I was, well, then I wouldn't
14:31 24 have any problem with him going to the death penalty.

14:31 25 Q. I understand. But what I'm asking is this:

14:31 1 Are you going to give the State an automatic "yes" to
14:31 2 that question if you've found him guilty of capital
14:31 3 murder of two people?

14:31 4 A. Well, no.

14:31 5 Q. Okay. So it wouldn't be automatic?

14:31 6 A. No. It wouldn't be automatic.

14:31 7 Q. They would have to prove it to you beyond a
14:31 8 reasonable doubt?

14:31 9 A. Yeah, yeah.

14:31 10 Q. Okay. That's fair enough. And I want to go to
14:31 11 the next question, and take some time to look at it.
14:31 12 It's long, drawn out.

14:32 13 THE COURT: That sentence has 50 words.

14:32 14 MR. HIGH: It does? It's an awful lot of
14:32 15 words.

14:32 16 Q. (BY MR. HIGH) Ms. Ballard, how about I labor
14:32 17 with you?

14:32 18 A. Okay.

14:32 19 Q. The legislature gave us this question. I
14:32 20 didn't make it up. The Judge didn't make it up.
14:32 21 Mr. Schultz didn't make it up, but the folks in Austin
14:32 22 gave it to us. And we have to live with it and deal
14:32 23 with it, and if you are on the jury, you are going to
14:32 24 have to deal with it, too. And let's make sure we're on
14:32 25 the same sheet of music.

14:33 1 A. Yeah.

14:33 2 Q. We found somebody guilty of capital murder. We
14:33 3 found that other question, yes, he's a continuing threat
14:33 4 to society. Now you get this question.

14:33 5 A. Uh-huh.

14:33 6 Q. Fifty words. And a lot of folks say, this is
14:33 7 the one-last-look question where the jury has a chance
14:33 8 to look one last time at the defendant.

14:33 9 A. Uh-huh.

14:33 10 Q. Or look back at him, if you will, and say: Is
14:33 11 there any reason why he shouldn't get the death penalty?
14:33 12 Is there sufficient mitigating circumstances or
14:33 13 circumstance to warrant that a sentence of life
14:33 14 imprisonment, rather than a death sentence, be imposed?
14:33 15 Mitigating, you probably don't use that word everyday,
14:33 16 do you?

14:33 17 A. No. But it's lowering the -- or.

14:34 18 Q. To lessen.

14:34 19 A. Lessen, yes.

14:34 20 Q. I do a lot of that in my job. I know full well
14:34 21 what that means. And so we're thinking about situations
14:34 22 that would make it, where you think about the
14:34 23 circumstances, whatever they are, and they give you some
14:34 24 examples, you know, whether they are taking into
14:34 25 consideration all the evidence, all the evidence that

14:34 1 you've heard in the trial in the guilt-innocence phase,
14:34 2 the evidence that you hear in the punishment phase,
14:34 3 everything that you've heard in the courtroom. You are
14:34 4 going to consider all the evidence.

14:34 5 And then the next phrase, concerning the
14:34 6 circumstances of the offense, the defendant's character
14:34 7 and background. And Mr. Schultz talked an awful lot
14:34 8 about that with you. About his upbringing and childhood
14:35 9 and broken home and things like that. Decisions that
14:35 10 he's made in the past, wrong decisions, and this bag of
14:35 11 mitigation evidence that we all carry around with us.

14:35 12 A. Well, I've always believed that a person is
14:35 13 responsible for their own actions. And I know you are
14:35 14 who your friends are, you should not -- you should know
14:35 15 to stay away from certain people. You should, I guess
14:35 16 there's really not -- those circumstances, you should
14:35 17 turn them around and make them better if you are a
14:35 18 responsible adult.

14:35 19 Q. I understand that. And you and I are both that
14:35 20 way. And I -- I think I know you well enough that I
14:35 21 probably could have grown up in your household because I
14:35 22 think I know how things are there. But, and I'm sure
14:35 23 it's a fine place to be and a fine place to live, but
14:35 24 unfortunately, the world's not like that.

14:36 25 A. No. It's not, is it? I know where some people

14:36 1 are brought up in terrible circumstances, and I feel so
14:36 2 sorry for them. But I guess -- I guess if you can show
14:36 3 me that they are going to be a good person, I could just
14:36 4 give them life in prison. But I would have to know that
14:36 5 they would be -- have some contribution to society, or
14:36 6 why just put them in prison?

14:36 7 Q. I think you are jumping just a little bit ahead
14:36 8 of me.

14:36 9 A. I know.

14:36 10 Q. I know your mind is going 90 to nothing up
14:36 11 there. Do you understand that it's not your burden to
14:36 12 show you --

14:36 13 A. That's right. I know that.

14:36 14 Q. -- to show that he's going to be a good person.

14:36 15 A. That's right.

14:36 16 Q. And the law says -- tell you what, let me
14:36 17 finish what I'm saying before you talk.

14:36 18 A. Okay, okay.

14:37 19 Q. I'm not jumping on you, but the court reporter,
14:37 20 she's having to take us both down at the same time, and
14:37 21 that's, that's really hard to do. The instruction says
14:37 22 that the jury is supposed to take into consideration all
14:37 23 of the evidence including the circumstances of the
14:37 24 offense, the defendant's character and background. Not
14:37 25 what you think it should be or --

14:37 1 A. Yeah, yeah.
 14:37 2 Q. Or what your background was or my background,
 14:37 3 but his background and the personal moral culpability of
 14:37 4 the defendant. Do you have any idea what that means?
 14:37 5 Those are some pretty complicated words, aren't they?
 14:38 6 A. Well, that would be his feelings and -- I think
 14:38 7 that I would have to take all that into consideration.
 14:38 8 Q. Well, the law says you have to.
 14:38 9 A. Well, yeah.
 14:38 10 Q. But I'm asking you if you would.
 14:38 11 A. Yes.
 14:38 12 Q. You're not going to substitute what his
 14:38 13 judgment should have been by what yours are, are you?
 14:38 14 The way your household is run, are you?
 14:38 15 A. No.
 14:38 16 MR. SCHULTZ: Excuse me. I'm going to
 14:38 17 object to that question as an attempt to commit the
 14:38 18 juror to what judgments she might require the defendant
 14:38 19 to demonstrate.
 14:39 20 THE COURT: As to what judgment she might
 14:39 21 require the defendant to demonstrate?
 14:39 22 MR. SCHULTZ: Yes. Because the question
 14:39 23 was: You wouldn't require him to make the same types of
 14:39 24 judgments that you would at your home and do it that
 14:39 25 way? That's trying to commit her to what kinds of

14:39 1 judgments she would want to make, want him to be making.
 14:39 2 THE COURT: I'll overrule the objection.
 14:39 3 I suppose that it gives us some insight.
 14:39 4 Q. (BY MR. HIGH) Ms. Ballard, do I need to
 14:39 5 rephrase?
 14:39 6 A. Yes. Tell me one more time, please.
 14:39 7 Q. Okay. I'm going to go to personal moral
 14:39 8 culpability. Let's spend a little time with that. And
 14:39 9 you said feelings, and I kind of heard you say that.
 14:39 10 A. Uh-huh.
 14:39 11 Q. And you've mentioned remorse throughout your
 14:39 12 questionnaire, and that's a type of feeling?
 14:39 13 A. Uh-huh.
 14:39 14 Q. And what about personal guilt? Would that be
 14:40 15 personal moral culpability? You know, personal guilt,
 14:40 16 acceptance of responsibility, that sort of thing?
 14:40 17 A. Uh-huh.
 14:40 18 Q. Okay. Guess what, there's no definition for
 14:40 19 it. You're not going to get a definition from us, from
 14:40 20 the State or even from the Judge. Okay? Because
 14:40 21 there's not a definition for it in the law.
 14:40 22 A. Uh-huh.
 14:40 23 Q. Let me give you an example. I have been trying
 14:40 24 to think of an example that might fit this, and I want
 14:40 25 to see what you think about this. I remember when I was

14:40 1 in high school, I think it was in junior high, and I was
 14:40 2 in a youth group. And, in fact, we were at church one
 14:40 3 night, and I think we were circled around. We were in a
 14:40 4 semicircle. And there was a front semicircle, and there
 14:40 5 was a back semicircle. And we were all standing up
 14:40 6 doing something and we were playing a little game, but
 14:40 7 we were pulling the chair out from under the folks in
 14:41 8 front.
 14:41 9 And, you know, the person in front would
 14:41 10 sit down. Maybe they would slightly miss the chair,
 14:41 11 maybe they would hit the chair, but nothing really
 14:41 12 happened. Then I did it. I pulled the chair out, and
 14:41 13 the girl completely missed the chair and fell on her
 14:41 14 bottom on the floor, and it was bad.
 14:41 15 A. Yeah, I bet.
 14:41 16 Q. And she hurt herself so bad that she broke the
 14:41 17 bone on her rear end. So for the next six weeks she had
 14:41 18 to walk around with one of those doughnut things. Okay?
 14:41 19 Let me tell you something, I felt really bad that night
 14:41 20 when it happened. But I felt even worse that she would
 14:41 21 show up to church carrying that doughnut for the next
 14:41 22 six weeks. The way I felt, my remorse increased over a
 14:41 23 period of time.
 14:41 24 Now, everybody was playing that same game.
 14:42 25 Okay? And, in fact -- and I'm not saying this is right,

14:42 1 but this particular young lady that I did it to was kind
 14:42 2 of an outcast in the group. This is the way everybody
 14:42 3 treated her.
 14:42 4 A. Yeah.
 14:42 5 Q. Okay. I guess you could say I was following
 14:42 6 what the group norms were. That doesn't make it right.
 14:42 7 A. No, no.
 14:42 8 Q. Okay. Yet, that doesn't lessen my own personal
 14:42 9 responsibility. And obviously, I felt some that night,
 14:42 10 and I felt even more as time went by.
 14:42 11 A. Sure, you should.
 14:42 12 Q. It made such an impression on me that I
 14:42 13 remember it 30 years later. Okay?
 14:42 14 A. Yes.
 14:42 15 Q. Does that kind of give you an insight into
 14:42 16 personal moral culpability, maybe the way a person would
 14:42 17 feel after they've done something bad?
 14:42 18 A. Yes, yes.
 14:42 19 Q. Okay. Now, with respect to being able to
 14:43 20 consider that kind of evidence, you know, you're going
 14:43 21 to have to be able to consider that when you take that
 14:43 22 last look at him and also his character and his
 14:43 23 background and the circumstance of the offense. And
 14:43 24 you're going to have to look at all of that and see if
 14:43 25 there is sufficient mitigating circumstances to warrant

14:43 1 the sentence of life as opposed to death.

14:43 2 A. I could do that.

14:43 3 Q. You could do all of that?

14:43 4 A. Yes, I could.

14:43 5 Q. And can you envision a situation where, in a
14:44 6 double homicide case where two people are killed, and
14:44 7 there was evidence of robbery and burglary, maybe some
14:44 8 passion involved obviously? Can you envision, when you
14:44 9 hear that kind of evidence and you answer these
14:44 10 questions, that you could at least plausibly consider
14:44 11 mitigating evidence and render a life sentence?

14:44 12 MR. SCHULTZ: Excuse me, just a moment,
14:44 13 Ms. Ballard. Excuse me, Judge. We're going to object
14:44 14 to that question. It attempts to commit the juror to a
14:44 15 particular response to the particular facts of this
14:44 16 case. It is not cast in terms of her liberty to
14:44 17 consider mitigation, in general, in a homicide case.
14:44 18 But rather, it's cast in terms of these specific
14:44 19 allegations and with regard to the specific indictment.

14:44 20 Plus, it further interjects facts by
14:44 21 trying to commit her to some evidence of some type of
14:44 22 passion or emotion involving a killing, which is an
14:45 23 attempt to offer evidence to the juror in an unsworn
14:45 24 fashion.

14:45 25 THE COURT: Okay. I'll sustain the

14:45 1 objection.

14:45 2 Q. (BY MR. HIGH) Well, I'll ask them one at a
14:45 3 time, then. With respect to a double homicide as
14:45 4 alleged in the indictment, can you consider a situation
14:45 5 or at least contemplate a situation, when after you
14:45 6 viewed all the issues in this question that you could at
14:45 7 least plausibly render a life sentence?

14:45 8 MR. SCHULTZ: Excuse me a moment,
14:45 9 Ms. Ballard. Judge, we again object because that's the
14:45 10 same objection on the same ground. It may well be that
14:45 11 the allegations in the indictment, what alleged facts
14:45 12 that would make a juror unable to consider mitigation if
14:45 13 those particular facts are true.

14:45 14 The McVeigh situation, for example, and
14:45 15 that's not the test, but rather in a hypothetical
14:45 16 capital murder case, could a juror fairly consider and
14:45 17 assess a life sentence in response to that special
14:45 18 issue?

14:45 19 If you are asking, in a capital murder
14:46 20 case, would you consider mitigating evidence where two
14:46 21 people have been murdered in an attempt to commit the
14:46 22 juror to that? That's in excess of our law. I don't
14:46 23 know that. There may well be some capital murders where
14:46 24 there could never be a mitigation circumstance, but he's
14:46 25 attempting to commit her to this case and the facts of

14:46 1 this case. And that's my objection.

14:46 2 THE COURT: And your impression is that it
14:46 3 should be just the question? If it were proper, it
14:46 4 would be just as to capital murder, generally?

14:46 5 MR. SCHULTZ: Yes.

14:46 6 THE COURT: Okay. I'll sustain the
14:46 7 objection.

14:47 8 Q. (BY MR. HIGH) With respect to a capital
14:47 9 murder, generally, we're not saying in this case, but
14:47 10 where two people were killed -- well, Mr. Schultz talked
14:47 11 about that in voir dire last week. That's one way you
14:47 12 can get a capital murder. And you are confronted with
14:47 13 this question. And you have to answer the question:
14:47 14 Can you envision sufficient mitigating circumstances?
14:47 15 Is that within the realm of possibilities where you
14:47 16 could assess a life sentence?

14:47 17 A. I would probably lean more towards the death
14:47 18 sentence still. I meant, there's not really much excuse
14:48 19 for standing there shooting two people, I guess.

14:48 20 Q. Now, I'm not -- look, I can't -- I can't argue
14:48 21 with that. I cannot disagree with that. I cannot.
14:48 22 Okay. I mean, absolutely. If that's the way you feel,
14:48 23 absolutely. What I got to know, if you are going to
14:48 24 wind up on the jury, if you are going to be on the jury,
14:48 25 I got to know if you could fairly, reasonably consider

14:48 1 that question, if a life sentence is within a range or
14:48 2 realm of possibilities when we have multiple homicide,
14:48 3 two deaths have occurred. And I'm talking about you,
14:48 4 you know, if you are sitting as a juror, is that even
14:48 5 possible, or is it going to be --

14:48 6 A. That I could give them a life sentence, well,
14:48 7 it would be possible. But I meant, it seems too hard
14:49 8 because, you know, wouldn't you have to have the facts
14:49 9 and know more of why it was done and how it was done
14:49 10 and, wouldn't you? Because I wouldn't want to sentence
14:49 11 someone to death unless I really knew. And I know we
14:49 12 all have different backgrounds, but -- but it's just not
14:49 13 right to kill someone.

14:49 14 Q. Or two people?

14:49 15 A. Or I mean, two people. And it seems like,
14:49 16 wouldn't you wake up after you shot the first one?
14:49 17 But...

14:49 18 Q. Okay. I won't be upset with you, with your
14:49 19 answer, no matter what it is. I just need to -- I will
14:50 20 be upset if you don't tell me how you really feel.

14:50 21 A. I won't be -- I guess there are circumstances,
14:50 22 I mean, I wouldn't just say, well, because someone
14:50 23 killed someone, they are going to have the death
14:50 24 sentence. There's got to be circumstances.

14:50 25 Q. What about two people killing?

14:50 1 A. Well, two people. Well, oh, me. (Weeping)
 14:50 2 Thank you. Oh, gosh, I guess there could be
 14:50 3 circumstances for two people being killed.
 14:51 4 Q. And would you be able to consider those
 14:51 5 circumstances?
 14:51 6 A. Yes, I could.
 14:51 7 Q. Let me ask you this: Ms. Ballard, if you were
 14:52 8 sitting where I am, having to defend this young man,
 14:52 9 knowing what you know about you --
 14:52 10 A. Uh-huh.
 14:52 11 Q. -- would you want you on your -- on the jury or
 14:52 12 would you not?
 14:52 13 A. I think I can be fair. I think I would want me
 14:52 14 on the jury.
 14:52 15 Q. You would?
 14:52 16 A. Uh-huh.
 14:52 17 Q. Now, there's also -- we haven't talked much
 14:52 18 about this, but there's also the possibility that he may
 14:52 19 not be convicted of capital murder.
 14:52 20 A. Yeah, yeah.
 14:52 21 Q. There's this thing called lesser included
 14:52 22 offenses --
 14:52 23 A. Uh-huh.
 14:52 24 Q. -- in law. Offenses that are not quite as
 14:52 25 serious as the offense charged.

14:52 1 A. Uh-huh.
 14:52 2 Q. For instance a lesser included offense, maybe
 14:52 3 just regular murder.
 14:52 4 A. Uh-huh.
 14:52 5 Q. Not capital murder, but regular murder.
 14:52 6 A. Uh-huh.
 14:52 7 Q. Or burglary or robbery. And I think
 14:53 8 Mr. Schultz talked about this somewhat in general voir
 14:53 9 dire, that they don't involve the death penalty. But
 14:53 10 like in a regular murder case, it would involve a
 14:53 11 sentence of somewhere between 5 years and 99 years to
 14:53 12 life in the penitentiary. And, say, in a robbery case
 14:53 13 it could be 2 years to 20 years in the penitentiary, et
 14:53 14 cetera. Okay? Lesser offenses and lesser time.
 14:53 15 A. Uh-huh.
 14:53 16 Q. And to be a qualified juror, you would need to
 14:53 17 be able to consider the entire range of punishment,
 14:53 18 let's say, although you don't convict of capital but you
 14:53 19 find regular murder, you would have to be able to
 14:53 20 consider a 5-year sentence all the way up to a life
 14:53 21 sentence for a murder conviction. Have I lost you or
 14:53 22 are you still with me?
 14:53 23 A. Yeah, I'm with you.
 14:53 24 Q. Let's say that you found him guilty of regular
 14:54 25 murder, not capital murder --

14:54 1 A. Uh-huh.
 14:54 2 Q. -- would it be possible for you to give a 5-
 14:54 3 year sentence in a regular murder case?
 14:54 4 A. No.
 14:54 5 MR. SCHULTZ: Excuse me, just a moment,
 14:54 6 Judge. That's attempting to commit her to this
 14:54 7 particular case. She's already said, she already knows
 14:54 8 what the indictment alleges, assuming he found him
 14:54 9 guilty of a lesser offense of murder. And he's trying
 14:54 10 to commit her to this particular case of murder, rather
 14:54 11 than the hypothetical murder case in which the question
 14:54 12 is: Are you free in a murder case to assess a
 14:54 13 punishment within full range of punishment?
 14:54 14 MR. HIGH: I'll rephrase, Judge.
 14:54 15 VENIREPERSON: All right.
 14:54 16 MR. SCHULTZ: Excuse me. For the record,
 14:54 17 may I get a ruling, Judge?
 14:54 18 THE COURT: Well, if he's going to
 14:54 19 rephrase. Who cares? She is not going to answer it.
 14:54 20 We don't know.
 14:54 21 MR. SCHULTZ: I'd like a ruling. If I
 14:54 22 could have a ruling.
 14:54 23 THE COURT: Well, I'll tell you what.
 14:54 24 I'll sustain the objection. You go ahead and ask it a
 14:54 25 different way.

14:54 1 Q. (BY MR. HIGH) I'm not talking about this case.
 14:54 2 I'm just talking about the law.
 14:54 3 A. Yeah.
 14:54 4 Q. The regular murder, which is a lesser-included
 14:55 5 offense of capital murder or the range of punishment is
 14:55 6 5 to 99 or life. If you were to render a regular
 14:55 7 conviction of regular murder, could you consider the
 14:55 8 entire range of punishment all the way from 99 years to
 14:55 9 life in prison all the way down to 5 years in prison for
 14:55 10 a murder conviction?
 14:55 11 A. I could. I guess I could consider it,
 14:55 12 depending on, you know, the circumstances.
 14:55 13 Q. Fair enough. There's also the concept called
 14:55 14 probation.
 14:55 15 A. Uh-huh.
 14:55 16 Q. Where a person is not committed to jail or
 14:55 17 prison, but they walk out of the courthouse and have to
 14:55 18 report to a probation officer periodically, and they are
 14:55 19 under supervision. They have to pay a fine, pay court
 14:55 20 costs, report to a probation officer, subject to drug
 14:55 21 testing, maybe not carry a firearm, not associate with
 14:56 22 certain people, et cetera. And probation in the right
 14:56 23 circumstance with the right kind of evidence may be
 14:56 24 something you would have to consider as a juror, if the
 14:56 25 evidence came down a certain way. Okay?

14:56 1 Would you, as a juror, be able to consider
14:56 2 probation if it was within the range of possibilities
14:56 3 for the regular murder conviction?
14:56 4 A. Probably not.
14:56 5 Q. All right. In other words, probation would
14:56 6 just be out of the question?
14:56 7 A. For murder, I would think so.
14:56 8 Q. And even if the Judge were to instruct you in
14:56 9 his charge at the end of the trial that this person has
14:56 10 filed a sworn application for probation, he's eligible
14:56 11 for it. I instruct you to consider it.
14:56 12 A. I would have to, wouldn't I?
14:57 13 Q. Well, let me finish my question.
14:57 14 A. All right.
14:57 15 Q. He tells you to consider it, and yet you know
14:57 16 there's been a conviction for murder. Okay? Are you
14:57 17 going to fairly consider it as the -- if the Judge
14:57 18 instructs you, or are you going to say: Well, look,
14:57 19 this is murder and absolutely not. Probation is out of
14:57 20 the question. He's going to get some time.
14:57 21 A. I would think he would need some time.
14:57 22 Q. Okay. And I'm not arguing with you at all, and
14:57 23 I don't disagree with you. I'm not jumping on you. We
14:57 24 just need to know --
14:57 25 A. I guess.

14:57 1 Q. -- how you would approach that. Would you
14:57 2 consider probation or would you not?
14:57 3 A. I wouldn't.
14:57 4 Q. No way, no how. Even if the Court instructed
14:57 5 you, that's just not going to happen?
14:58 6 A. I have to do what the Judge tells me, don't I?
14:58 7 Q. Well, I understand the Judge may tell you, but
14:58 8 in your heart of hearts, and this is where we're talking
14:58 9 about what's going to happen here and here.
14:58 10 A. If it's like self-defense, you know, or
14:58 11 something like that, maybe, maybe probation. But it
14:58 12 would have to, I wouldn't feel good if someone just out
14:58 13 and out killed someone just because they wanted their
14:58 14 money or --
14:58 15 Q. You understand that we're talking about a
14:58 16 conviction for murder, and self-defense is a
14:58 17 justification to criminal conduct.
14:58 18 A. Yeah.
14:58 19 Q. In other words, we've already gotten past that.
14:58 20 A. Yeah.
14:58 21 Q. We're saying, look, it wasn't self-defense. It
14:58 22 was murder.
14:58 23 A. Well, I think they should have some prison
14:58 24 time.
14:58 25 Q. Okay.

14:58 1 A. I wouldn't agree with --
14:58 2 Q. Fair enough.
14:58 3 A. -- with probation.
14:58 4 Q. So you wouldn't be able to consider probation?
14:58 5 A. No.
14:59 6 Q. All right.
14:59 7 MR. HIGH: Judge, at this time, I'm going
14:59 8 to pass the juror. And I'm going to request a sub rosa
14:59 9 hearing at this point.
14:59 10 THE COURT: Do you have any other
14:59 11 questions?
14:59 12 MR. SCHULTZ: Yes, sir.
14:59 13 THE COURT: Let me have him ask the
14:59 14 questions. And then we'll finish the questioning, and
14:59 15 then we'll have the hearing.
14:59 16 VOIR DIRE EXAMINATION
14:59 17 BY MR. SCHULTZ:
14:59 18 Q. A lot of the things that we think about as,
15:00 19 before we may become a juror, are things that we kind of
15:00 20 have impressions of, just kind of how -- how it all
15:00 21 might be. And then if we understand what the law
15:00 22 requires of us as jurors, sometimes we can do that, and
15:00 23 I guess, sometimes we can't.
15:00 24 For example, when we talked real early on,
15:00 25 when you and I started talking, you were sort of of the

15:00 1 opinion that the State had the burden of proving guilt,
15:00 2 and the defense had the burden of proving innocence. Do
15:00 3 you remember that?
15:00 4 A. Yes.
15:00 5 Q. And we talked about that. And when I explained
15:00 6 to you that really the law never put a burden on the
15:00 7 defense. The law envisioned the juror would never do
15:00 8 that. You seemed perfectly willing to say, okay, if
15:00 9 that's the law, then I can do that. And that seems
15:00 10 fine.
15:00 11 Let me explain to you the concept of what
15:00 12 probation is. And if it's your answer, nobody is
15:01 13 fussing with you. They are not fussing with you, and
15:01 14 I'm not fussing with you. I want to make sure that you
15:01 15 really understand what's being asked of you.
15:01 16 Under our law there are crimes which carry
15:01 17 penitentiary time as possible punishment, and those are
15:01 18 called felonies, and they usually have a punishment
15:01 19 range. And that can be like 2 years to 10 years, if
15:01 20 there's certain classes of crimes. 2 years to 20 years
15:01 21 if they are a little more severe crimes. And then 5
15:01 22 years to 99 years if they are in the high range. Then
15:01 23 there's also some special cases in which the punishment
15:01 24 range is 15 to 99 years. And that can be typically in
15:01 25 the controlled substance acts. And then there are also

15:01 1 some crimes that can be as much as 25 years to life,
15:01 2 depending on what all has happened in the past with that
15:01 3 defendant.

15:01 4 And the idea is that jurors will come
15:01 5 saying, I will follow all aspects of the law that's
15:01 6 required of me, and so what that would mean is, if you
15:02 7 come in on a case where the Judge tells you the
15:02 8 punishment range is 2 years to 20 years, if you say
15:02 9 that's not enough and I'm going to put 25 years in
15:02 10 there, even though the legislature says 20 is the
15:02 11 maximum, then you wouldn't be following the law.

15:02 12 A. No. That's right.

15:02 13 Q. Are you with me on that?

15:02 14 A. Yes, I understand.

15:02 15 Q. And the whole system only works with jurors who
15:02 16 are willing to follow the law.

15:02 17 A. Uh-huh.

15:02 18 Q. It's kind of like on the death penalty
15:02 19 questions. It only works if you are willing to consider
15:02 20 mitigation when you get to that question, in that
15:02 21 mitigation question. That's the only time it works.
15:02 22 Now, that's not saying that you are a bad person if you
15:02 23 refuse to follow some portion of the law, but what it is
15:02 24 saying is, if you are going to refuse to follow the law,
15:02 25 you can't sit as a juror in that case. Are you with me?

15:02 1 A. Yes.

15:02 2 Q. If you say 25 years, if you decide,
15:02 3 Ms. Ballard's legislature says 25 years is the
15:02 4 punishment, and you stick to that, that doesn't mean you
15:03 5 are a bad person. But it does mean you wouldn't be a
15:03 6 qualified juror because you wouldn't follow what the
15:03 7 Judge told you. Does that make sense?

15:03 8 A. Yes, it does, uh-huh.

15:03 9 Q. Just like all those death questions we ask you.
15:03 10 If you told Mr. High that I would automatically assess a
15:03 11 death sentence as soon as I convicted somebody of
15:03 12 capital murder, then that doesn't make you a bad person,
15:03 13 it just makes you a person that couldn't be fair because
15:03 14 you wouldn't give them a fair shot at the burden
15:03 15 question. Does that make sense?

15:03 16 A. Yes.

15:03 17 Q. Now, we allow our legislature down in Austin to
15:03 18 make our laws. That's the whole process. And if we
15:03 19 don't like the laws, we go vote for somebody who will be
15:03 20 down there to change the laws.

15:03 21 In other words, that's how that works. If
15:03 22 I don't like, if I don't like the sales tax because I
15:03 23 think it's too high, then I'll vote for a legislator to
15:03 24 go down there and reduce the sales tax. I don't refuse
15:03 25 to pay any tax, and I don't say, I'm only going to give

15:03 1 you 6 percent instead of 8.25 percent. Are you with me
15:04 2 on that?

15:04 3 A. Uh-huh.

15:04 4 Q. It's especially important when you have jurors,
15:04 5 that they express a willingness to follow the law which
15:04 6 requires fair consideration of everything involved.

15:04 7 A. Uh-huh.

15:04 8 Q. If you are dealing with mitigation, you might
15:04 9 not ever, in a regular case, ever answer that question,
15:04 10 yes, there's sufficient mitigation. But you have to be
15:04 11 open-minded enough to realize that the legislature says
15:04 12 there are such cases that require a "yes" finding to
15:04 13 that mitigation question. And I've got to keep my mind
15:04 14 open for those cases.

15:04 15 A. Uh-huh.

15:04 16 Q. Make sense?

15:04 17 A. Uh-huh.

15:04 18 Q. Now, when we get to this concept of a
15:04 19 punishment range in a regular case, what that means, how
15:04 20 that would apply to you as a juror would be, you get
15:04 21 your instructions from Judge Sandoval who, among other
15:04 22 things, tells you to consider whether or not the
15:05 23 defendant is guilty of capital murder. And he further
15:05 24 tells you, if you have a reasonable doubt about his
15:05 25 guilt in capital murder, he would direct you to consider

15:05 1 regular murder.

15:05 2 A. Uh-huh.

15:05 3 Q. And I can't think exactly of how that would
15:05 4 happen in our case. But let's just say you had -- you
15:05 5 believed he killed one of the people, but you had a
15:05 6 reasonable doubt that he killed the other one, let's
15:05 7 say. When I say we, I mean this hypothetical capital
15:05 8 murder subject. Okay?

15:05 9 A. Uh-huh.

15:05 10 Q. If you had a reasonable doubt that he killed
15:05 11 two people, you couldn't find him guilty of capital
15:05 12 murder because he just killed one. And so you would
15:05 13 look and see: Is he guilty of regular murder? And the
15:05 14 jury would probably unanimously agree, yes, he's guilty
15:05 15 of regular murder.

15:05 16 A. Uh-huh.

15:05 17 Q. Okay. But that does several things. For one
15:05 18 thing, it takes the death penalty away as a
15:05 19 consideration. Forget those questions, then. That's
15:05 20 only if you find him guilty of capital murder.

15:05 21 A. Okay.

15:05 22 Q. So then you end up in a situation like you
15:05 23 would if you were on a regular murder case from the
15:06 24 beginning. You just came into court. And they said
15:06 25 there's a murder case, and you try it.

15:06 1 A. Uh-huh.

15:06 2 Q. The State can put on evidence, in the
15:06 3 punishment phase, to show why the sentence should be
15:06 4 real high. The defense, if it chooses, can put on
15:06 5 evidence to show why the sentence should be real low.

15:06 6 A. Uh-huh.

15:06 7 Q. And the legislature has given the jury that
15:06 8 range for murder cases to be as low as 5 years or as
15:06 9 high as 99 years or life. Does it make sense?

15:06 10 A. Yes.

15:06 11 Q. And the jury has to figure out which it can be.
15:06 12 It could be 5 years. It could be 7 years. It could be
15:06 13 39 years. It could be 80 years. It could be 99 years
15:06 14 or life. That's all up to the jury. And everything you
15:06 15 said so far applies. It depends on the facts and
15:06 16 circumstances of the defendant.

15:06 17 In that case, you can consider whether the
15:06 18 defendant's ever done other crimes before. You can
15:06 19 consider why he did the crime you found him guilty of.
15:06 20 You can consider remorse. You can consider his whole
15:07 21 life and background, all of those kinds of things. And
15:07 22 maybe you find he's just an awful person, all his life.
15:07 23 And you may be thinking, okay, because of that he gets
15:07 24 life. Okay. You may say, this happened one time.

15:07 25 It may be like Mr. High. You know, you

15:07 1 can tell he's a nice man. And he gave you that example
15:07 2 of him, and he comes home, and he thinks he's a happily
15:07 3 married fellow. And he comes home, and he finds that
15:07 4 apparently he's not so happy. And all of a sudden and
15:07 5 he's coming home, and he's thrilled. And the next thing
15:07 6 you know, he's committed a murder. And he's sorry about
15:07 7 it. And I think his terms were, he misses his wife
15:07 8 because he loved her. And he's sorry he killed the guy
15:07 9 because he probably had a family who loved him and all
15:07 10 of that. All right.

15:07 11 And so you understand how those kinds of
15:07 12 situations, you might say, you know, he did wrong. He's
15:07 13 convicted a murder. He loses his law license. But
15:07 14 maybe that's a five-year sentence. Does that make sense
15:07 15 to you?

15:07 16 A. Yes.

15:08 17 Q. Doesn't mean that it is.

15:08 18 A. Yes.

15:08 19 Q. And then you go further, the legislature says
15:08 20 you have to be able to consider probation, which is the
15:08 21 idea that maybe they contribute more. Maybe they make
15:08 22 it up better to us by being outside of prison with
15:08 23 obligations than in prison. Maybe under all the
15:08 24 circumstances that's the right thing to do.

15:08 25 A. Uh-huh.

15:08 1 Q. Maybe you say, Mr. High, we're really mad that
15:08 2 you did the killing, but you have been a good man all
15:08 3 your life. You went to church. You felt bad about
15:08 4 pulling the chair out from under the other girl, and
15:08 5 you've shown remorse.

15:08 6 Had it not been for these other people's
15:08 7 conduct, you never would have been put in that position.
15:08 8 Something snapped and you are better now. And we know
15:08 9 you've got a Christian faith. And since the legislature
15:08 10 gave us the option of giving you probation, we, the
15:08 11 jury, find that's the best result to come out of this
15:08 12 tragedy. Does that make any sense to you?

15:09 13 A. Uh-huh, uh-huh. Yes.

15:09 14 Q. Now, it may make sense to you, and I'm talking
15:09 15 about it in theory. But the law says, if you are going
15:09 16 to serve on this jury, you have to recognize that there
15:09 17 are sometimes when even for a quote murder, probation is
15:09 18 the proper punishment, if the defendant is eligible and
15:09 19 worthy.

15:09 20 A. Yes.

15:09 21 Q. You need to answer yes or no for me. Do you
15:09 22 understand that?

15:09 23 A. Yes, I understand.

15:09 24 Q. Now, if you are going to say, I don't care what
15:09 25 the legislature says. I would never vote for probation.

15:09 1 It doesn't matter what they say. I've made up my mind
15:09 2 that there will be no probation if I'm on the jury, then
15:09 3 you are still a good person. But you are, in a sense,
15:09 4 putting the law in your hands. You are taking the law
15:09 5 in your own hands.

15:09 6 A. I understand what you are saying.

15:09 7 Q. And now is the time to tell us. Are you that
15:09 8 person that's going to reject probation?

15:09 9 A. No. I wouldn't do that then, no. I just
15:09 10 misunderstood.

15:09 11 Q. I felt like you just misunderstood the
15:09 12 question.

15:10 13 A. Yeah, I did.

15:10 14 Q. Now, you may be the kind of person that would
15:10 15 give probation right and left. Ten murder cases, eight
15:10 16 times you would give it. You may be the person that
15:10 17 would almost never give it. That's all okay. You have
15:10 18 to have the same open mind to probation as you would to
15:10 19 any other kind of punishment. And you have to be
15:10 20 willing to fairly consider it, and in a proper case
15:10 21 assess it.

15:10 22 Now, they don't have the right to ask you
15:10 23 will you give him probation if you find him guilty of
15:10 24 the lesser offense of regular murder. Just like I don't
15:10 25 have the right to say, will you give me a death sentence

15:10 1 if I prove he's guilty of capital murder because that's
15:10 2 kind of the point of why we do this hypothetically.

15:10 3 A. Yes.

15:10 4 Q. Will you fairly consider probation in a murder
15:10 5 case if that's what you find a defendant guilty of, the
15:10 6 lesser-included offense of murder?

15:10 7 A. Uh-huh, yes. I would consider, yes.

15:10 8 Q. Do you feel like you understand what we would
15:10 9 be asking you?

15:11 10 A. Yes. I understand now what you mean. Yes, I
15:11 11 could do that.

15:11 12 MR. SCHULTZ: Thank you, very much.

15:11 13 MR. HIGH: I just have a couple of
15:11 14 questions.

15:11 15 THE COURT: All right.

15:11 16 MR. HIGH: I just have a couple more
15:11 17 questions, Judge.

15:11 18 VOIR DIRE EXAMINATION

15:11 19 BY MR. HIGH:

15:11 20 Q. I thought I understood you to say just moment
15:11 21 ago, if a person was found guilty of murder, that they
15:11 22 ought to have to do some time.

15:11 23 A. Well, I didn't know -- I thought that -- you
15:11 24 are saying if it's up to me? I didn't know that there
15:11 25 was a law that the Judge would say, you know, this is

15:11 1 what we're going to do. I thought you were just putting
15:11 2 it in my ballpark. Saying to me, if somebody committed
15:11 3 a murder, well, they need to be punished for it, but
15:11 4 there are circumstances. And if the Judge says they are
15:11 5 going to get probation --

15:11 6 Q. No. That's not -- that's not what we're
15:11 7 saying. The Judge is not the one that would make the
15:11 8 decision.

15:11 9 A. Well, I mean. It's the law. Right?

15:11 10 Q. Let me finish my question. All right? The
15:11 11 Judge is not going to tell you whether he gets time or
15:11 12 probation. You are the one that's going to have to make
15:11 13 that decision.

15:11 14 A. Oh.

15:11 15 Q. Whether -- whether the defendant --

15:11 16 A. Oh.

15:11 17 Q. -- goes to prison or whether he walks out of
15:12 18 this courtroom on probation.

15:12 19 A. Oh, okay.

15:12 20 Q. You, as a juror, would decide that.

15:12 21 A. Oh, we would decide. Yes.

15:12 22 Q. You are the one.

15:12 23 A. Yes.

15:12 24 Q. Do you understand that?

15:12 25 A. Yes. I understand that, yes, and I could do

15:12 1 that.

15:12 2 Q. Well, the Judge will instruct you about the law
15:12 3 on probation --

15:12 4 A. Uh-huh.

15:12 5 Q. -- but I think you told me earlier that you
15:12 6 wouldn't consider probation. Let me finish my question.
15:12 7 You told me earlier that if a fellow did a murder and
15:12 8 was found guilty of murder, that he ought to do some
15:12 9 time. And that you, as a juror, would not consider
15:12 10 probation as a punishment for him. Didn't you tell me
15:12 11 that earlier?

15:12 12 A. I did, uh-huh.

15:12 13 Q. Okay. Is that still your position?

15:12 14 A. No. No.

15:12 15 Q. So you've changed your position?

15:12 16 A. Yes.

15:12 17 Q. And now you are telling us that you would, in
15:12 18 fact, legitimately consider probation as an end result
15:12 19 in a murder case?

15:12 20 A. Yes, yes.

15:12 21 MR. HIGH: Okay. That's fair enough.

15:13 22 THE COURT: You may step down, ma'am. And
15:13 23 I might have you back in a minute or two.

15:13 24 (Venireperson Ballard not present.)

15:13 25 THE COURT: Is there a motion for

15:13 1 challenge?

15:13 2 MR. GOELLER: Yes, there's going to be,
15:13 3 Judge. Judge, we'd submit this juror for cause. She's
15:13 4 biased in the phase of the law which we'd be entitled to
15:13 5 rely on. I think it's clear, Your Honor, she --
15:13 6 probation is out of the question for her. I would ask
15:13 7 the Court to -- I point out to the Court, even after
15:13 8 Mr. Schultz, what appeared to be a rehabilitation of
15:13 9 this juror, she fires back, "Well, if the Judge says
15:13 10 give him probation" -- that is the gist of what she
15:14 11 said -- "If the Judge says give him probation, why I'll
15:14 12 listen to that Judge. Give him probation."

15:14 13 She's so confused. And I recall, I'd ask
15:14 14 the Court to remember and recall her demeanor when
15:14 15 Mr. Schultz had her, twenty-six times in a row, I guess.
15:14 16 Let the record reflect, and everybody can remember,
15:14 17 "uh-huh, uh-huh, uh-huh." She just, uh-huhs, even when
15:14 18 Mr. Schultz wasn't asking a question. Uh-huh, uh-huh,
15:14 19 uh-huh.

15:14 20 And Mr. High gets her. They'll talk a
15:14 21 little bit and then uh-huh, uh-huh, uh-huh. And then
15:14 22 she comes back with, "Well, if the Judge says give him
15:14 23 probation..."

15:14 24 And I think she was so -- the record
15:14 25 should indicate that she's so confused, when she finally

15:14 1 said -- well, she said, first of all, to Mr. High, well,
 15:14 2 I was confused. I didn't understand. And apparently
 15:14 3 Mr. Schultz convinced her that you instructed her to
 15:14 4 give probation or pen time. I think she walked out of
 15:14 5 here -- I think if we asked her another two hours' worth
 15:15 6 of questions, she wouldn't get it.

15:15 7 I don't mean that in a mean way, Judge.
 15:15 8 But you take the totality of her testimony regarding
 15:15 9 this probation issue, and she is biased against it. And
 15:15 10 I think the record's pretty clear, even after an attempt
 15:15 11 to rehabilitation that she tells Don, "Well, I get it
 15:15 12 now," and she points at you.

15:15 13 That's a bad juror. That's a juror that's
 15:15 14 not going to be able to follow your instructions if she
 15:15 15 is seated, Judge. So for those two reasons, we'd move
 15:15 16 to strike her for cause.

15:15 17 THE COURT: All right. Deny the challenge
 15:15 18 for cause. Is there anything from the State?

15:15 19 MR. SCHULTZ: I'm sorry. The juror is
 15:15 20 acceptable.

15:15 21 THE COURT: All right. Defense?
 15:16 22 (Counsel conferring.)

15:16 23 THE COURT: Tell you what we can do. I'm
 15:16 24 going to step down, and you can think about it. We'll
 15:16 25 be back in ten minutes or less, and then we'll hear what

15:16 1 the defense has to say.

15:16 2 THE BAILIFF: All rise.
 15:16 3 (Break.)

15:16 4 THE COURT: Remain seated.

15:18 5 MR. GOELLER: We'll go ahead and preempt
 15:18 6 her. We'll strike her.

15:18 7 THE COURT: Okay.
 15:33 8 (Break.)

15:34 9 THE COURT: All right. We're back on the
 15:34 10 record in the Cantu case. And is there a -- anything
 15:34 11 from the defendant with regard to Ms. Ballard?

15:34 12 MR. GOELLER: Yes, Your Honor. We would
 15:34 13 use our fourth preemptory strike.

15:34 14 MR. HIGH: Defense strike.

15:34 15 THE COURT: I'll tell you what, I was
 15:34 16 going to, yeah, I'll tell you what. I'll do Diane Kerr.
 15:34 17 If you bring her in, Mr. Powell. And she circled
 15:34 18 question No. 5. So I'll ask the State to take 20
 15:34 19 minutes. And if you feel like you've done what you need
 15:34 20 to do about that, I'll hear something from her and if
 15:34 21 you don't, just pass the witness.

15:34 22 MR. SCHULTZ: Do I get any credit from the
 15:34 23 Court if I don't use 20 minutes, or some admiration at
 15:35 24 the very least, respect?

15:35 25 THE COURT: My undying admiration.

15:35 1 MR. SCHULTZ: Yes. That would be good.

15:35 2 THE COURT: In fact, I'll make a little
 15:35 3 note in the notebook that I keep.

15:35 4 (Venireperson Kerr present.)

15:35 5 THE COURT: Ma'am, are you Diane Kerr?

15:35 6 VENIREPERSON: Yes, sir.

15:35 7 THE COURT: I just want to remind you that
 15:35 8 a week ago I swore everyone in with regard to the matter
 15:35 9 in answering the questions truthfully. And so I want to
 15:35 10 advise you that that oath is still in effect. Thank
 15:35 11 you, ma'am. Please be seated.

15:35 12 All right. Mr. Schultz?

15:35 13 VOIR DIRE EXAMINATION

15:35 14 BY MR. SCHULTZ:

15:35 15 Q. Good afternoon.

15:35 16 A. Hello.

15:35 17 Q. You may or may not remember or care, my name is
 15:35 18 Bill Schultz, assistant district attorney, representing
 15:35 19 the State of Texas in its capital prosecution of Ivan
 15:36 20 Cantu. To my left is Ms. Gail Falco, and further to my
 15:36 21 left is Ms. Jami Lowry. And we're all assistant
 15:36 22 district attorneys who will be involved in this trial.

15:36 23 The defendant is the man at the defense
 15:36 24 table first, there on your left. And then next to him
 15:36 25 is Mr. Don Neeley High from Plano, Texas. And Mr. Matt

15:36 1 Goeller, also from Plano, Texas, two very fine decent
 15:36 2 board certified criminal law specialists representing
 15:36 3 the defendant in this case.

15:36 4 I believe you do not know any of us
 15:36 5 because you did not indicate that on last Tuesday when
 15:36 6 we talked. The purpose of this examination is to really
 15:36 7 focus on the special issues that would arise in a death
 15:36 8 penalty case. And it is certainly not a time for
 15:36 9 anybody criticizing anybody else. This is America and
 15:36 10 everybody's got views. And mine are good, yours are
 15:37 11 good, and that's what -- and that's where we are.

15:37 12 I get a strong sense from your
 15:37 13 questionnaire answers that you are not going to make it
 15:37 14 on to this jury because of your views on the death
 15:37 15 penalty, but that's not a criticism. And that's also
 15:37 16 not for me to decide. It's only for the Judge to
 15:37 17 decide. But kind of -- here's how this works.

15:37 18 A fair juror may not be a right-down-the-
 15:37 19 middle-on-an-issue juror. But a fair juror is the kind
 15:37 20 of person who could set aside his or her personal
 15:37 21 beliefs about what laws are better than other laws and
 15:37 22 enforce them.

15:37 23 I'll give you a small example of what I
 15:37 24 mean and then maybe a larger one. We have a law in this
 15:37 25 State that says, you got to wear seat belts when you are

15:37 1 driving an automobile. Now, and I'm only talking about
 15:38 2 adults. I'm not talking about kids because that's
 15:39 3 special, and kids should be protected by society in many
 15:38 4 situations.

15:38 5 A couple things, I don't care about the
 15:38 6 seat belt law. For one thing I don't particularly like
 15:38 7 how we ended up with it. We didn't get it because we,
 15:38 8 in Texas, decided it's a great thing to have a seat belt
 15:38 9 law. We got bullied by the United States Government
 15:38 10 with their highway fund saying, if you don't come up
 15:38 11 with a seat belt law, we're going to cut off your money.
 15:38 12 And rightly or wrongly, we decided that our principles
 15:38 13 would be controlled by our state pocketbook. That's
 15:38 14 just me talking. So I don't like it that way, number
 15:38 15 one. I don't like the fact we got bullied by the Feds.

15:38 16 But even more importantly, it sort of
 15:38 17 occurs to me that one of the reasons I like America so
 15:38 18 much is that I have the right to do what's right or
 15:38 19 wrong, as long as I don't hurt other people. If I'm
 15:38 20 silly enough to get launched through the windshield of
 15:38 21 my car because I'm not wearing a seat belt, I ought to
 15:39 22 have the right to drive around that way as to go sky
 15:39 23 dive or scuba dive or mountain climb or cave explore or
 15:39 24 a lot of things that you probably say, it's nutty. You
 15:39 25 are going to get hurt doing it, that kind of thing. Do

15:39 1 you follow what I'm saying?

15:39 2 A. Uh-huh.

15:39 3 Q. And yet, at the same time, if I were called
 15:39 4 upon to sit on a jury and decide whether a guy was
 15:39 5 wearing a seat belt or not, I'm with you there, brother,
 15:39 6 but still you are guilty of the offense, and I'll fine
 15:39 7 you. I'll fine you whatever I got to fine you, if I
 15:39 8 find you guilty. And that's fine because that's a
 15:39 9 little thing. When you get right down to, I don't care
 15:39 10 that much about the seat belt law. I'm not losing any
 15:39 11 sleep over the immorality of pulling people over about
 15:39 12 seat belts. It gets tougher with other kinds of crimes.

15:39 13 It sometimes gets tougher with drug cases
 15:39 14 because, on the one hand, as much as we hate drugs in
 15:39 15 our society, we've got to have a certain amount of
 15:39 16 compassion for people who are drug addicts because,
 15:40 17 however they got that way, they are probably sick.

15:40 18 And there are some people who say, I can't
 15:40 19 convict somebody of a drug offense and send him to the
 15:40 20 pen if they were just possessing because that's like
 15:40 21 sending somebody to the pen for having TB or sending
 15:40 22 somebody to the pen for having cancer or something.

15:40 23 It's a sickness, and they need to be
 15:40 24 someplace to deal with the sickness rather than in the
 15:40 25 pen where you got robbers and killers. And there are

15:40 1 people who legitimately have the view. I'm not faulting
 15:40 2 it. It may not be my view. It may not be your view,
 15:40 3 but people feel that way. And it's tougher then because
 15:40 4 it's bigger and it's more of a moral thing. It's
 15:40 5 tougher to find a juror who thinks the drug laws are
 15:40 6 unfair. They punish sick people. They get somebody to
 15:40 7 say, okay, they send a sick person to prison for a
 15:40 8 sickness.

15:40 9 But when you get into a really huge issue
 15:40 10 like capital punishment, and it is enormous. I don't
 15:40 11 know if it is our number one most enormous debate. I
 15:41 12 know -- I know we have others that are pretty large and
 15:41 13 pretty tense in our society too, but it's right up
 15:41 14 there.

15:41 15 And when you get to that issue, it's
 15:41 16 asking more from most people if it makes any sense to
 15:41 17 say, well, I know that you believe that capital
 15:41 18 punishment is an immoral thing. I know that you believe
 15:41 19 that it violates Scripture and flies as much in the face
 15:41 20 of Scripture as idolatry, as -- as worshipping false
 15:41 21 idols, as those other things. But I'll go ahead and do
 15:41 22 it anyway, even though I believe it's a huge immoral
 15:41 23 thing.

15:41 24 And that's kind of what this whole process
 15:41 25 now is about, Ms. Kerr. It is to test whether or not

15:41 1 your opposition to the death penalty is so strong that
 15:42 2 if you are on that jury, we've already lost on that
 15:42 3 issue. Does that make sense what I'm saying, what I'm
 15:42 4 talking about?

15:42 5 A. I understand what you are saying.

15:42 6 Q. And it's not, I mean, there's nothing right or
 15:42 7 wrong about it. I'd like to think of Nazi Germany in
 15:42 8 analogizing these issues to people in good conscious in
 15:42 9 America having to deal with the death penalty. And why
 15:42 10 I like to do that is because that was a society in which
 15:42 11 it was legal to be exterminating people because of their
 15:42 12 religion, because of their background. That was Nazi
 15:42 13 Germany. People were killed because they were Jewish,
 15:42 14 and that's it. And it was the law because the
 15:42 15 government said it was the law.

15:42 16 It was not -- it was not something done
 15:42 17 illegally by vigilantes. It was being done by the
 15:42 18 government, and it was the law of the -- of the nation
 15:42 19 of Germany during World War II. That was the law. And
 15:43 20 I think of the people that were like at those railroad
 15:43 21 stations that were loading all those poor people up on
 15:43 22 those cars and shipping them off to the death camps.
 15:43 23 And I'm thinking, how could they be doing that? They
 15:43 24 had to have known it was wrong to load those people up.
 15:43 25 How could anybody do that? And I'm thinking, what would

15:43 1 they say? It turns out some have been prosecuted and
15:43 2 some have been interviewed since.

15:43 3 They said, well, I wasn't killing anybody.
15:43 4 All I was doing was being a trainman, and I just put the
15:43 5 people on the cars. And what happened down at the end
15:43 6 of the track, I didn't have anything to do with it. So
15:43 7 I was just being a trainman. And that sounds okay, but
15:43 8 that's almost like if I were to tell you, ma'am, you are
15:43 9 not going to be executing a defendant. All you are
15:43 10 doing is answering questions. You are not -- you are
15:43 11 not the person doing it. It sounds okay, but you are
15:43 12 part of doing it, if you are on the jury. Does that
15:43 13 make sense to you?

15:44 14 A. Yes, sir.

15:44 15 Q. And that's why I use the analogy. We were not
15:44 16 like Nazi Germany. Whether you believe in the death
15:44 17 penalty or not, this is a good society, whether you
15:44 18 agree with us or not. The people on my table are good
15:44 19 people. We care about life. We care about values. We
15:44 20 love our families. We're good people. We may disagree
15:44 21 with you. We're not like Nazi Germany. But what we're
15:44 22 doing is something that you clearly believe would be
15:44 23 immoral for you to be doing; is that right?

15:44 24 A. Correct.

15:44 25 Q. All that having been said, suppose I were to

15:44 1 say, well, suppose I did tell you that, Ms. Kerr, you
15:44 2 are not going to be putting the needle in his arm. All
15:44 3 you are doing is voting on evidence, and so you are not
15:44 4 doing it. Would that make a difference to you?

15:44 5 A. If the results are the needles in the person's
15:44 6 arm?

15:44 7 Q. Uh-huh.

15:44 8 A. Then to me, it's the same as me doing it.

15:44 9 Q. Kind of like me saying about the guy on the
15:44 10 train. You didn't pull the gas chamber lever, but you
15:45 11 put him on there, and you knew what was on the other
15:45 12 end. That kind of idea?

15:45 13 A. Yes.

15:45 14 Q. And maybe I would say, the way this all works,
15:45 15 we're not going to ask you whether to kill him or not
15:45 16 directly. Instead, what we'll ask you is a series of
15:45 17 questions, the answers to which are going to determine
15:45 18 that and say: Is that going to make it any easier for
15:45 19 you? All you are doing is answering questions, but you
15:45 20 know what the questions are going to do. Does that make
15:45 21 a difference to you?

15:45 22 A. Can you repeat that, I'm --

15:45 23 Q. First question we're going to ask you is, is he
15:45 24 guilty of capital murder? And you have to find that
15:45 25 beyond a reasonable doubt, and let's say that you do.

15:45 1 Then the second question we ask you is whether there's a
15:45 2 probability that he's going to commit future acts of
15:45 3 violence that are a continuing threat to society.

15:45 4 Now, that question is pretty simple and
15:45 5 straightforward. And you seem to me to be the kind of
15:45 6 person who could answer that question in some other
15:45 7 context other than the death penalty, just fine. You
15:45 8 know if I've got -- if I've got a fellow charged with
15:46 9 robbery, and I'm prosecuting him, and I ask you: Do you
15:46 10 think he's going to be a continuing threat to society,
15:46 11 and it's not a death penalty case, you have the ability
15:46 12 to answer that question just fine, based on the
15:46 13 evidence. Right? No problem there?

15:46 14 A. Right.

15:46 15 Q. It's not real well worded perhaps, but people
15:46 16 can understand it. But if you answer this question yes,
15:46 17 we're on our way toward a death sentence being imposed.
15:46 18 And so my question is: Do you get any comfort in the
15:46 19 idea that you are not really saying death? You are just
15:46 20 answering questions, when you know what those answers
15:46 21 are going to be, what they are going to mean? Does it
15:46 22 make any difference?

15:46 23 A. I guess to me, if you are saying that, if we go
15:46 24 along this line, you prove a case, correct.

15:46 25 Q. I prove a capital murder, and we get to the

15:46 1 punishment phase. And let's say I prove to your
15:46 2 satisfaction that he's probably going to be a continuing
15:46 3 threat to society.

15:46 4 A. Okay.

15:46 5 Q. Now, if it weren't a death case, you already
15:46 6 told me you have the ability to answer that question,
15:47 7 yes, if it's proven. Why couldn't you do it in a death
15:47 8 penalty case knowing what the result might be?

15:47 9 A. I have a problem with what the result could be.

15:47 10 Q. Okay. Fair enough. Different people have
15:47 11 different views of why the death penalty is
15:47 12 inappropriate and wrong. One is people are concerned
15:47 13 about a mistake. Somehow getting the wrong person or,
15:47 14 can you imagine like if we found out Timothy McVeigh,
15:47 15 the Oklahoma City bombing, imagine if we found out he
15:47 16 was innocent, like five years from now, how we'd all
15:47 17 feel, you know. That isn't the case. In fact, to the
15:47 18 end, he bragged about it. So we don't have that
15:47 19 problem, but that's one thing people are concerned
15:47 20 about. That's not really where you are coming from on
15:47 21 this, is it?

15:47 22 A. No.

15:47 23 Q. Some people have a concern that it's used
15:47 24 unfairly toward minorities and males. The truth of the
15:47 25 matter is, that there's only about two women on all of

15:47 1 our death row, which is less than 1 percent. And
 15:48 2 there's a large black, Hispanic population on death row,
 15:48 3 perhaps larger than representation in our population in
 15:48 4 Texas. But that's not the -- that's not really the --
 15:48 5 that's not really the target of your opposition to it,
 15:48 6 either, is it?

15:48 7 A. No.

15:48 8 Q. And then some other people say that it's just
 15:48 9 not very dignified of our society that we prize human
 15:48 10 life so much that we create a death penalty for those
 15:48 11 who take it. And then we turn right around and do the
 15:48 12 same thing. It's almost kind of like -- it's almost
 15:48 13 kind of like our form of murder. It's just a little bit
 15:48 14 fancier than the other form of murder. And I may be
 15:48 15 getting closer to your thoughts, but I am still not
 15:48 16 quite there, am I?

15:48 17 A. Do you want me to tell you my thoughts? Is
 15:48 18 that what you are asking me?

15:48 19 Q. Yes.

15:48 20 A. If you look at the definition you gave us of
 15:48 21 murder last Tuesday.

15:48 22 Q. Yes.

15:48 23 A. Knowingly or intentionally taking someone's
 15:49 24 life; is that correct?

15:49 25 Q. Yes. Thanks for noticing.

15:49 1 A. Okay. What I would say is you are asking me to
 15:49 2 do the same thing if you ask me to return a verdict of a
 15:49 3 death penalty. You are asking me personally, I can't
 15:49 4 speak for anyone else.

15:49 5 Q. Absolutely, and that's all. That's all we're
 15:49 6 talking about is your situation. Is this view -- how
 15:49 7 much of this is related to your religious training and
 15:49 8 conviction as opposed to just your personal getting
 15:49 9 along in the world kind of thing? Do you understand me?

15:49 10 A. Yes. It has a lot to do with my religious
 15:49 11 convictions. I work with teenagers. I'm a role model
 15:49 12 to them, and I need to walk my talk. I mean, I have to
 15:49 13 live the values that I'm teaching.

15:49 14 Q. Have you ever -- is it like Sunday school
 15:49 15 teaching?

15:49 16 A. It's Sunday school. It's mission trips. It's,
 15:49 17 you know, I'm a youth director. And it's all facets of
 15:49 18 working with 7th through 12 graders.

15:49 19 Q. What's your church?

15:49 20 A. Wesleyan United Methodist Church.

15:50 21 Q. Where is that?

15:50 22 A. Right off of Virginia Parkway here in McKinney.

15:50 23 Q. Are you ordained, by any chance?

15:50 24 A. I'm not ordained at this time.

15:50 25 Q. Have you ever talked with your youth about

15:50 1 capital punishment?

15:50 2 A. No, but it was a topic they wanted to get to
 15:50 3 this year, so.

15:50 4 Q. How -- what do you -- how do you plan to teach
 15:50 5 them that? How are you going to approach that?

15:50 6 A. I would do research, just like I would for
 15:50 7 anything. I would look at the biblical references. I
 15:50 8 would talk to my pastor. I would talk to the parents
 15:50 9 to, you know, understand where the different players are
 15:50 10 coming from. It's a very -- just like we do with sex
 15:50 11 education. You get your homework done.

15:50 12 Q. Okay.

15:50 13 A. Before you present a view.

15:50 14 Q. Do you propose to offer your own personal
 15:50 15 views, depending on how you interact?

15:50 16 A. There's a lot of times when I would offer a
 15:50 17 personal view, correct.

15:50 18 Q. Now, it is possible, and the law contemplates
 15:51 19 there could be a person who has tremendous opposition to
 15:51 20 the death penalty, whether on moral grounds, economic
 15:51 21 grounds, evidence grounds, almost any kind of grounds
 15:51 22 that there are. There are even some people who are
 15:51 23 opposed to the death penalty because they think it is
 15:51 24 too gentle. They believe that staying in prison for the
 15:51 25 rest of their life is actually more punishment. How am

15:51 1 I doing on time, Judge?

15:51 2 THE COURT: Let's see here. Let me tell
 15:51 3 you what you've got. You've got -- actually you've
 15:51 4 exceeded your time. So let me ask you to take a couple
 15:51 5 minutes to wrap up.

15:51 6 MR. SCHULTZ: I'm trying. I just need to
 15:51 7 get a watch, and I'll do a lot better for you.

15:51 8 THE COURT: You've gone about 25 at this
 15:51 9 point. So I'll give you about 2 minutes to wrap up, and
 15:51 10 then we'll give the other side a chance.

15:51 11 MR. SCHULTZ: I got to do it quickly.

15:51 12 THE COURT: I wasn't watching my watch in
 15:51 13 spite of what I'm saying.

15:52 14 MR. SCHULTZ: Well, I'm on the honor
 15:52 15 system.

15:52 16 Q. (BY MR. SCHULTZ) As you sit there right now,
 15:52 17 if you were sitting on this jury, there is no way there
 15:52 18 would ever be a death vote from you, no matter what the
 15:52 19 evidence. Is that a fair statement?

15:52 20 A. That's a fair statement.

15:52 21 Q. I mean, I could tell you that -- I mean, we
 15:52 22 could go from now until next year if the Judge would
 15:52 23 allow it. And not because it's personal to me or
 15:52 24 anybody at this table or disrespectful to me, but you
 15:52 25 will do whatever it takes to make sure that this, that

15:52 1 that defendant does not die, if you are on the jury?
 15:52 2 A. Correct.
 15:52 3 Q. And even if the Judge tells you to fairly give
 15:52 4 consideration to those special issues and to a death
 15:52 5 sentence, it's not that you're disobedient to the Judge,
 15:52 6 but in terms of walking the walk, as you put it, that's
 15:52 7 not going to make any difference. If you are on this
 15:52 8 jury, there's no way there could ever be a unanimous
 15:52 9 verdict for death?
 15:52 10 A. Because of me, correct. If I'm on the jury and
 15:52 11 they -- and you say that I have to return that, based on
 15:52 12 the law, based on the sentencing.
 15:53 13 Q. Right.
 15:53 14 A. Me personally sentencing, I could not do that.
 15:53 15 Q. I could be the world's greatest prosecutor, and
 15:53 16 it's not personal to the State. It's just how you will
 15:53 17 vote?
 15:53 18 A. Correct.
 15:53 19 MR. SCHULTZ: I appreciate that. We'll
 15:53 20 pass the juror, Judge.
 15:53 21 MR. GOELLER: This will be very brief,
 15:53 22 Judge.
 15:53 23 VOIR DIRE EXAMINATION
 15:53 24 BY MR. GOELLER:
 15:53 25 Q. Is it Diane Kerr?

15:53 1 A. Diane, yes.
 15:53 2 Q. You aren't kin to Andy Kerr, are you? I don't
 15:53 3 know how common "Kerr" is.
 15:53 4 A. Do you mean in America?
 15:53 5 Q. Yeah.
 15:53 6 A. No.
 15:53 7 Q. Diane, let me -- I think I understand where you
 15:53 8 are coming from. We play this -- I'll say play.
 15:53 9 Obviously, I mean, you know, obviously, I would like you
 15:53 10 on this jury. You know that?
 15:53 11 A. Sure.
 15:53 12 Q. You know the State doesn't want you on the
 15:53 13 jury?
 15:53 14 A. Sure. I wouldn't want to be in either one of
 15:53 15 your seats.
 15:53 16 Q. I want to be intellectually honest. Sometimes
 15:53 17 we play this game where I'll spend an hour, two hours
 15:53 18 trying to get you to the point where you could be fair
 15:54 19 to the State so I could try to maybe seat you on this
 15:54 20 jury. Okay? I don't want to do that with you. Your
 15:54 21 time is valuable. Everybody's time is valuable.
 15:54 22 If you found somebody guilty of capital
 15:54 23 murder and in this case, you would either have found
 15:54 24 they intentionally killed two people or intentionally
 15:54 25 killed in the course of a burglary or intentionally

15:54 1 killed in the course of a robbery. They are found
 15:54 2 guilty of capital murder. Their punishment is set,
 15:54 3 either life or death. That's it. One of those two
 15:54 4 things has to happen. Life is really the automatic one.
 15:54 5 Death, a few more things have to happen to bring about a
 15:54 6 death sentence.
 15:54 7 And as you know, the answer to two
 15:54 8 questions, individually and the jury answers two
 15:54 9 questions. What we call the future dangerous question:
 15:54 10 Is there a probability that the defendant would commit
 15:54 11 criminal acts of violence? In other words, does the
 15:54 12 jury find beyond a reasonable doubt that this person
 15:55 13 would be a future danger violently?
 15:55 14 A. Okay.
 15:55 15 Q. Some type of thing. You might be able to hear
 15:55 16 more evidence in the punishment phase. You might be
 15:55 17 able to go back, look at the evidence in the guilt-
 15:55 18 innocence phase. Could you answer that question, based
 15:55 19 on the evidence?
 15:55 20 A. Based on the evidence if they were a continuing
 15:55 21 threat to society?
 15:55 22 Q. Yeah.
 15:55 23 A. I would hope that I could do that, yes.
 15:55 24 Q. I guess my bottom line is, it's okay. I want
 15:55 25 to phrase this right. Even though you are against the

15:55 1 death penalty, it's okay, and you have the right to sit
 15:55 2 on the jury as long as you don't violate your oath as a
 15:55 3 juror, and your personal views or religious views would
 15:55 4 not substantially interfere with you.
 15:55 5 Our law says we recognize that you
 15:56 6 wouldn't come in in a vacuum. I mean, you are going to
 15:56 7 look at everything, maybe skewed, as an opponent of the
 15:56 8 death penalty. That's all right, because the person who
 15:56 9 is a proponent of the death penalty, they are going to
 15:56 10 look at all the evidence maybe skewed in that way.
 15:56 11 Hopefully we get a good mix on the jury.
 15:56 12 So you have that question. And if the answer to that
 15:56 13 question -- I guess the bottom line is: Would you
 15:56 14 answer that question solely to make sure a death
 15:56 15 sentence wouldn't result?
 15:56 16 A. If the death sentence was the only choice, is
 15:56 17 that what you are asking? I'm confused a little
 15:56 18 bit.
 15:56 19 Q. No. I know it's confusing. I know it's hard.
 15:56 20 I had one juror that didn't like this term, but I asked
 15:56 21 the juror, would you purposely throw that question? In
 15:57 22 other words, answer it not based on the evidence, at
 15:57 23 all, solely to bring about a life sentence?
 15:57 24 A. I would be in conflict because I would have to
 15:57 25 answer it honestly, but it would conflict me if I knew

15:57 1 it was the death penalty.
 15:57 2 Q. Well, it's not a death penalty yet.
 15:57 3 A. Well, I could answer that based on evidence.
 15:57 4 Q. All right. If the jury answers that
 15:57 5 unanimously yes, then we move onto the last question.
 15:57 6 If the answer to it is no or there can't -- there is no
 15:57 7 answer to it, it's a life sentence. Okay? We get to
 15:57 8 the last question. That's the look-back question.
 15:57 9 That's the final, does the jury give life or does the
 15:57 10 jury give death question?
 15:57 11 Again, this asks you to look back at all
 15:57 12 the evidence, circumstances of the offense, the
 15:57 13 defendant's character, background, personal moral
 15:58 14 culpability. Is there a sufficient mitigating
 15:58 15 circumstance or circumstances to give life rather than
 15:58 16 death? That's what that really means, I guess it's a
 15:58 17 last look, a way out to avoid a death sentence.
 15:58 18 I suppose it's got to be based on
 15:58 19 something, whatever an individual juror might think is
 15:58 20 mitigating or what they think, what they thought about
 15:58 21 the original offense and the facts surrounding both, or
 15:58 22 maybe the reason for the killing, all that kind of
 15:58 23 thing. Could you answer that based on the evidence?
 15:58 24 A. Yes.
 15:58 25 Q. Okay.

15:58 1 A. If you take off death sentence.
 15:58 2 Q. Which one?
 15:58 3 A. At the very end. I mean, if you say life, I
 15:58 4 could answer it. Life imprisonment, I could answer
 15:58 5 that.
 15:58 6 Q. Well, that's what the question is asking. The
 15:58 7 question is asking: Is there something there to give a
 15:58 8 life sentence?
 15:58 9 A. I could answer that.
 15:58 10 MR. SCHULTZ: Excuse me, I'm going to
 15:58 11 object to that. The question is asking whether
 15:58 12 sufficient mitigating evidence to not give a death
 15:59 13 sentence. It's not just asking: Is there something
 15:59 14 there to give a life sentence?
 15:59 15 MR. GOELLER: Well --
 15:59 16 MR. SCHULTZ: It's got to be attached in
 15:59 17 terms of mitigating evidence, not if there's something
 15:59 18 there. For example, if the only something there is she
 15:59 19 doesn't like the death penalty, that's not mitigating.
 15:59 20 That's just -- that's just her view.
 15:59 21 MR. GOELLER: I agree with that statement.
 15:59 22 I agree with Mr. Schultz's statement, so I'll rephrase
 15:59 23 it.
 15:59 24 THE COURT: All right. Did you understand
 15:59 25 what he said?

15:59 1 Q. (BY MR. GOELLER) I tell you what.
 15:59 2 A. Would you ask me again, please. I'm sorry.
 15:59 3 Q. Both of these questions really call into play
 15:59 4 evidence.
 15:59 5 A. Okay.
 15:59 6 Q. Whatever it may be. All right? If you are
 15:59 7 telling us that you would disregard the evidence and
 16:00 8 vote no matter what in either issue to absolutely make
 16:00 9 sure a death sentence would not result, is that what you
 16:00 10 are telling us?
 16:00 11 A. I could not vote if the death sentence were
 16:00 12 going to be imposed. I don't know how else to answer
 16:00 13 it.
 16:00 14 Q. I got to ask you a couple more questions. I
 16:00 15 may not -- probably my fault. You said you could answer
 16:00 16 that first one based on the --
 16:00 17 A. Evidence or the facts.
 16:00 18 Q. -- on the evidence.
 16:00 19 A. Okay.
 16:00 20 Q. Could you answer the second one based on the
 16:00 21 evidence?
 16:00 22 A. I would think I could, based on evidence.
 16:00 23 Q. Of course, let's say you say in a hypothetical
 16:00 24 case, gee, I really think there's a probability of
 16:00 25 future danger. I'm going to vote yes. Okay. And down

16:00 1 in this question, you said to yourself, I don't find
 16:01 2 anything that's sufficiently mitigating to give a life
 16:01 3 sentence. If you voted that way, and that's the way the
 16:01 4 jury saw it, a death sentence would come about?
 16:01 5 A. Uh-huh.
 16:01 6 Q. If that was a unanimous verdict. And if you
 16:01 7 voted, based on the evidence and what you thought was
 16:01 8 proper in that case as the evidence dictated to you, as
 16:01 9 much as you dislike the death penalty, could you do
 16:01 10 that? Vote your -- vote the evidence and vote your
 16:01 11 conscious as to what is the right answer based on the
 16:01 12 evidence?
 16:01 13 A. I would not want to vote for that, if I knew it
 16:01 14 would result in the death penalty.
 16:01 15 Q. I would hope nobody would. Well, I don't think
 16:01 16 anybody wants to come in here hoping to get their vote
 16:01 17 to kill somebody. Okay? I hear you saying you would
 16:02 18 not like to do that because you don't like the death
 16:02 19 penalty. Am I also hearing you say you wouldn't like
 16:02 20 it, but you could do it if the Judge instructed you you
 16:02 21 shall vote based on the evidence?
 16:02 22 A. That's really hard. I know -- I'm not trying
 16:02 23 to be difficult but --
 16:02 24 Q. I know you are not.
 16:02 25 A. But I would really, really not want to ever

16:02 1 vote a death penalty sentence.

16:02 2 Q. Would you say that your views on the death
16:02 3 penalty, therefore, would cause you to -- your views on
16:02 4 capital punishment would substantially impair your
16:02 5 ability to answer those special issues?

16:02 6 A. Okay. If I answer the first question, then it
16:02 7 doesn't always come to the third question. Is that what
16:02 8 you are saying?

16:03 9 Q. Well, assume for our argument, I mean, if the
16:03 10 answer to this question is no, and the jury says no
16:03 11 future danger, it's over. It's a life sentence.

16:03 12 A. Okay.

16:03 13 Q. It's over. We don't even get to the death
16:03 14 sentence then.

16:03 15 A. Okay.

16:03 16 Q. But if the answer to that question is yes, then
16:03 17 you are going to have to answer that question. What our
16:03 18 law contemplates is, if you know going in that you will
16:03 19 not answer those questions based on the evidence.

16:03 20 A. What I know going in is that I would be very
16:03 21 conflicted.

16:03 22 Q. Okay.

16:03 23 A. I really would be. I have to be honest because
16:03 24 I've thought, I mean, since last Tuesday obviously
16:03 25 everybody would have thought about that. And I thought

16:03 1 about the examples that Mr. Schultz brought up last
16:03 2 week, whether it was this circumstance, that
16:03 3 circumstance. I thought about if someone had killed my
16:03 4 niece. I thought about all kinds of things. And even
16:03 5 if those circumstances -- of course I'm not in them --

16:03 6 Q. Right.

16:04 7 A. -- I cannot personally think that I would do
16:04 8 the death penalty even for those circumstances. I mean,
16:04 9 even if someone was guilty of that crime of killing my
16:04 10 niece.

16:04 11 Q. To get to these, we'll assume that this person
16:04 12 is guilty. You don't even get to these questions unless
16:04 13 you found they are guilty of capital murder.

16:04 14 A. Right.

16:04 15 Q. Okay? Okay? I guess another way to state it
16:04 16 is, if the Judge says you'll take an oath as a juror,
16:04 17 and you will render a true verdict. And I'll ask you to
16:04 18 answer those questions based on the evidence. If you
16:04 19 are telling us that you cannot do that, and I would tell
16:04 20 you that because you are conflicted, because it would
16:04 21 weigh heavily, because it's extremely difficult, because
16:04 22 you are an opponent of the death penalty, you may still
16:04 23 be a qualified juror.

16:04 24 But if your views substantially impair
16:05 25 your ability to answer those questions such that you

16:05 1 would have to violate your or the other kind of person,
16:05 2 going in, I know I'm going to rig my answer to make
16:05 3 sure -- I don't care what the evidence shows -- I'm
16:05 4 going to rig my answer so no one will ever die.

16:05 5 A. Right. I hear what you are asking. I couldn't
16:05 6 rig my answer because then I'm not standing on my
16:05 7 convictions.

16:05 8 Q. Okay.

16:05 9 A. But, again, I'll go back to, when we were
16:05 10 talking to Mr. Schultz earlier or when I was -- then
16:05 11 I'm -- I am a murderer based on the definition. That's
16:05 12 where I'm struggling.

16:05 13 Q. That's hard. And, Ms. Kerr, tell me if my
16:06 14 assessment of your position is correct. All you got to
16:06 15 do is say you are wrong, sir, you are right. I hear you
16:06 16 saying, I could take my oath. I would be greatly
16:06 17 conflicted should I find somebody guilty of capital
16:06 18 punishment and then have to answer these questions. But
16:06 19 I would abide by my oath and base my answers to those
16:06 20 questions to the best of my ability on the evidence,
16:06 21 knowing that it would be very difficult for me. But I
16:06 22 could follow the Judge's instructions and take my oath
16:06 23 and not violate my oath.

16:06 24 A. I could take my oath, and I would hope that I
16:06 25 wouldn't violate it, but I would be concerned that I

16:07 1 would violate it if it got to that. That's my concern.
16:07 2 I can't answer what I would do until I'm there.

16:07 3 Q. No one can -- no one can force you to. I
16:07 4 can't -- I can't tell you, how would you vote right now?
16:07 5 Because, you know, you may vote no based on the evidence
16:07 6 on either one of those questions.

16:07 7 A. I understand. But I thought about what is the
16:07 8 least amount of things that could happen based on
16:07 9 evidence, and what is the maximum that could happen on
16:07 10 evidence and understanding the maximum, that's what's
16:07 11 weighed heavy. And that's what I had to think about
16:07 12 last Tuesday and from Tuesday through now, and I really
16:07 13 struggle. I would struggle.

16:07 14 I would have to keep my oath, but I would
16:07 15 be conflicted because then I'm walking away as a
16:07 16 murderer. And I have to live with that.

16:07 17 Q. Is that something that you could live with?

16:07 18 A. Not very nicely because then I would have to
16:07 19 give up my job.

16:08 20 Q. I understand it's tough.

16:08 21 MR. GOELLER: That's all the questions I
16:08 22 have, Judge.

16:08 23 THE COURT: All right.

16:08 24 MR. GOELLER: Judge, I don't know if
16:08 25 Mr. Schultz is going to have some more questions. But

16:08 1 I'd like a brief opportunity for a sub rosa. Maybe
16:08 2 confer with Mr. Schultz and Ms. Falco and Ms. Lowry.

16:08 3 THE COURT: Would you step down for a
16:08 4 moment?

16:08 5 VENIREPERSON: Do I go back to the room?

16:08 6 THE COURT: Yes, ma'am.

16:08 7 (Venireperson Kerr not present.)

16:09 8 THE COURT: Do you have anything to say to
16:09 9 the Court? Do you want to confer with Mr. Schultz?

16:09 10 MR. GOELLER: We did, and I'm not sure
16:09 11 what the next step is. I guess Mr. Schultz is probably
16:09 12 going to make a motion to, for --

16:09 13 THE COURT: All right.

16:09 14 MR. SCHULTZ: Yeah, I am. I'd ask for
16:09 15 permission very briefly on a limited issue. I ran out
16:09 16 of time, and I didn't do it on purpose. But
16:09 17 otherwise -- if I don't make the record as clear as I
16:09 18 can make it. Let's say I don't make it more clear, and
16:09 19 I don't know where the Court is on it, and if I don't
16:09 20 make it more clear and you overrule our challenge that's
16:10 21 going to be coming. Then we'll have to talk to her more
16:10 22 anyway. And then we'll get to go over the other stuff.
16:10 23 If a challenge is overruled, as I understand the rules,
16:10 24 that we're not stuck with that 25-minute rule then?

16:10 25 THE COURT: I tell you what, let's invite

16:10 1 her back in.

16:10 2 MR. SCHULTZ: I'll be quick.

16:10 3 (Venireperson Kerr present.)

16:10 4 THE COURT: Ms. Kerr, I want to ask you a
16:10 5 question, and sometimes I accuse the attorneys of being
16:10 6 redundant, and I may be being redundant. But I want to
16:10 7 ask you if you recall that you filled out a
16:10 8 questionnaire.

16:10 9 VENIREPERSON: Correct.

16:10 10 THE COURT: And down at the bottom of the
16:10 11 page there's a sentence or a portion of the question
16:11 12 says: "Which of the following statements best represent
16:11 13 your feelings about the death penalty?" And you circled
16:11 14 under 5 which reads, "I could never under any
16:11 15 circumstances return a verdict which assess the death
16:11 16 penalty." Do you recall that?

16:11 17 VENIREPERSON: Yes.

16:11 18 THE COURT: Did you say that it's still
16:11 19 your position?

16:11 20 VENIREPERSON: Yes.

16:11 21 THE COURT: All right. Are there any
16:11 22 other questions?

16:11 23 MR. SCHULTZ: Just a couple.

16:11 24 VOIR DIRE EXAMINATION

16:11 25 BY MR. SCHULTZ:

16:11 1 Q. I know you said you'd follow your oath as a
16:11 2 juror. That's almost like a soldier saying, you know,
16:11 3 if I got sent into battle and they said, "shoot," I'd
16:11 4 shoot. And some people could never pull that trigger.
16:11 5 They just couldn't do it, and they are good people, and
16:11 6 you and I have no problems of any kind. There are
16:11 7 probably more people in this courtroom up here that
16:11 8 agree with you than you'd ever know.

16:11 9 All I need to know is is what you told me
16:11 10 before still true? No matter what I do or what the rest
16:11 11 of us do, because of your views, there's no way a death
16:12 12 sentence could ever result from you? Are you still with
16:12 13 that position?

16:12 14 A. Yes, sir.

16:12 15 Q. And it could -- that could happen in a couple
16:12 16 of ways with you. And I don't think you'd just say, my
16:12 17 law is better than the Judge's law; although, you know,
16:12 18 if it came down to that, that might be where you end up
16:12 19 having to be because of your morality about this.

16:12 20 But what I'm more concerned about is that
16:12 21 because of your view, you would -- your ability to look
16:12 22 fairly at the evidence would be substantially impaired
16:12 23 because you would be dead set against wanting to view
16:12 24 the evidence in a way that would be a death sentence
16:12 25 result. Does that make sense to you?

16:12 1 A. I can tell you I would be very conflicted. I
16:12 2 don't know what other word to use.

16:12 3 Q. And that's my -- even if you wouldn't
16:12 4 automatically rig the answers. And Matt's questions are
16:12 5 fine because I could see how that would happen on
16:12 6 something this big, and if I felt like you did and I'm
16:13 7 on the jury, I can see -- I can see how I would say, if
16:13 8 it comes down to it, that's the only way for me to do
16:13 9 the right thing, then so be it. I could see how that
16:13 10 could even happen.

16:13 11 But I think more likely it would simply be
16:13 12 that, I would only look at what -- I would look at the
16:13 13 evidence with a view toward finding some excuse to not
16:13 14 impose the death sentence. And I would not be, I would
16:13 15 not be being fair as a juror. That's what I'm thinking.

16:13 16 A. And I think probably, consciously I don't
16:13 17 believe I would do that because I would try not to do
16:13 18 that. Subconsciously, that is going to be on my mind.

16:13 19 Q. Which is what?

16:13 20 A. And I didn't know I believed this way until I
16:13 21 was put in a situation to answer those questions. I did
16:13 22 not know how strong my convictions were, one way or the
16:13 23 other. And I think until you are faced with the real
16:13 24 situation, you have to examine yourself in a very
16:13 25 different way and much more thorough. I've never had to

16:14 1 do that. This is the first time I have had to do that.
 16:14 2 Q. And you, knowing yourself better than any of us
 16:14 3 would ever know you, however it happened, whether it's
 16:14 4 conscious or subconscious, you are telling us your vote
 16:14 5 has already been decided in this case, really.
 16:14 6 However -- however you get to that point, has really
 16:14 7 already been decided on the death issue?
 16:14 8 A. As far as the death issue, whether it would be
 16:14 9 this case or a future case, until we did the
 16:14 10 questionnaire last Tuesday and until this situation, I
 16:14 11 wouldn't have known that about myself. But I, you know,
 16:14 12 if you called me back next week and it was capital
 16:14 13 punishment with these same questions --
 16:14 14 Q. Same issue.
 16:14 15 A. -- I'm afraid, and I've thought about that, I
 16:14 16 mean.
 16:14 17 Q. And however you get there, that's still what's
 16:14 18 going to happen. There will never be a death vote from
 16:14 19 you, however your mind and your spirit.
 16:14 20 A. I don't know what would ever change me from
 16:14 21 this position in the future. I have no idea what would
 16:14 22 change that position.
 16:14 23 Q. Right now, you are not moving on it at all? I
 16:14 24 cannot say that I can move on it. I mean --
 16:14 25 MR. SCHULTZ: That's all I have. We

16:14 1 respectfully challenge her for cause.
 16:15 2 THE COURT: All right. I grant the
 16:15 3 challenge.
 16:15 4 MR. GOELLER: Judge.
 16:15 5 THE COURT: Yes. Did you need some more
 16:15 6 time?
 16:15 7 MR. GOELLER: No more questions. I need
 16:15 8 to -- I need to just make a --
 16:15 9 THE COURT: You need a little hearing?
 16:15 10 All right. Let me ask you to step down.
 16:15 11 MR. GOELLER: Well, if the Court's granted
 16:15 12 it, I don't want to waste her time if she wants to be
 16:15 13 excused.
 16:15 14 THE COURT: All right.
 16:15 15 MR. GOELLER: I just need to speak to the
 16:15 16 record for a minute.
 16:15 17 THE COURT: You are finally excused.
 16:15 18 VENIREPERSON: And when you are finally
 16:15 19 excused --
 16:15 20 THE COURT: It means you can go home and
 16:15 21 enjoy your life.
 16:15 22 VENIREPERSON: Until the next summons?
 16:15 23 THE COURT: Forever. All right.
 16:15 24 (Venireperson Kerr excused.)
 16:15 25 MR. GOELLER: Judge, just for the record,

16:15 1 I need to object to the Court's granting of the State's
 16:15 2 challenge for cause.
 16:15 3 Comes now Ivan Cantu, object to the
 16:15 4 Court's granting of the State's challenge for cause in
 16:15 5 juror No. 15, Diane Marie Kerr, in that the defense
 16:15 6 believes the defendant, Ivan Abner Cantu's 6th Amendment
 16:16 7 and 14th Amendment rights in the United States
 16:16 8 Constitution have been violated per *Adams v. Texas*,
 16:16 9 *United States Supreme Court, 448, U.S. 38* -- wherein the
 16:16 10 Court says, the touchstone was whether the imposition of
 16:16 11 the death penalty would follow automatically from
 16:16 12 affirmative answers to the questions that would have any
 16:16 13 effect at all in the juror's performance of their
 16:16 14 duties.
 16:16 15 Such a test can and did exclude jurors who
 16:16 16 stated that they would be affected by the possibility of
 16:16 17 the death penalty, but who apparently meant only that
 16:16 18 the potentially lethal consequences of the decision will
 16:16 19 invest their deliberations with greater seriousness and
 16:16 20 gravity, and that would involve them emotionally.
 16:16 21 And at this point, I'd ask the Court to
 16:16 22 recall that the juror stated, she would not violate her
 16:17 23 oath. She wouldn't like it. She would have to live
 16:17 24 with the fact that, perhaps she imposed the death
 16:17 25 penalty. But never did she say she would disregard her

16:17 1 oath as a juror or refuse to follow the questions of the
 16:17 2 Court.
 16:17 3 Adams goes on to state, others were
 16:17 4 excluded, and they are talking about trial court error
 16:17 5 in excluding these types of jurors. Others were
 16:17 6 excluded only because they were unable -- unable
 16:17 7 positively to state whether or not their deliberations
 16:17 8 would in any way be affected. But neither nervousness,
 16:17 9 emotional involvement, inability to deny or confirm any
 16:17 10 effect whatsoever is equivalent to an unwillingness or
 16:17 11 inability on the part of the jurors to follow the
 16:17 12 Court's instructions and obey their oaths, regardless of
 16:17 13 their feelings about the death penalty. The grounds for
 16:17 14 excluding these jurors were consequently insufficient
 16:17 15 under the 6th and 14th amendments.
 16:17 16 In our view the Constitution would not
 16:18 17 permit the exclusion of jurors from the penalty phase of
 16:18 18 a Texas murder trial. They state that they will
 16:18 19 honestly find the facts and answer the questions in the
 16:18 20 affirmative if they are convinced beyond a reasonable
 16:18 21 doubt, but not otherwise, yet who frankly concede the
 16:18 22 prospects of the death penalty may affect what their
 16:18 23 honest judgment of the facts would be or what they may
 16:18 24 deem to be reasonable doubt.
 16:18 25 Such assessments and judgments by jurors

16:18 1 are inherent in the jury system and exclude all these
 16:18 2 jurors who would be in the slightest way affected by the
 16:18 3 prospect of the death penalty or by their views about
 16:18 4 such a penalty would be to deprive the defendant of an
 16:18 5 impartial jury to which he or she is entitled under the
 16:18 6 law.

16:18 7 We repeat that the State may bar from jury
 16:18 8 service those whose beliefs about capital punishment
 16:18 9 would lead them to ignore the law or violate their
 16:18 10 oaths. But in the present case, Texas has applied
 16:18 11 strikes to exclude jurors whose only fault was that they
 16:19 12 could take the responsibilities with special seriousness
 16:19 13 or to acknowledge honestly that they might or might not
 16:19 14 be affected.

16:19 15 It does not appear in the record before us
 16:19 16 that these individuals were so irrevocably opposed to
 16:19 17 capital punishment as to frustrate the State's
 16:19 18 legitimate efforts to administer its constitutionally
 16:19 19 valid death penalty scheme. Accordingly, the
 16:19 20 Constitution disentitles the State to execute a sentence
 16:19 21 of death imposed by a jury from which such prospective
 16:19 22 jurors have been excluded.

16:19 23 Anyhow, that's the record I'd like to
 16:19 24 make, Judge, and I further object to the 6th and 14th
 16:19 25 Amendments, that the exclusion of juror Diane Marie

16:19 1 Kerr, Juror No. 15, violates my client's constitutional
 16:19 2 rights, both under the Texas Constitution and the United
 16:19 3 States Constitution.

16:19 4 We are now -- what the net effect of these
 16:19 5 rulings by the Court is, it diminishes our number of
 16:20 6 peremptory strikes because the State will -- each juror
 16:20 7 that comes up here and if the State gets rid of them for
 16:20 8 cause, they are not burning any peremptory strikes and
 16:20 9 that puts us at a serious disadvantage, Your Honor.

16:20 10 So, I object, and I would ask for future,
 16:20 11 for future jurors who fall under the type of a Diane
 16:20 12 Marie Kerr, Juror No. 15, that they not be allowed to be
 16:20 13 stricken for cause.

16:20 14 I know I'm asking for advance advisory
 16:20 15 opinions and rulings, but I feel it necessary at this
 16:20 16 point to protect my client. Thank you, Judge.

16:20 17 THE COURT: All right. Thank you.

16:20 18 MR. SCHULTZ: Judge, just one thing for
 16:20 19 the record, if I might. I know you've already ruled.
 16:20 20 And I want to make sure this appears in the record so
 16:20 21 somebody doing the appeal will find it.

16:20 22 When somebody says that going for a death
 16:20 23 penalty means that she's committing murder, it would
 16:20 24 seem to me that for a good Christian woman to be
 16:21 25 expected to commit murder in order to follow the Court's

16:21 1 oath would be something that would substantially impair
 16:21 2 her ability to do what's required of her. Those were
 16:21 3 her words. "I would feel that I'm committing murder if
 16:21 4 I voted any way that would cause the death penalty."

16:21 5 THE COURT: I want to ask you, do you want
 16:21 6 to offer her questionnaire?

16:21 7 MR. SCHULTZ: Please, please, Judge.

16:21 8 THE COURT: All right. All right. Then
 16:21 9 I'll tell you what. If you -- why don't you offer your
 16:21 10 copy then?

16:21 11 MR. SCHULTZ: It's been marked up. We'll
 16:21 12 get another copy.

16:21 13 THE COURT: All right. I tell you what,
 16:21 14 here's what I want you to do, if you would. Just make
 16:21 15 me a copy of yours. Mine is a clean copy. And we'll
 16:21 16 make this, if you want to have that marked and offer it.

16:21 17 MR. SCHULTZ: Couldn't we just offer all
 16:21 18 the questionnaires in the record. Then we won't have to
 16:21 19 do that on an individual basis. And then they'd always
 16:21 20 be part of the record, and we wouldn't have to think
 16:22 21 about it on an individual basis.

16:22 22 THE COURT: All right. I tell you what,
 16:22 23 at the close of the voir dire, does either side have any
 16:22 24 objection to offering all of the questionnaires?

16:22 25 MR. GOELLER: No, sir.

16:22 1 THE COURT: That's what we'll do.

16:22 2 MR. SCHULTZ: Do you still want me to do a
 16:22 3 copy of this one?

16:22 4 THE COURT: No. Let's make sure that we
 16:22 5 offer all 100 and how many are there? 177? All right.
 16:22 6 Tell you what, the next juror is going to be Jamie Ray
 16:22 7 Kay. She has marked question No. 1 with a circle, and
 16:22 8 I'm going to ask the defense to go first on this one for
 16:22 9 20 minutes. And if you feel like you are there, then
 16:22 10 you can ask her to do something. And if you are not,
 16:22 11 the State would start and admit No. 29.

16:22 12 (Venireperson Kay present.)

16:23 13 THE COURT: Are you Jamie Ray Kay?
 16:23 14 You've got my daughter's birthday, September 27th. I
 16:23 15 want to ask you, do you recall that I asked jurors last
 16:23 16 Tuesday to swear to tell the truth to all the questions
 16:23 17 that were propounded by either me or the attorneys?

16:23 18 VENIREPERSON: Yes, sir.

16:23 19 THE COURT: I want to remind you you are
 16:23 20 still under oath.

16:23 21 VENIREPERSON: Okay.

16:23 22 THE COURT: Please be seated. All right,
 16:23 23 Mr. Goeller?

16:23 24 MR. GOELLER: Thank you.

16:23 25 VOIR DIRE EXAMINATION

16:23 1 BY MR. GOELLER:
 16:23 2 Q. Good afternoon. Ms. Kay, it's Jamie Ray Kay,
 16:23 3 K-A-Y?
 16:23 4 A. Yes, sir.
 16:23 5 Q. How are you today?
 16:23 6 A. Good. How are you?
 16:23 7 Q. Pretty good. When you took your oath last,
 16:24 8 that's been a week ago, last Tuesday, you understand the
 16:24 9 nature of an oath, right?
 16:24 10 A. Yes, sir.
 16:24 11 Q. What kind of work do you do?
 16:24 12 A. I work for a CFO.
 16:24 13 Q. Chief financial officer?
 16:24 14 A. Yes.
 16:24 15 Q. Are you a notary?
 16:24 16 A. No, sir.
 16:24 17 Q. You probably work with notaries, though?
 16:24 18 A. Yes, sir.
 16:24 19 Q. Or have occasion to know what a notarized
 16:24 20 document is. You understand the nature of an oath, and
 16:24 21 I'm sure you take it very seriously in your line of
 16:24 22 work.
 16:24 23 A. Yes, sir.
 16:24 24 Q. Has anything about this questionnaire or
 16:24 25 anything that you can think of in the last week would

16:24 1 cause you to want to change an answer in your
 16:24 2 questionnaire?
 16:24 3 A. Not offhand. I mean, I don't remember all of
 16:24 4 the questions.
 16:24 5 Q. Oh, and I don't mean -- I'm not trying to
 16:24 6 nitpick you and make you sit here and think, there's 15
 16:24 7 pages of probably a hundred answers or questions. But I
 16:24 8 mean, overall, generally speaking about capital
 16:24 9 punishment, are you -- are your answers -- are your
 16:24 10 feelings today as they were a week ago under oath when
 16:25 11 you filled this out?
 16:25 12 A. Yes, sir.
 16:25 13 Q. I want you to know that the thing that we
 16:25 14 appreciate more than anything, and I think I speak for
 16:25 15 the State, I know I speak for the State on this, as well
 16:25 16 as us, is just your absolute frankness, candor and
 16:25 17 honesty, because this case is like nothing else in the
 16:25 18 world, well, at least in America.
 16:25 19 A. Right.
 16:25 20 Q. Because it involves potentially life or death.
 16:25 21 A. Yes, sir.
 16:25 22 Q. In your questionnaire, you circled out of your
 16:25 23 options on the death penalty, you circled No. 1. "I
 16:25 24 believe that the death penalty should be imposed in all
 16:25 25 capital murder cases."

16:25 1 A. Yes, sir.
 16:25 2 Q. Capital murder, I think you probably understood
 16:25 3 or you know that that's an intentional killing.
 16:25 4 A. Yes.
 16:25 5 Q. It's murder plus. In the indictment at hand
 16:25 6 the State has alleged murder in the course of a
 16:25 7 burglary, murder in the course of a robbery, and killing
 16:26 8 two people intentionally.
 16:26 9 A. (Moving head up and down.)
 16:26 10 Q. I think you also put in your questionnaire:
 16:26 11 Someone who murders someone should get the death
 16:26 12 penalty. Okay? That was your argument, your best
 16:26 13 argument in favor of the death penalty. And against the
 16:26 14 death penalty: If a person does not have adequate proof
 16:26 15 that he or she has murdered anyone, then they should not
 16:26 16 be given the death penalty.
 16:26 17 A. Yes.
 16:26 18 Q. And I -- my job here, I have -- I have no right
 16:26 19 whatsoever to disagree with your views on capital
 16:26 20 punishment.
 16:26 21 A. Uh-huh.
 16:26 22 Q. We have a sentencing scheme in Texas that
 16:26 23 allows a jury, once they have found somebody guilty
 16:26 24 beyond a reasonable doubt of capital murder --
 16:26 25 A. Uh-huh.

16:26 1 Q. -- really what boils down to two options, life
 16:27 2 or death. As I read your jury questionnaire as a whole,
 16:27 3 you are of the opinion that, if they have been found
 16:27 4 guilty of intentionally committing capital murder or a
 16:27 5 murder in a capital scheme, that they should get the
 16:27 6 death penalty and that life is not an option for you.
 16:27 7 A. Yes, sir.
 16:27 8 Q. And that's how you felt last Tuesday, and
 16:27 9 that's how you felt today?
 16:27 10 A. Yes, sir.
 16:27 11 Q. And neither myself nor anyone else is going to
 16:27 12 change your mind about that?
 16:27 13 A. No, sir.
 16:27 14 Q. These questions that we have, when somebody
 16:28 15 gets to these questions, these are the special issues,
 16:28 16 and you may remember these being put up. I can't
 16:28 17 remember if they were on the placards, or if they were
 16:28 18 on the PowerPoint up on the wall last week. But do you
 16:28 19 recall seeing those questions?
 16:28 20 A. Yes, sir.
 16:28 21 Q. These are questions that a jury is asked once
 16:28 22 they have found somebody guilty of capital murder.
 16:28 23 Based on your, and like I said, I don't disagree with
 16:28 24 you, there's nothing wrong with it. No one will
 16:28 25 chastise you. No one will debate you. No one will

16:28 1 argue with you, nothing, because that's your absolute
 16:28 2 right. But your feelings as a proponent of capital
 16:28 3 punishment, if you are the person who has already found
 16:28 4 somebody guilty of capital murder --
 16:28 5 A. Right.
 16:28 6 Q. -- you believe that a death sentence should
 16:28 7 take place?
 16:28 8 A. Yes, sir.
 16:28 9 Q. No matter what?
 16:28 10 A. Yes, sir.
 16:28 11 Q. And, therefore, these questions really don't
 16:28 12 figure into -- you would not give due deference to these
 16:29 13 questions because, based on your personal convictions,
 16:29 14 the proper punishment is death?
 16:29 15 A. Yes, sir.
 16:29 16 Q. In your questionnaire, ma'am, on page 4, I
 16:29 17 think -- I don't think, you were asked the question: If
 16:29 18 someone is accused of capital murder, he should have to
 16:29 19 prove his innocence. And you had five options -- yeah,
 16:29 20 five options. Anywhere from strongly agree to strongly
 16:29 21 disagree. And you circled agree, that the accused
 16:29 22 should have to prove his innocence.
 16:29 23 A. Uh-huh.
 16:29 24 Q. Again, I won't -- I absolutely will respect
 16:30 25 your answer. I was wondering why you circled that one.

16:30 1 A. Well, I feel like, if a person is on trial for
 16:30 2 a murder, that it should be proven that they actually
 16:30 3 committed the murder. And if they find that the person
 16:30 4 is guilty, then that's when they should be given the
 16:30 5 death penalty. But, I mean, there's been cases, I'm
 16:30 6 sure, that people have been found guilty, but they
 16:30 7 actually didn't do it. And I feel like it should be
 16:30 8 taken -- that they should find out for sure before.
 16:30 9 Q. So you are maybe saying in a case that, where a
 16:30 10 person was possibly not guilty -- well, I won't go
 16:30 11 there. It's so confusing, it even confuses me. It's
 16:30 12 probably not fair of me to read that to you. It's much
 16:30 13 easier as a person. If somebody says, did you write or
 16:30 14 did you say it, I always like to eyeball it so I know
 16:31 15 what they are talking about.
 16:31 16 This one right here: If someone is
 16:31 17 accused of capital murder, he should have to prove his
 16:31 18 innocence. And you circled "agree."
 16:31 19 A. Uh-huh.
 16:31 20 Q. I mean, I may not have understood your answers
 16:31 21 as to why you circled that one. Why did you circle that
 16:31 22 one again? Do you know what I'm saying? I think you
 16:31 23 had started to say something about if they are not
 16:31 24 guilty or something, but I thought maybe I would let you
 16:31 25 read it.

16:31 1 A. Well, I took it as, like I said, you know, a
 16:31 2 person -- if a person is on trial for capital murder,
 16:31 3 that they, you know, should have the chance to prove
 16:31 4 that they are innocent. And if it comes about that they
 16:31 5 are not, then that's when they should get the death
 16:31 6 penalty -- I mean, if they are found guilty.
 16:31 7 Q. Okay. Okay. During the first phase of the
 16:31 8 trial, when the jury is trying to figure out, are they
 16:31 9 guilty or not guilty, do you think the defendant should
 16:31 10 have to bring some proof to show he's not guilty?
 16:32 11 A. I don't understand the question.
 16:32 12 Q. During the first phase of the trial, not this
 16:32 13 phase, this phase is only if somebody is found guilty --
 16:32 14 A. Right.
 16:32 15 Q. -- of some offense. But in the first phase of
 16:32 16 a trial, the jury's sole inquiry is: Are they guilty or
 16:32 17 are they not guilty? During that phase of the trial,
 16:32 18 would you expect a person accused of capital murder to
 16:32 19 bring you some evidence that they are not guilty?
 16:32 20 A. Yes.
 16:32 21 Q. Okay. Tell me why you believe that.
 16:32 22 A. I honestly don't know.
 16:32 23 Q. But the defendant, and is that unique to
 16:32 24 somebody accused of capital murder?
 16:32 25 A. No. I think that's with any case.

16:32 1 Q. All right. So you don't necessarily believe --
 16:33 2 let me see -- a defendant is innocent until proven
 16:33 3 guilty beyond a reasonable doubt, and you circled agree
 16:33 4 there. And I suppose how you reconcile those two, that
 16:33 5 although they are presumed innocent, they've got a
 16:33 6 burden. They should have a burden of proof to prove
 16:33 7 their innocence during that phase of the trial?
 16:33 8 A. Right.
 16:33 9 Q. Okay. All right. Have you held that belief
 16:33 10 for a long time?
 16:33 11 A. Yes, sir.
 16:33 12 Q. Okay. Anything, any particular reason why you
 16:33 13 held that belief --
 16:33 14 A. No.
 16:33 15 Q. -- so long? Just, you think that if, and a lot
 16:33 16 of people, I think believe this. If you are accused of
 16:33 17 a crime, you should say something, prove your innocence,
 16:33 18 bring forth evidence.
 16:33 19 A. Right.
 16:34 20 Q. Even though the State and the laws say, the
 16:34 21 defendant has no burden of proof, you honestly believe
 16:34 22 they do and should have a burden?
 16:34 23 A. Uh-huh.
 16:34 24 Q. I got to have you say yes or no.
 16:34 25 A. Yes.

16:34 1 Q. I'm not -- you and I could have coffee. We
 16:34 2 could do that, and she gets mad at me if she can't take
 16:34 3 that down that. Okay. Okay. In one of the questions
 16:34 4 in the questionnaire it said: "Do you believe the death
 16:35 5 penalty is applied fairly in Texas?" You circled "no."
 16:35 6 And you said, "I believe that anyone who murders should
 16:35 7 receive the death penalty, but in some cases they were
 16:35 8 given life." And I think that is very consistent and
 16:35 9 honest with the answers you previously have given me.

16:35 10 Because, as you sit there, based on your
 16:35 11 personal beliefs and your values, Jamie Kay does not
 16:35 12 believe that life, the reason why you answered that
 16:35 13 question, it's not fair, is because some people got
 16:35 14 life. And you believe that, if you are convicted of
 16:35 15 capital murder, you ought to get the death sentence?

16:35 16 A. Yes, sir.

16:35 17 Q. Okay. Or murder. Do you draw a distinction
 16:35 18 between capital murder and murder?

16:35 19 A. No. I mean, I'm --

16:36 20 Q. It's all the taking of a human life.

16:36 21 A. Right.

16:36 22 Q. Do you believe that the death sentence should
 16:36 23 be the proper punishment in any murder case?

16:36 24 A. Yes, sir.

16:36 25 Q. Okay. Okay.

16:36 1 MR. SCHULTZ: Done?

16:36 2 MR. GOELLER: I probably ran out of time,
 16:36 3 anyway.

16:36 4 THE COURT: No. You started at 4:25, and
 16:36 5 it's only 4:37. I know that time flies when you are
 16:36 6 doing this work, but so you've only used 12 minutes. If
 16:36 7 you want to use more, fine. If you want to pass the
 16:36 8 witness, pass the witness.

16:36 9 MR. GOELLER: I pass. I'll pass and then
 16:36 10 obviously --

16:36 11 THE COURT: Then you'll come back?

16:36 12 MR. GOELLER: I'll have some motion to
 16:36 13 make to the Court.

16:36 14 MR. SCHULTZ: Ms. Lowry will speak for the
 16:36 15 State, Judge.

16:36 16 VOIR DIRE EXAMINATION

16:36 17 BY MS. LOWRY:

16:36 18 Q. My name is Ms. Lowry. As you know they
 16:36 19 introduced us all on last Tuesday. First of all, I want
 16:37 20 to talk to you just a little bit about your jury
 16:37 21 service. You checked on your questionnaire that you
 16:37 22 don't really want to be on this jury; is that right?

16:37 23 A. Yes.

16:37 24 Q. Let's talk about that just a minute. You have
 16:37 25 a three-year-old daughter; is that correct?

16:37 1 A. Yes, I do.

16:37 2 Q. Is there any reason why you didn't take that
 16:37 3 opportunity to exercise your exemption as far as having
 16:37 4 a child under ten?

16:37 5 A. Well, if I'm not mistaken, I think that the
 16:37 6 exemption was only for if you are a single parent with a
 16:37 7 child under the age of ten. I did not realize that it
 16:37 8 was or that you were the only sole caregiver. And I
 16:37 9 thought that's the way.

16:37 10 Q. It's actually if you are the primary caregiver.

16:37 11 A. I have a husband, but he works at night
 16:37 12 sometimes, so.

16:37 13 Q. Now, when you filled out this questionnaire,
 16:37 14 what was your understanding of what capital murder was?

16:37 15 A. I really haven't given it much thought about
 16:37 16 the difference between capital murder and murder.

16:37 17 Q. Because also in your questionnaire, I see that
 16:37 18 you checked under life confinement that you believe life
 16:37 19 confinement in prison is appropriate in some capital
 16:38 20 murder cases, and you could return a verdict resulting
 16:38 21 in life confinement in a proper case.

16:38 22 A. Right.

16:38 23 Q. Talk to me a little bit about that. What were
 16:38 24 you thinking about whenever you were reading that
 16:38 25 question?

16:38 1 A. I don't know. Can you repeat the question?

16:38 2 Q. It just asked you to check which of the
 16:38 3 following statements best represents your feelings about
 16:38 4 life confinement in prison. And the one that you
 16:38 5 checked was that you believe life confinement in prison
 16:38 6 is appropriate in some capital murder cases, and you
 16:38 7 could return a verdict resulting in life confinement in
 16:38 8 a proper case.

16:38 9 A. To be honest with you, I don't even -- I don't
 16:38 10 even remember the question and why I came up with it.

16:38 11 Q. Basically what we need to know is whether or
 16:38 12 not you can fairly consider the evidence when you are
 16:38 13 answering certain questions in the punishment phase.
 16:38 14 Usually the questions that we're asking you right now
 16:38 15 are assuming that someone has been found guilty of
 16:38 16 capital murder.

16:38 17 In order to be qualified as a juror to sit
 16:38 18 on this panel, you have to be able to fairly listen to
 16:39 19 the evidence and fairly answer questions like this first
 16:39 20 special issue of whether or not, based on the evidence,
 16:39 21 you think somebody might be a future danger.

16:39 22 A. Uh-huh.

16:39 23 Q. Do you think that's something that you would be
 16:39 24 able to do?

16:39 25 A. No.

16:39 1 Q. You don't think you would fairly be able to
 16:39 2 listen to the evidence?
 16:39 3 A. Oh, yes. I'm sorry, yes. I'm sorry. I'm
 16:39 4 nervous.
 16:39 5 Q. That's okay. I'm as nervous as you are, I
 16:39 6 promise you. My question basically is, I understand
 16:39 7 that, you know, certainly, if it's a horrible crime, you
 16:39 8 think that someone should get the death penalty?
 16:39 9 A. Yes, ma'am.
 16:39 10 Q. Is that what you are telling me?
 16:39 11 A. Yes, ma'am.
 16:39 12 Q. Let's take -- let's, as an example, let me
 16:39 13 remind you of what Mr. Schultz was talking to you about
 16:39 14 on Tuesday. What about an instance where you have a
 16:39 15 father whose child had been murdered, two people had
 16:39 16 killed the child and got off on some kind of
 16:39 17 technicality in court and basically walked out of the
 16:39 18 courtroom laughing. Certainly you can see that's going
 16:39 19 to be very upsetting to the father. He then goes out
 16:39 20 and kills them both.
 16:40 21 A. Right.
 16:40 22 Q. That technically is capital murder because he's
 16:40 23 killed two people.
 16:40 24 A. Yes, ma'am.
 16:40 25 Q. Do you think even in an instance like that,

16:40 1 that capital murder -- is that something that you still
 16:40 2 think requires the death penalty?
 16:40 3 A. I guess murder is murder. It doesn't matter if
 16:40 4 it was because of, you know, it was your family member
 16:40 5 that was murdered and you are doing it in retaliation.
 16:40 6 Murder is murder.
 16:40 7 Q. So even in an instance like that, you would
 16:40 8 think: I don't care why he did it, I know he's not
 16:40 9 going to kill anybody else, you are still going to vote
 16:40 10 for the death penalty?
 16:40 11 A. Yes, ma'am.
 16:40 12 Q. Is that because you -- I mean, that's how you
 16:40 13 really feel or is that because you really don't want to
 16:40 14 be on the jury?
 16:40 15 A. That's how I really feel.
 16:40 16 Q. At this stage of the trial in the punishment
 16:40 17 phase, the Judge is going to give you certain
 16:40 18 instructions. One of those instructions is that you are
 16:41 19 to fairly listen to the evidence and fairly consider the
 16:41 20 evidence when your answering these questions.
 16:41 21 Another instruction is going to be that
 16:41 22 you can't take into consideration what you want the
 16:41 23 result to be and answer the questions in a way that's
 16:41 24 going to cause that result. Does that make sense?
 16:41 25 A. Yes.

16:41 1 Q. Are you telling me that you are not going to
 16:41 2 follow the law that the Judge has given you in this
 16:41 3 case?
 16:41 4 A. No, ma'am.
 16:41 5 Q. Okay. Then I'm not sure that I understand.
 16:41 6 A. I don't know. I'm sorry. Can you repeat it?
 16:41 7 Q. Well, the Judge is going to give you a law or
 16:41 8 the law in this case that basically says, you are to
 16:41 9 listen to the evidence that comes in, fairly evaluate
 16:41 10 it, and answer these questions.
 16:41 11 A. Okay.
 16:41 12 Q. And not in regards to what the result is going
 16:41 13 to be. That meaning, even if you want the death
 16:41 14 penalty, if the evidence doesn't show that this person
 16:41 15 is going to be a future danger, then your answer to that
 16:41 16 question is going to be no. Are you going to fairly
 16:41 17 listen to the evidence and answer the questions based on
 16:41 18 what that evidence is because that's the law the Judge
 16:41 19 is going to give you?
 16:42 20 A. Yes, ma'am.
 16:42 21 Q. So you are going to listen to the evidence and
 16:42 22 answer the questions strictly on what the evidence is?
 16:42 23 A. Yes, ma'am.
 16:42 24 Q. And you are not going to, at that point, take
 16:42 25 into account what you want the result to be when you are

16:42 1 answering these questions?
 16:42 2 A. Yes, ma'am.
 16:42 3 Q. So if this question comes up and, say, which
 16:42 4 the burden of proof on this question is on the State.
 16:42 5 We have to prove to you beyond a reasonable doubt that
 16:42 6 he's going to be a future danger.
 16:42 7 A. Yes.
 16:42 8 Q. If we don't prove that to you, are you going to
 16:42 9 answer that question no?
 16:42 10 A. No.
 16:42 11 Q. You are going to answer that question yes,
 16:42 12 regardless of what the evidence is, because you are
 16:42 13 bound and determined to have the death penalty; is that
 16:42 14 correct or incorrect?
 16:42 15 A. That's correct.
 16:42 16 MS. LOWRY: Pass the juror.
 16:42 17 THE COURT: Any further questions?
 16:42 18 MR. GOELLER: No, sir.
 16:42 19 THE COURT: Any challenge?
 16:42 20 MR. GOELLER: Yes, sir.
 16:42 21 THE COURT: All right. It's granted. You
 16:42 22 are finally excused.
 16:42 23 (Venireperson Kay excused.)
 16:43 24 THE COURT: We'll do No. 14 and 16 first
 16:43 25 thing in the morning. And then we're going to continue

16:43 1 with people who are scheduled for August 29th.

2 (Court adjourned.)

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1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS
3 COUNTY OF COLLIN

4 I, Barbara L. Tokuz, CSR, RMR, CRR, Deputy Official
5 Court Reporter in and for the 380th Judicial District
6 Court of Collin County, State of Texas, do hereby
7 certify that the above and foregoing contains a true and
8 correct transcription of all portions of evidence and
9 other proceedings requested in writing by counsel for
10 the parties to be included in this volume of the
11 Reporter's Record, in the above-styled and -numbered
12 cause, all of which occurred in open court or in
13 chambers and were reported by me.

14 I further certify that this Reporter's Record of the
15 proceedings truly and correctly reflects the exhibits,
16 if any, offered by the respective parties.

17 WITNESS MY OFFICIAL HAND this the 11th day of
18 February, 2002.

19
20 
21 Barbara L. Tokuz, CSR #4615, RMR, CRR
22 Deputy Official Court Reporter
23 Expiration Date: 12/31/2002
24 1855 Wind Hill Road
25 Rockwall, Texas 75087