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2
3
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5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
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R E P O R T E R ' S R E C O R D

VOLUME 16 OF 53

Trial Court Cause No. 380-80047-01

THE STATE OF TEXAS * IN THE 380TH DISTRICT COURT

*

V. *

*

IVAN ABNER CANTU * OF COLLIN COUNTY, TEXAS

REPORTER'S RECORD

VOLUME 16 - VOIR DIRE

CAPITAL MURDER JURY TRIAL

CLERK OF DISTRICT COURT
COLLIN COUNTY, TEXAS

COPY

On the 6th day of September, 2001, from 9:00 a.m. to 5:30 p.m. the Voir Dire proceedings came on to be heard outside the presence of a jury, in the above-entitled and -numbered cause; and the following proceedings were had before the Honorable Charles F. Sandoval, Judge Presiding, held in McKinney, Collin County, Texas:

Proceedings reported by Computerized Stenotype Machine; Reporter's Record produced by Computer-Assisted Transcription.

LISA M. RENFRO, Texas CSR #4534

Official Court Reporter - 380th Judicial District Court

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COLLIN COUNTY, TEXAS
[Signature]

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1 PROCEEDINGS
 2 (Open court, jury not present.)
 3 THE COURT: Back on the record in Cause Number
 4 380-80047. The Defendant is present, as is Mr. Goeller,
 5 Mr. Schultz, Ms. Falco and Ms. Lowry. Is there anything to
 6 take up before we start?
 7 MR. GOELLER: I think we're reviewing some of
 8 these questionnaires, and I think we have some agreements.
 9 THE COURT: Do you want a little time?
 10 MR. GOELLER: I think we can get started. We
 11 have some announcements on jurors later on in the day.
 12 THE COURT: We can do it now, whatever you
 13 want.
 14 MR. SCHULTZ: It will be right after the first
 15 one.
 16 THE COURT: Do you want to do it now while
 17 we've got a break?
 18 MR. GOELLER: Okay. Judge, I think we've
 19 agreed to strike Juror Number 58, that would be Mr. Gary
 20 Spence, and Juror Number 57, Kim Lien Tran.
 21 MR. SCHULTZ: That's correct. And that's a
 22 negotiated agreement. Kind of our view on all this is we take
 23 one we don't like, and they take one they don't like, but all
 24 these agreements are always contingent upon the approval of
 25 the Defendant and not just his attorneys.

1 CHRONOLOGICAL INDEX
 2 September 6, 2001
 Voir Dire
 3 Volume 16
 4 VENIREPERSONS
 Name/Examination By: STATE DEFENSE PAGE V.
 5
 SPENCE, GARY 14
 6 Excused by Agreement 4
 7 TRAN, KIM-LIEN 14
 Excused by Agreement 4
 8
 STONE, KELLY 5 56 14
 9 State's Challenge for Cause granted 66
 10 TRUE, CATHY 14
 Excused by Agreement 67
 11
 ROUNTREE, JAMES 14
 12 Excused by Agreement 67
 13 BLACKWELL, DANIEL 69, 128 120 14
 Defendant's Challenge for Cause denied 135
 14 Defendant's Peremptory strike 136
 15 NODDIN, FRED 137 166 14
 Excused by Agreement 178
 16
 17 PAGE
 18 Reporter's Certificate 180
 19 End of Volume 16.
 20
 21
 22
 23
 24
 25

1 THE COURT: So I guess I should ask the
 2 Defendant, is that your desire to strike Number 57 and
 3 Number 58?
 4 THE DEFENDANT: Yes, Your Honor.
 5 THE COURT: All right. The agreements are
 6 approved.
 7 Let's bring in the next one, Billy.
 8 THE BAILIFF: Yes, Your Honor.
 9 (Venireperson enters the courtroom.)
 10 THE COURT: Ma'am, are you Kelly Stone?
 11 VENIREPERSON: I am.
 12 THE COURT: And you're Number 56. I just want
 13 to remind you that I put everybody under oath, and you are to
 14 give true answer to the questions for both sides and to me,
 15 and I just want to remind you you're still under that oath.
 16 VENIREPERSON: Okay.
 17 THE COURT: Please be seated.
 18 Mr. Schultz.
 19 DIRECT QUESTIONS
 20 BY MR. SCHULTZ:
 21 Q. Good morning, ma'am.
 22 A. Hi.
 23 Q. My name is Bill Schultz. I'm one of the Assistant
 24 District Attorneys representing the State of Texas, and you
 25 may recall -- it's been a matter of weeks now -- but I gave

1 the general presentation for the State at the opening of these
2 proceedings.

3 To my left at this table is Ms. Gail Falco, a chief
4 felony prosecutor assigned to another district court but on
5 loan to this court for the duration of this prosecution. To
6 her left at the end of our table is Ms. Jami Lowry, an
7 Assistant District Attorney ordinarily assigned to this court.
8 And I only tell you that, we assign prosecutors to particular
9 courts to service the State's business in those courts, and
10 that could be anywhere from announcements to motions to
11 anything that might occur in the courtroom, and this is
12 certainly, in terms of complexity, probably the most
13 complicated type of work that we ever do.

14 At the defense table is the Defendant, Ivan Cantu.

15 A. Hi.

16 Q. And to his left, your right, is Mr. Matt Goeller, a
17 very fine --

18 MR. GOELLER: Good morning, ma'am.

19 Q. -- practicing attorney in Plano, Texas. He has
20 another attorney that you may or may not recall seeing,
21 Mr. Don High. And one of the advantages of having more than
22 one attorney on each side, other than just there's a lot of
23 material to master and to keep control of, is that people can
24 be in and out from time to time and doing other things related
25 to this case or otherwise, and we still keep moving along.

1 A few observations before we begin. I have asked
2 this question of all jurors we've examined so far, and it's
3 interesting, there's some questions you almost for sure know
4 the answer to, but yet you still need to ask it. And my
5 question is this, when you woke up this morning and realized
6 this is the day you're coming up here to be examined to see
7 whether or not you would serve on a death penalty jury, did
8 you find yourself thrilled at the prospect somehow that you
9 could be involved in possibly doing work that would result in
10 somebody's death? Were you excited about that?

11 A. No.

12 Q. Okay. And nor should, I hope, anybody take delight
13 in that or pleasure. I mean, I can tell you, quite frankly,
14 this is not something that I wake up in the morning and say,
15 you know, one step closer toward the result that I may believe
16 will fall from the evidence.

17 I think most people, when they think of capital
18 punishment -- most people of conscience, view it as perhaps a
19 regrettable necessity for society. I can't imagine any human
20 being not wishing we had a Utopia where we never needed a
21 death penalty, or we didn't even need prisons. What a great
22 place it would be if we didn't have crime and have to deal
23 with that problem, just like other things in our society we
24 wish we didn't have, and we do the best we can trying to make
25 it better for those of us who don't break the law.

1 And I also say that -- you might recall a couple of
2 weeks ago when I asked the jury -- this was after you filled
3 out the questionnaire. But I asked the jury to take a moment,
4 look at the Defendant -- which, by the way, you can do all you
5 want here. It's perfect -- it's not like something you're not
6 supposed to be watching him, or something. That's all fine,
7 but you don't have to. Find your own comfort level up there.

8 But I asked the jury to take a moment and look at
9 the Defendant and realize that it was our position that we
10 would prove to the jury beyond a reasonable doubt that the
11 Defendant is guilty of capital murder in one of the varieties
12 that we've alleged in the indictment. And we further propose
13 to prove to the jury that the special issues should be
14 answered in such a way that a death sentence upon the
15 Defendant would result from this legal process that we have.
16 And I talked a little bit -- I talked actually very
17 graphically about how it would be, and the fact that this was
18 not going to be a voluntary execution perhaps; nevertheless,
19 it would be carried out in accordance with our law. And I'm
20 hoping your take on that was not that I was trying to be
21 entertaining or that it was somehow shock-value, being graphic
22 or something like that. I hope what you understood was that I
23 think both sides owe it to any juror that's going to sit on
24 this case to force those jurors to get really in touch with
25 how they feel on this issue, and I think there's several

1 reasons that's important. That's our approach, and perhaps in
2 a different way it's the Defense's approach, too.

3 I think we owe, first of all -- first and foremost
4 to the jurors because this isn't easy stuff. This isn't like
5 whether you give somebody a certain amount of damages because
6 their SUV rolled over and they got hurt. While that's
7 important to them, and they may deserve to be compensated,
8 it's not the same level of human experience, I think, as is
9 death penalty stuff. I mean, it's still money. It's not the
10 same as human life, so I think that's important. And I want
11 to make sure that jurors really understand what they're about
12 to get into.

13 We do things in our lives, and I don't know about
14 you, but I know looking back on mine and people I know, we do
15 things sometimes in our lives where we say we're for
16 something, and yet, deep in our heart, maybe we're not, or we
17 say we're against something and deep in our heart maybe we're
18 not. And it's almost, like, down the road we wonder, why
19 didn't I stand up and say something about that then? Why
20 didn't I say this isn't how it ought to be? That can be a lot
21 of things. I mean, people go in the military, and they wonder
22 why did I volunteer for this? I knew it wasn't me when I did
23 that. I knew I didn't belong in the -- you know, why did I do
24 that? People get married that way. How in the world did I
25 get here? They wake up one morning thinking how did this

1 happen? I knew better when I did it. People take jobs they
2 don't want. They move places sometimes they just know, and I
3 don't want somebody on a jury not having some good idea about
4 how he or she feels about the death penalty because you've got
5 a long life ahead of you, and you've got to be able to look
6 back on this, not with pleasure, but with self-respect.
7 Twelve people got to come out of here, whatever happens,
8 respecting the fact that they did a hard job. Does that make
9 sense to you?

10 **A. Uh-huh.**

11 **Q.** All right. You seem to be a person that's done
12 some thinking about this in your life because I noted on your
13 questionnaire that you indicated you might have had different
14 opinions at a younger age about the death penalty, and
15 probably that's true for many of us.

16 Many times I think we start out being more
17 idealistic than we get as we go through life and have our
18 disillusionment or have our surprises or understand people
19 better than we do when we're 17, for example. But you
20 indicated that when you were younger you were opposed to the
21 death penalty; is that correct?

22 **A. Uh-huh.**

23 **Q.** Tell me, first of all, if you would, how did you
24 find yourself even thinking about that issue enough to have an
25 opinion on it one way or another?

1 **A. When I was younger?**

2 **Q.** Uh-huh.

3 **A. I think it had to do with the religion that I was.**
4 **I was raised Church of Christ, and that is just completely**
5 **against death penalty, and so I fell in line with that**
6 **thinking and just did not believe in it under any**
7 **circumstance.**

8 **Q.** You know, there are people that are for the death
9 penalty. There are people that are kind of in the middle, and
10 they don't -- I guess it's okay, but I never really thought of
11 it, and there are people that are against it. And I guess
12 there are -- at those extremes there are people at both
13 ends -- ends of all that.

14 But I think the religious aspect is the one that we
15 hear most frequently for people who are opposed to it. I
16 think when you were younger, I think you're right in line. I
17 was not aware that the Church of Christ had a position on
18 that, but I can see how that happened. I know other faiths
19 do. I know the Roman Catholic Church is, if not doctrinally
20 opposed to the death penalty per se, certainly takes a pretty
21 strong position on the subject. And I know that the Society
22 of Friends, Quakers, take an official position against the
23 death penalty, and I didn't know about the Church of Christ,
24 and I suspect there are other religions.

25 I have a sense, without knowing, that there are some

1 eastern religions that probably do. I have a sense without
2 knowing, for example, that the Buddhist Church is officially
3 against, to the extent there is an official church in
4 Buddhism.

5 But be that as it may, in our society it is
6 possible for our church to be against something, and yet
7 either we disagree with the church and still find ourselves
8 within that church, or in the alternative, we just disregard
9 it and go ahead, anyway. Do you feel like it would be
10 possible for you to be a member of the church and the church
11 have a position on a certain thing, and yet still you would
12 make the decision that either you didn't agree with the
13 church, or I agree with the church in principle but that
14 doesn't quite work in my situation, and I have to do what I
15 believe. Are you that kind of person?

16 **A. Uh-huh. Yes.**

17 **Q.** Let me explain something to you. You might notice
18 and you might hear that there's a person right next to you
19 who's typing, or taking all this information down. Virtually
20 every word that's said in this trial from the "good morning,
21 everybody" by the Judge, to the "we're going to recess for the
22 afternoon or the evening," virtually every word is taken down
23 and has to be. So sometimes even though you and I are
24 perfectly communicating if you were to nod your head yes or
25 no, please don't think I'm being demanding if I say, well, I

1 need to get an answer from you, because it's very hard for the
2 court reporter to take down a nod of the head. It's
3 interesting. Some will. If they can understand that it's an
4 affirmative nod, they will note in the record "nods
5 affirmatively." And other reporters will take the position,
6 if it's not spoken, it doesn't exist. And so, without having
7 to worry about that or whether the nod was noticed by the
8 reporter, I'll just say I need an answer yes or no. It's not
9 rudeness, and I'm not trying to be difficult. It's just
10 everything we do is highly regulated in this trial.

11 And why I ask you those questions about could you
12 disregard church teachings, the Roman Catholic Church
13 certainly has official positions, for example, on a number of
14 things that may seem incompatible with American life. I don't
15 know how much you pay attention to that or if it's of interest
16 to you, but the death penalty is certainly one that a majority
17 of the American people seem to favor having a death penalty.
18 And yet, the Roman Catholic Church at least seems to disfavor,
19 although I don't know -- I'm not a Catholic, so I don't know
20 exactly what that means and what that might mean for a Roman
21 Catholic to disregard that from jury service.

22 I know that most churches take the position that
23 what we're doing in a courtroom is not religious work. I
24 mean, almost the idea of separation of church and state, and
25 it would be a very unusual faith that would somehow say that

1 it's -- you're supposed to disregard the laws of the state or
2 the nation in favor of the religion, because there are many
3 things in Scripture that say just the opposite. There are two
4 things going on; there's God's law and there's man's law and
5 people's law, I guess. And you got to do it differently.

6 Do you still attend a church?

7 A. No.

8 Q. And I apologize for even asking this. Ordinarily,
9 it's none of my business, and -- but only because of how much
10 religion interplays with the death penalty and that whole
11 concept, if it's okay with you, I'd like to just kind of ask
12 you a little bit about where you are in that and how that
13 occurred, because it sounds like religion played a part in
14 your earlier views on the death penalty.

15 Kind of roughly when in your life did you cease
16 involvement with the church?

17 A. Probably my mid-20s.

18 Q. That's certainly a time when -- that's certainly
19 within that time range when lots of us do that sort of thing.
20 Sometimes it's when we go off to college or go in the
21 military, something like that.

22 I get a sense from you, but I could be wrong. I get
23 a sense that maybe you viewed the Church of Christ in many
24 ways as a little too controlling or sometimes when you were
25 growing up in it, or am I right about that?

1 A. No. I still believe in the teachings that they
2 teach. I chose to stop going because it was an incident that
3 I had during a divorce that was a Biblical divorce that they
4 did not support me in. So at that point, I kind of
5 re-examined. Maybe I need to figure things out on my own,
6 instead of just going by what they're teaching me. I need to
7 figure it out on my own, so that's why I quit.

8 Q. That's sort of an example of what I'm talking
9 about. It sounds like you ended up having to make a personal
10 choice to split from the teachings, at least from that
11 particular church, if not the entire Church of Christ --

12 A. Uh-huh.

13 Q. -- organization.

14 If you read -- if you read the Bible, I guess
15 it's -- I guess it's clear, at least clear as mud, that we're
16 not supposed to be killing as human beings because -- and it's
17 kind of funny because there's nothing in -- there's nothing in
18 there that has any exceptions, even though we seem, as people,
19 to recognize certain exceptions to that rule.

20 An example is we know they were having wars back
21 when the Ten Commandments were revealed. We know that -- as a
22 matter of fact, that was about half the war going on at the
23 time with Moses and all these people, so we know that. And
24 yet, it doesn't say thou shalt not kill, except in wartime.
25 It just says thou shalt not kill. Some people read that, and

1 they say, well, that means I can't carry a rifle and go to
2 combat, and that's how we get conscientious objectors and
3 that sort of thing, passivists, the kind of people that they
4 say it doesn't say otherwise.
5 And most of us think it's okay to kill in
6 self-defense if you've got to. You're home tonight and
7 minding your own business, and the next thing you know here
8 comes an intruder coming in to do you harm or death or
9 something like that. Most of us feel that it is moral and
10 acceptable to not give up our life to avoid taking somebody
11 else's, when we're minding our own business and he's not. And
12 yet, it doesn't say that in the Bible.

13 It just says -- as a matter of fact, it's worse than
14 that. It says -- not only does it not say you can't kill in
15 self-defense, I mean some people say that turn the other cheek
16 concept kind of means you've got to let him kill you. I mean,
17 it's almost like a guy slaps me in the face. Most of us think
18 we're supposed to slap him back, you know? But maybe the
19 Bible says let him hit you again kind of thing until he gets
20 tired.

21 And it doesn't say anything in there about
22 accidental killing. For example, you're a surgeon at the
23 emergency room, and you've been working too many hours, and
24 some guy comes in and you get to working on him because he's
25 been hurt, and you end up making a mistake and you kill him,

1 like happens sometimes regrettably. It doesn't say thou shalt
2 not kill, except accidentally. I mean, it doesn't say any of
3 those kinds of things. It simply says thou shalt not kill.
4 It doesn't say thou shalt not kill except in a capital murder
5 case. There's nothing that says it's okay to kill if it's
6 part of the legal process with trials and lawyers and
7 defendants and that sort of thing. So, different people look
8 at all that differently.

9 And other people, they say, well, that's all
10 historical, because they had executions back when the Ten
11 Commandments were revealed and read that Old Testament stuff.
12 They're always talking about killing somebody for this or
13 that, and you stone them to death if they do this, or you
14 crush them or you burn them. There's all that stuff in the
15 Bible. So, it's all pretty confusing, and I guess it ends up
16 to many people the Biblical teaching might just depend on who
17 you're listening to or what you're reading sometimes.

18 You've indicated now, however, that you are not in
19 favor of the death penalty. At least on your questionnaire
20 you circled, when given the choice of yes or no, you circled
21 cannot say for certain that I would not -- that I would or
22 would not be in favor. It depends on the circumstances, and I
23 learn more -- I lean more towards not being in favor of it.

24 And that's perfectly reasonable. First of all,
25 there wasn't any explanation to you about how we did it in

1 Texas or what the rules are. When you answered that, that was
 2 kind of -- I look at this survey as just almost like a what
 3 are your attitudes on all kinds of things? How do you feel
 4 about, maybe, gun control? How do you feel about the criminal
 5 justice system in general? What do you think about
 6 prosecutors? What do you think about defense attorneys? Do
 7 people have too many rights? It's never a question of will
 8 you follow the law if you're put on the jury? It's just a
 9 what-do-you-think kind of question.

10 And I use that as an example because some people
 11 were asked, do you think criminals have too many rights in our
 12 society? And they say, yeah, I think so. I think they get --
 13 I think sometimes we spend so much time wringing our hands
 14 over these trial proceedings that we end up almost looking
 15 like we lose our resolve. And then if they end up being
 16 convicted, they get to watch TV, and they get movies and they
 17 get, you know, this and that when they're in prison. And many
 18 people say, yeah, I think -- since you asked me, I think
 19 criminals have too many rights in our society. I work hard to
 20 do right, and then I got to support criminals, too.

21 And that's okay. That doesn't make you an unfair
 22 juror as long as what you believe in your -- as an attitudes
 23 doesn't prevent you from fairly measuring the evidence later
 24 on. Does that make sense to you?

25 **A. Uh-huh, yes.**

1 we don't care about fellow human beings, we don't want to go
 2 to jail and have to pay fines and have our jobs messed up and
 3 all that sort of thing. And so they say, well, the reasons
 4 for DWIs, which doesn't require intent. The driving while
 5 intoxicated defendant probably doesn't get in his car and say
 6 who can I go out and hurt tonight? They're not thinking.
 7 They're not paying attention. They've got to drink all the
 8 time, and sometimes they've got to drive before they do their
 9 drinking, and then they figure they're okay or the odds are
 10 fine, or they're in denial about how much they're drinking,
 11 all those kinds of things. They drive home.

12 Some jurors say it's absolutely wrong to put
 13 somebody like that in prison because it's not a regular kind
 14 of crime. They're not looking to hurt anybody. They're sick.
 15 They've got a sickness, alcoholism, and it's almost like
 16 putting somebody in jail because they have tuberculosis, or --
 17 I don't know -- some kind of disease that nobody knows quite
 18 how they caught and that disease has a lot of symptoms. It's
 19 kind of like that. And if you ask them, well, since you think
 20 prison isn't the right way our society is going, could you sit
 21 on a jury where you have to decide punishment that could
 22 result in prison for somebody driving while intoxicated?
 23 They'll say, well, yeah, I could. Just because I don't think
 24 the law is exactly the right way, I don't have such a passion
 25 for it that's it's going to interfere with my ability to

1 Q. And the same thing with having -- not being --
 2 leaning against the death penalty, or not being in favor of
 3 the death penalty. It seems, at first, that you'd say, well,
 4 how could I be a qualified juror if I'm up here telling
 5 everybody that I'm leaning against the death penalty because
 6 it sounds like then I'm not a fair juror. This is America.
 7 You can have your opinions and attitudes about anything, and
 8 if people don't respect them, they don't have a right. They
 9 don't respect the freedom to have attitudes, however you want
 10 them, they're missing the whole point.

11 What a juror needs to have is a willingness and an
 12 ability to measure the evidence and apply the law that the
 13 judge says relates to that evidence, and that means even if
 14 you don't like all the law that you still are able to apply it
 15 correctly. Are you with me on that?

16 **A. Uh-huh.**

17 Q. I like to use the example of driving while
 18 intoxicated cases. Not always, but many times when people
 19 have DWIs, if you look at their life with scrutiny, they've
 20 probably got a drinking problem. Some people say they have
 21 got a driving problem. The drinking isn't it, but the core of
 22 people that get DWIs are probably alcoholics. Are you with me
 23 on that?

24 **A. Uh-huh.**

25 Q. Because you and I know better to do that. Even if

1 measure -- to measure evidence.

2 Do you see yourself as being that kind of person in
 3 a death penalty case, that you have the ability to measure the
 4 evidence, and even if you lean against the death penalty what
 5 will control how you answer the question is how you see the
 6 evidence?

7 **A. I think that I need to be really honest and tell you
 8 that I did a lot of thinking about this.**

9 Q. Okay.

10 **A. And I think I'm a very fair person. I really don't
 11 preconceive things. I'm a very fair person, and I think that
 12 I could be very fair in determining guilt or innocence,
 13 regardless.**

14 Q. Okay.

15 **A. I don't believe I could actually give someone the
 16 death penalty.**

17 Q. Okay.

18 **A. I don't believe I could do it.**

19 Q. Well, we'll talk about that. We'll talk about
 20 that. I guess we can kind of move into it right now.

21 When I said before that we expect jurors who can --
 22 I don't want to use the term "professional," because it almost
 23 sounds like you've chosen to be a juror and people don't do
 24 that. But it's kind of -- we expect people on a jury to be
 25 able to function in their role as jurors, and that's

1 essentially find evidence and base results upon the evidence,
2 and we do that in any kind of case.

3 I mean, if it's a civil case and you've got some
4 poor, old homeless person that never had two dimes to rub up
5 against each other in his pocket, and he's a plaintiff suing
6 the City of Dallas because they don't put heaters down under
7 the underpass where he's living, I mean, it may be that you've
8 got tremendous compassion for a homeless person, and maybe you
9 don't like the City of Dallas because you don't like how
10 they -- you see them on TV fighting down at city chambers all
11 the time over utter nonsense.

12 Still, we expect jurors to be able to say this guy
13 doesn't have a cause of action. He may be poor and we may
14 feel sorry for him, but it's not right to take the City's
15 money just to -- it's not a Robin Hood kind of thing. The
16 evidence isn't there, and the City doesn't have any duty to
17 put a heater down there for him. Do you follow what I'm
18 saying?

19 A. Uh-huh.

20 Q. And it's the same thing in any other kind of case.
21 If you have a compassion for alcoholics, jurors are still
22 expecting the State proves beyond a reasonable doubt that he
23 was driving while intoxicated, that you find him guilty, and
24 you give him the punishment that's appropriate under the
25 circumstances of what you have to work with. And that works

1 okay in most kind of cases. It's a very unusual human being
2 that, like I said before, that's going to be so passionate
3 that they're going to worry about -- that they're going to
4 have any trouble with a homeless guy, for example. They're
5 not going to be that way.

6 But when we talk about human life and human death,
7 that's real different for almost all of us. We are a society
8 that's very compassionate, and I think that's a strength.
9 That's not a weakness. Maybe I grumble about it sometimes,
10 but it's still a strength. Somebody can be lost overboard on
11 a ship, and we'll spend how many millions of dollars on fuel
12 just searching for what we know is going to be a body because
13 it's too cold to live out there, and it's just because we're
14 that kind of a society. Nobody complains about that.

15 Remember when John Kennedy, Jr.'s plane went down?
16 Everybody knew he had to be dead. We're out there searching.
17 We've got rescue units out there. Not just find-the-body
18 units, but rescue units out there for days. And everybody
19 said, well, it's 52 degrees in that water. Humans can't
20 survive more than a couple of hours in that.

21 A. Uh-huh.

22 Q. But we do that because we're a compassionate
23 society. Capital murder cases, we don't just convene a firing
24 squad. We create an extremely careful and elaborate legal
25 process to try to protect even human life of people that we

1 say have done atrocious, awful crimes, you know?

2 Some jurors think we spend too much time in this,
3 but they're just not thinking if they think that. You know,
4 your time up here is not wasted. It's important to you, to
5 him, to the State. It's real important, but all that being
6 said, it's not enough to just say, well, ma'am, it's the law.
7 Can you follow the law? Because for many people the answer
8 is, yeah, I can follow the law, but that result can occur,
9 anyway.

10 And I go back to the military a lot of times with
11 this because I think there's some real -- I think there's some
12 teaching in that. There are some people that are willing to
13 get in harm's way. The issue for them is not am I willing to
14 go into a hot zone where bullets are flying, and I may be dead
15 from some rifle that was so far away I couldn't even see it,
16 but he had a scope and I didn't have a scope. Am I willing to
17 do that in defense of my country? And the answer is, yeah,
18 I'm willing to do that, but I'm not willing to kill, so let me
19 be a medic, or let me -- you know, let me carry ammunition. I
20 will not do the killing, but I will support -- I will support
21 our people. And I can fix a guy up who's bleeding to death.
22 I can patch up his wounds and get him back knowing that he's
23 going to get well enough to go back and maybe kill some more
24 people. I can do all that. I can't do it myself, but I can
25 respect other people who can. And I can say they're not bad

1 people because they can do that. The way I'm made, I can't do
2 that. Does that make sense to you how that can be in the
3 military?

4 A. Yes.

5 Q. Now, I could try to be clever with you, and I could
6 say, well, you know, the way we have this process established,
7 you're not really killing anybody. You're not doing it. I
8 might, for example, say they don't let jurors down into the
9 execution chamber. And I'd say, therefore, the only person
10 that's ever going to execute somebody is going to be the
11 person that plunges the syringe that has the lethal substance
12 in it.

13 And I think I understand how it's done down there.
14 They've got three guys with three thumbs, not each, but thumbs
15 on the syringe, and the idea is none of those three guys knows
16 which one has the inert stuff and has the hot stuff. Are you
17 with me? And so, you've only got a one-in-three chance that
18 you're even the person, and probably very few people ever know
19 who actually did it. Maybe just the warden or the doctor that
20 puts all that. So, we can say to those people, well, odds
21 are, you know, only one in three that you're the killer. It's
22 probably the other guy. It's the other thumb that's doing
23 it.

24 And yet, the truth is they're involved in the
25 process, too, and who actually pushes the lethal substance, if

1 you're part of it -- if you're actually part of the process,
 2 doesn't mean you're not part of the killing? Do you agree
 3 with that?
 4 **A. No.**
 5 **Q** You don't agree with that?
 6 **A. (Shakes head.)**
 7 **Q** You think that makes a difference?
 8 **A. Yes, I do.**
 9 **Q.** Okay. Then you wouldn't see yourself as being
 10 involved in killing the Defendant if you were on the jury?
 11 **A. I would see myself as being involved in the killing**
 12 **if I was on a jury that sentenced him to death.**
 13 **Q.** Okay. But you didn't push the syringe?
 14 **A. Irrelevant.**
 15 **Q.** Okay. You know, and I look back at Nazi, Germany.
 16 I look at that whole (inaudible), but I look back -- I look
 17 back and I think to myself, do you remember how they loaded
 18 all those people on trains and shipped them off to the death
 19 camps? They can claim they didn't know what was happening,
 20 those guys in the train stations, but, come on, those kinds of
 21 secrets don't get kept when it's that big. People talk. I
 22 mean, people probably made jokes about it, and everybody on
 23 those trains knew when they were loading men and women and
 24 children on those trains knew they weren't coming back.
 25 Everybody knew what that was.

1 And, yet, they could say, you know, I'm just working
 2 at the train station. I'm just -- all I do is load people on
 3 trains. I don't kill anybody so I'm absolved. I'm not
 4 morally responsible for it. Do you agree that they wouldn't
 5 be, those people, who are loading people on the trains to send
 6 them to death camps? Do you think they're not responsible
 7 because they weren't doing it at the other end?
 8 **A. I think they are just as responsible because they**
 9 **knew what was going to happen.**
 10 **Q.** Okay. And it's not even -- and they might say,
 11 well, all I was doing was -- I was law-abiding because our law
 12 says it's okay to do that. I mean, Hitler was in charge, and
 13 he said do this and so that was the law of Germany. And they
 14 could say, I'm just obeying the law. And yet, sometimes
 15 people come into a Pelagian with the law where they've got
 16 to -- maybe not religion, but just Pelagian to themselves in
 17 the law where they've got to say that's not good enough to say
 18 I'm following the law. In my own little way I'm going to take
 19 a stand, and I have to. Does that make sense to you?
 20 **A. Yes.**
 21 **Q.** And that's the last analogy I ever make to Nazi,
 22 Germany because this isn't that way. Those people were sent
 23 to the death camp without a trial. Their only crime in life
 24 was being Jewish or being gypsies or being homosexuals or
 25 being retarded or being somehow disfavored by the Arian

1 society in control at the time.
 2 **A. (Nods head.)**
 3 **Q.** And this isn't like that because every single
 4 defendant in Texas that has a death sentence has had a trial
 5 and has had appeals and had review and had lots of scrutiny.
 6 Now, some people complain and say it's not -- the trials
 7 weren't good enough, or there was this or that problem, but
 8 even that stuff gets looked at and gets reviewed. It's very
 9 lengthy before that happens.
 10 And yet, still the bottom line to this is jurors
 11 have voted in a way that causes a death sentence, and they
 12 know it. It's not even like the trainmen in Nazi, Germany
 13 because they could at least say I've never been to Auschwitz.
 14 I don't know what goes on there. We tell jurors what the
 15 results of answers to those questions are.
 16 **A. (Nods head.)**
 17 **Q.** Now, I told you before and I meant what I said: It
 18 is not only okay for you to have any view that you want to
 19 have. No quarrel with me, but it's even okay for you to be a
 20 juror in a case if you have a view one way or the other on the
 21 death penalty that's off of center that's -- I'm real strong
 22 for it and I'm real strong against it. That's okay as long as
 23 you can assure both sides that either answer could result to
 24 the question presented to you depending upon the evidence, and
 25 not in a sense a desire to make a little bit of law for this

1 one particular case. Are we communicating what I'm talking
 2 about?
 3 **A. Yes.**
 4 **Q.** So, I want to talk to you then about the special
 5 issue.
 6 **A. Yes.**
 7 **Q.** But first, let me follow up on what you were telling
 8 us about guilt-innocence phase. You indicated to me that you
 9 consider yourself to be a fair person?
 10 **A. (Nods head.)**
 11 **Q.** And you believe you could fairly decide whether or
 12 not the Defendant is guilty of capital murder?
 13 **A. (Nods head.)**
 14 **Q.** Am I --
 15 **A. Yes.**
 16 **Q.** -- right?
 17 **A. Yes.**
 18 **Q.** And why I say that is there are some people who are
 19 so opposed to capital murder that they would say, you know,
 20 I'm not wanting to be on this jury. I'm being absolutely
 21 honest with everybody about how I am, and I don't feel that
 22 one side or the other is going to get a fair trial from me
 23 because of my strong views for or against the death penalty.
 24 That will interfere -- that will substantially interfere with
 25 my ability to answer those questions fairly.

1 And they might say, you know, I am so strongly
 2 opposed to the death penalty that I will tend to look for a
 3 way to acquit the Defendant of capital murder, or at least
 4 find him guilty of less than capital murder somehow in order
 5 to guarantee that I don't even have to face those death
 6 penalty issues because, you see, if he's not found guilty of
 7 capital murder, the jury never has to worry about the death
 8 sentence. It no longer applies. It no longer fits. And that
 9 means if you find a defendant guilty of capital murder, you
 10 don't worry about punishment because he walks free. If you
 11 find him guilty of something less than capital murder, then
 12 you just give him a term of years in the penitentiary. You
 13 never look at the death sentence.

14 Some jurors say I'm so strongly unable to give the
 15 death penalty that I can't see myself even being fair on the
 16 guilt-innocence portion because I will be wanting to find a
 17 way to not come back with a verdict of guilty of capital
 18 murder, and then I don't have to worry about any of this stuff
 19 later on. I'm done with that issue, and I'm through. But
 20 that doesn't sound like where you are to me. It doesn't sound
 21 like you're thinking that way about guilt-innocence; is that
 22 correct?

23 **A. No. I see them as two separate issues.**

24 **Q.** And that's what the law says, and that's what the
 25 law really contemplates.

1 Now, we get to the death issues -- what I call the
 2 death issues, and that's probably a wrong term because they're
 3 punishment issues, but the answers to those result in death,
 4 or result in life depending upon how you do it. And you may
 5 remember we talked a couple of weeks ago that the first
 6 question you're going to be given at the punishment phase of
 7 the trial is one that asks whether there is a probability that
 8 the Defendant --

9 **MR. SCHULTZ:** Could you excuse me just a
 10 moment, Judge, about 30 seconds?

11 (Brief pause in proceedings.)

12 **Q. BY MR. SCHULTZ:** That question asks you the question
 13 about the personality perhaps of the Defendant. What it asks
 14 is, do you find that he will probably be a danger to our
 15 society in the future? Is he probably going to commit
 16 criminal acts of violence that will constitute a continuing
 17 threat to society? Now, if we weren't talking about a death
 18 penalty case, does that seem to you to be the kind of question
 19 you have the ability to answer? Let's pretend it's a burglary
 20 case, let's say. Could you answer a question like that?

21 **A. No. I really can't tell you that I could ever**
 22 **answer that question, ever.**

23 **Q.** Does it even have anything to do with a death
 24 penalty case?

25 **A. I don't think it does.**

1 **(Don High enters the courtroom.)**

2 **Q.** Let me explain kind of how this process works.
 3 You're going -- as you and I proceed in this, you'll think,
 4 well, why didn't he get what I'm saying? I've already said I
 5 can't be fair, and you're going to think, well, why does he
 6 keep on doing this way? Any feelings like that?

7 **A. No, no.**

8 **Q.** Okay.

9 **A. Not yet.**

10 **Q.** You might give me another half hour to fall in, and
 11 if I ever found any entertainment in hearing myself talking,
 12 it went away a couple of weeks ago. I'm not liking that
 13 anymore. I like to hear you talk more than me probably, but
 14 I've done enough of this. It's not fun in any regard.

15 But where we're coming on, I want to explain to you
 16 how this whole process works. If a juror comes in and says, I
 17 don't like criminals. I think criminals are treated too
 18 lightly, and I'm the kind of juror that's going to be way over
 19 to the extreme end on the harsh side of punishment, but I can
 20 follow all of the law and I can consider anything that I might
 21 need to consider. That juror is qualified.

22 Now, common sense tells us that that's not the kind
 23 of juror that the defense would want actually on the jury, but
 24 the juror is qualified. In other words, then you've got to
 25 figure what you're going to do with that juror. And the way

1 we work that is very simple. It's called a peremptory
 2 challenge. It's a strike that both sides have 15 of, and we
 3 may say that he's a nice man, Your Honor, but I don't want him
 4 on my jury. Perhaps I could do that with you. Maybe I would
 5 say, well, she's a nice lady. She's honest, but that's not
 6 somebody that the State thinks is advantageous to our case. I
 7 mean, I know you agree with that, from what you're telling me
 8 for sure?

9 **A. Yes.**

10 **Q.** But there's another kind of challenge, also, and
 11 that is what's called a challenge for cause, and it's not an
 12 insult to the juror that you couldn't -- that you're a bad
 13 person or couldn't be fair. It's just a recognition that,
 14 here's an honest person who can't fairly do all of the things
 15 required of him or her in this kind of case, and that happens
 16 all the time. I mean, this is not a rarity. This happens day
 17 after day in our trial work. It often happens with things
 18 like probation. When you ask a juror, could you give
 19 probation in a child molestation case because the law requires
 20 a juror that can consider if certain things apply. And a lot
 21 of jurors say, how could I ever give a child molester
 22 probation, you know, knowing what I know and knowing how awful
 23 it is? And those people, great people, they can't be
 24 qualified because they can't follow the law. They're not
 25 balking. The Judge doesn't get mad at them. Nobody gets mad.

1 It's just how they are.

2 And so what's going to happen? I'm going to tell
3 you that you're going to feel -- you're going to see it.
4 Pretty soon you may feel like you're being bounced around, and
5 one side is trying to get you to say certain things, and then
6 the other side will try to get you to say certain things and
7 all that's true.

8 You know, I might give you extreme cases and help
9 you do it. The other side -- the defense might give you
10 extreme cases and how we should do it. But the bottom line is
11 you're going to know the true answer to the question anyway,
12 and on something this important you don't want to change your
13 position, not only because you're honest and under oath. But
14 imagine if you end up on the jury kind of thing, and the only
15 reason you said the things you did was just because you didn't
16 want to offend anybody or take too strong a stand or whatever.
17 So, that's where we're going. There's no fight involved
18 here.

19 Are you telling me that you don't think you could
20 ever answer that question even if it wasn't a death penalty
21 case. Is that something that you think is an impossible task
22 for you?

23 **A. I think that I have a different opinion now of
24 people's ability to change, and that is asking me to not have
25 any faith that this person could actually change and is going**

1 **to continue doing the same thing they've been doing, and I
2 have a different view on that now than I used to.**

3 Q. Well, the question doesn't -- the question, in all
4 fairness to everybody, the question doesn't say, do you have
5 to find that there's no ability to change because nobody
6 knows -- nobody knows how anybody could end up. I don't know
7 about you, but I don't know how I'm going to be in ten years.
8 I may have some clues. I mean, I figured how I've been the
9 last 50 years might relate to how I'm going to be in the next
10 10, but I might be different.

11 The same with you. You know, you're -- you know,
12 the past 40 years of your life, for example, might be a good
13 clue into how the next ten years are going to be, but I'll bet
14 you've changed a lot in the last ten years in many ways,
15 haven't you?

16 **A. Yes.**

17 Q. I mean, we all have. So you're absolutely right,
18 there's no way to predict the future. But that question
19 doesn't require prediction in the sense of guarantee. It
20 rather requires a prediction in the sense of probabilities.
21 Does that make any difference to your ability to answer that
22 question?

23 **A. I tend to think of probability as being a
24 mathematical equation. If you're just going to take what he's
25 done in the past and equate it all out, and there's a**

1 **mathematical answer, then you wouldn't be asking a jury to
2 decide that. I think that's an opinion that you have that
3 this person may or may not continue being a threat to society,
4 and I just don't know that I could ever, in good conscience,
5 decide that.**

6 Q. Okay. Let's move along a little bit. So, what
7 you're saying is even if this were a nothing -- nothing to do
8 with capital punishment. If this were, say, a theft case, and
9 for some reason somebody asked you that question about the
10 Defendant, you don't think you'd be able to answer that
11 question?

12 **A. Huh-uh.**

13 Q. Okay, all right.

14 **A. No.**

15 Q. Other juries -- every capital murder jury that has
16 ever been in Texas that has found a defendant guilty of
17 capital murder, all 12 of every one of those cases -- all 12
18 of the jurors in every single one of those cases we've ever
19 had has had that question posed to them. They've been, just
20 like with you, they've sat there by themselves, and both sides
21 get to talk with them, and then both sides ultimately accept
22 them as jurors, and then they listen to evidence. And then
23 they have to come to that question, if they find the defendant
24 guilty of capital murder.

25 And that means every one of those jurors would have

1 to have been able to say, yes, I can answer that question yes
2 or no depending on what evidence is presented. And that
3 doesn't mean that that -- you know, that doesn't mean that
4 that's right or wrong. It's just that people like you who say
5 that is an impossible question to be answered, it's not that
6 people -- it's not that you're the only one that ever has that
7 view. It's just that nobody with your view ever ends up on a
8 jury. Are you with me on that? Because if your view is, that
9 question can't be answered, then that probably is unfair to
10 somebody.

11 I'd have to think about it for a minute. It's
12 probably unfair to the State because if we can't get a yes
13 answer from 12 jurors, a death sentence could never result,
14 all right? And that's what you're saying, there's no -- if
15 you're put on this jury, you would never answer that question
16 yes, no matter what?

17 **A. I think it would be -- I don't think I could
18 say -- I don't think I could say yes to that.**

19 Q. We'll hold on to that for a little bit. I know you
20 don't think you could, but let's go back to a death penalty
21 case now. Let's talk about it.

22 If you answer that question no -- if the jury
23 answers that question no, do you know what results from
24 answering that question no, he is not a continuing threat to
25 society?

1 A. No. There is a probability that will he not be a
2 continuing threat to society.

3 Q. Exactly. If you answer no -- no, we do not find, or
4 we have a reasonable doubt of that -- we do not find that he
5 is probably going to be a continuing threat to society, what
6 is the result of a no answer to that question by the jury?

7 A. That he would get life.

8 Q. Exactly, and that's automatic. That's -- that's --
9 you know, the moment the "no" goes on to that verdict form by
10 10 or more jurors, the moment that occurs and they come back
11 out and announce it in court, the jury does, the Defendant --
12 everybody else goes home; judge, jury, lawyers. The Defendant
13 goes down to prison and begins serving a life sentence, which,
14 by in the way in Texas, is not until the end of his life.

15 It's a 40-year minimum, and after that it's not in anybody's
16 hands except the Board of Pardons and Paroles, anyway.

17 So a no answer to that question automatically
18 results in a life sentence in capital murder cases. A yes
19 answer to that question obliges the jury to consider a second
20 issue and that is -- can you see it okay from where you are?

21 A. Uh-huh.

22 Q. It gets a little low there. Take a second, if you
23 would, and read that.

24 A. (Complies.)

25 Q. Okay?

1 It goes both ways. But, it tells you to relook at the
2 evidence that you've heard, and there may be some other
3 evidence that you get to hear at the punishment phase that was
4 not either admissible or not thought really appropriate in the
5 first part of the trial by either side, and they don't have to
6 offer evidence on the punishment part of the trial, but
7 neither does State.

8 It's conceivable you get no evidence at all at the
9 second part of the trial, except relook at the crime itself
10 and decide. That means relook at the crime and say, you know,
11 anybody who could commit a terrible crime like I found this
12 Defendant guilty of will always probably be dangerous. The
13 law lets you do that based on the evidence of the crime. It
14 doesn't mean that you have to, but the law lets a jury do
15 that.

16 And then you look at that mitigation question, and
17 it tells you to take into consideration all the evidence
18 including circumstances of the crime, background of the
19 Defendant, the character of the Defendant and the Defendant's
20 moral culpability, whatever that means. Nobody can tell
21 you -- it's hard to understand how anybody could have no
22 normal culpability if they've committed capital murder, but
23 there must be some situation I guess where -- there must be
24 something about that to look at. I don't know what that would
25 be. I don't know what moral culpability would be.

1 A. Uh-huh.

2 Q. That question seems to tell the jury take another
3 look at the evidence. Now, what is the evidence that you took
4 another look at.

5 Certainly all the evidence you heard at the first
6 part of the trial probably tells volumes about the Defendant's
7 character and background just because it would probably come
8 out in the form of proving whether or not he was
9 guilty of capital murder. So you will have heard a whole lot
10 of evidence that that question seems to be asking you to
11 consider. But you didn't consider it with the same -- with
12 the same scrutiny. It was a different purpose you were
13 considering it for guilt-innocence, because the judge in the
14 guilt-innocence phase will tell you such things as don't
15 consider sympathy for or anger against the Defendant in
16 answering is he guilty or not. Just simply consider the
17 evidence.

18 A. (Nods head.)

19 Q. And that question then invites you to consider
20 sympathy for or anger against the Defendant in answering that
21 question because it goes both ways. When you look at the
22 Defendant's background you might say, you know, why would
23 anybody even consider a life sentence for somebody with that
24 kind of a background? Or you might say, how could anybody
25 give a guy a death sentence with that kind of background?

1 You take all that into consideration and then
2 decide, is there sufficient mitigating evidence, from
3 everything that you've seen and heard as a juror, to make a
4 life sentence the right thing to do as opposed to a death
5 sentence, which is at least considered because of the
6 conviction in that first special issue. Make sense to you
7 what -- the way it works, does it make -- am I explaining it
8 to you in a way that makes sense?

9 A. Yes.

10 Q. Now, how you do -- how you weigh the evidence at
11 that second phase of the trial is kind of up to you. For
12 example, you might hear evidence that a capital murderer had
13 the most tragic life you've ever heard of in your whole life.
14 You didn't -- you thought you'd heard it all, but you hear a
15 whole lot more than you even dreamed could ever befall
16 somebody growing up, let's say. I mean, there's a river of
17 tears sitting over in that jury box because everybody is
18 crying it's so bad. And you might say, boy, that's the most
19 awful story I've ever heard in my life, and I believe every
20 word of it, and I feel for the Defendant as he was growing
21 up. And you might say, that's not sufficient to justify a
22 life sentence. That's enormous. That's the worst there's
23 ever been.

24 But we're talking about a capital murder that was
25 done brutally, and all of this growing up misery is not

1 sufficient to change what should be a death sentence. Do you
2 understand the way the question works?

3 A. Yes.

4 Q. Because --

5 MR. GOELLER: Judge, I'm sorry. I've got to
6 object at that point. I object to his -- Mr. Schultz's
7 comment, do you understand how the question works based on
8 that specific fact situation he gave the juror right
9 beforehand. I don't want this juror thinking that's what the
10 question is. I don't know how else to phrase my objection,
11 but the way he linked it to, that's not what the question is.
12 It's an attempt to qualify her, or get her to understand the
13 question on a specific fact situation.

14 THE COURT: I'll overrule the objection.

15 Q. BY MR. SCHULTZ: So you understand that's how the
16 question works?

17 A. Yes.

18 Q. Now, the fact is that neither side has a burden of
19 proof, and the only way that question works fairly is if
20 people are open to being able to answer that either way,
21 depending upon the evidence. And why I say that is because
22 without a burden of proof, we can talk about sufficient
23 mitigating evidence, but really the measurement is almost what
24 the jury feels. I'm not saying disregard the way the question
25 is worded, but what I am saying is if you feel like a death

1 would do it if it was the right thing, but they know it will
2 never happen. They know in their hearts.

3 An example I like to use and everybody is probably
4 sick of it, but it works for me. We've got a roof up on top
5 of this building that you can get onto and walk around and is
6 strong enough to support people. You get up on that on the
7 sixth floor. And I guess if I were to say to you, ma'am, if
8 you and I went up to the roof of this building, and you were
9 convinced that jumping off it was the right thing to do and
10 landed on your head because you decided that was the right
11 thing that you should do, would you do it? I guess the answer
12 to the question is, well, yeah, if I thought it was the right
13 thing to do to jump off the building and land on my head, I
14 guess I would do that.

15 But you and I both know that there's no way ever
16 that you would ever think that's the right thing to do. Do
17 you follow what I'm saying?

18 A. Yes.

19 Q. So, to tell somebody in a case like this, yes, I
20 could do something if I thought it was the right thing to do
21 is okay unless there's no way you're going to find it's the
22 right thing to do no matter what. Are you with me on that?

23 A. Yes.

24 Q. Now, what I'm deriving from what you've said is,
25 first of all, you already told me, and you've already said in

1 sentence should not result, the way the human mind probably
2 works is that would be sufficient. Those reasons would be
3 sufficient for you. Do you know what I'm saying?

4 A. Yes.

5 Q. But the idea is still that the Defense is entitled
6 to jurors who could fairly consider mitigating circumstances.
7 It doesn't mean they've got to guarantee to do it. It doesn't
8 mean that it's going to happen very often, but they've got to
9 have a jury that can fairly consider mitigating evidence,
10 whatever that is, and be open to the idea that if they found
11 sufficient mitigating circumstances that they would, in fact,
12 vote in favor of mitigation, right?

13 A. Yes.

14 Q. And the State's entitled to people who can say, yes,
15 I will consider mitigating evidence. And if I don't find
16 sufficient mitigating evidence, I'll answer that question no,
17 which results in a death sentence. That's what the State is
18 entitled to from a juror. After that, it's up to either side
19 to decide how we -- kind of who we seat after that from that
20 qualified pool. And it's got to be a fair -- it's got to be a
21 fair answer.

22 It's got to be a willingness to fairly approach
23 those questions because if people could say, yeah, I could
24 consider that, and it's almost like a wink and a nod kind of
25 thing because they might say, yeah, I can consider it, and I

1 the questionnaire that you're not in favor of the death
2 penalty, and you're leaning against it in theory; is that
3 right? Not in this case, but in terms of the theory itself of
4 having a death penalty, you're -- you're not 100 percent one
5 way or the other, but you're leaning against not even thinking
6 it's good to have a death penalty in this case?

7 A. No. I believe in the death penalty in extreme
8 cases. I do believe that there are times when the death
9 penalty is warranted.

10 Q. Okay.

11 A. I do believe that. I just know that I could not sit
12 on a jury and be the person that handed down that judgment.

13 Q. Even in those extreme cases?

14 A. Even in those extreme cases.

15 Q. Okay, because that's important.

16 Now, you don't know anything about this case, and I
17 may think I know about what I think the jury is going to know
18 down the road, but I wasn't there, either, and neither was the
19 judge, neither were the attorneys, or the bailiffs or court
20 reporter or spectators, if we have any, which we don't seem to
21 now. None of us were there. And this -- for all we know,
22 this could be an extreme case, but it's not going to be an
23 extreme case like, perhaps, you're thinking of, because
24 there's one case that stands out in everybody's mind as the
25 extreme case that's out of our recent history, and that's the

1 Oklahoma City Bombing case?

2 **A. (Nods head.)**

3 Q. There are worse things -- whoever planted that bomb
4 on that Pan American plane that blew up. More people were
5 killed, but it's the same thing. It's just as bad; women,
6 children, strangers, spectators, people in there doing
7 business in the Federal Courthouse, all those people got
8 indiscriminately slaughtered by somebody who thought it was a
9 political statement being made. And for whatever it's worth,
10 apparently he didn't even have any remorse for it, although I
11 don't think that would have mattered to anybody. If he had
12 been blubbering and in tears over what have I done, what have
13 I done, I don't think anybody would care about that given what
14 he did. Do you agree with me?

15 **A. Yes, yes.**

16 Q. So you certainly, in that type of case, believe in a
17 death penalty, but you're saying even in that kind of case you
18 could never vote for it?

19 **A. No, I couldn't.**

20 Q. And it's kind of like me talking about being up on
21 the roof and jumping off. I could tell you -- or I could ask
22 you, if you thought it was the right thing to do after having
23 found somebody guilty of capital murder, to vote yes on future
24 danger, which you've told me probably could never happen
25 because you don't believe in the question --

1 evidence and how you measure that evidence, and you're telling
2 me there's no way -- first of all, we never get to that
3 question with you, right?

4 **A. Right.**

5 Q. Because your answer would always be no to that first
6 question?

7 **A. Yes.**

8 Q. No matter what -- and it's not me. It's nothing
9 personal to me or Ms. Falco, right?

10 **A. Right.**

11 Q. We could go get two new prosecutors. We could get
12 the world's handsomest prosecutor and the world's most
13 articulate one and wore the prettiest clothing. It wouldn't
14 matter, right?

15 **A. It wouldn't matter.**

16 Q. And I assume that's not me, by the way.

17 That question is automatically going to be answered
18 no by you, no matter what the evidence is?

19 **A. Yes, that's correct.**

20 Q. Okay. So we never even get to that -- it's funny
21 because we only deal with that mitigation question if we've
22 gotten a yes answer so I feel kind of awkward. It's almost
23 like, what am I doing talking with her about the mitigation
24 question because she's already told me there's no way she ever
25 gets to that.

1 **A. Right.**

2 Q. -- if you thought it was the right thing, would you
3 vote yes? I guess the answer would be, well, yeah, if I
4 thought it was the right thing, I'd vote yes. But like
5 jumping off the roof, you're telling me you would never think
6 it's the right thing to do ever?

7 **A. I would never think answering yes to that question
8 is something I could do.**

9 Q. Even if the evidence were overwhelming?

10 **A. Yes. For specific reasons, I don't think I could
11 ever answer that yes.**

12 Q. Okay, fair enough.

13 And apart from that question, which is interesting,
14 because that first question, some people just say it's
15 impossible to predict the future. When you look at -- you've
16 studied the Bible, and you look at somebody like Saul who
17 became Paul, and you look at somebody like him, you've got to
18 say, there's a guy that I can predict is going to turn out
19 pretty bad. He was awful in terms of his behavior, and, yet,
20 look at him toward the end, that kind of idea.

21 But in a death penalty case you see that special
22 issue, that second one on mitigation that I've got up there
23 now. That's the one that says take a second look at all the
24 evidence, and tell me whether or not you could be free to
25 return a yes or no answer to that question based on the

1 **A. I could never get to this. There's specific reasons
2 why I could never answer yes to the first question.**

3 Q. I understand.

4 Now, let's say somehow you got to that question --
5 or let's do it this way. Let's say the first question you got
6 asked, not the second, but the first one. Let's say instead
7 of asking you this future danger question we asked you this
8 one first --

9 **A. Okay.**

10 Q. -- let's just say.

11 You know that a no answer to that question will
12 result in a death sentence depending on what you do with the
13 second question, which we kind of know about that -- what will
14 become the second question. A no answer to that question
15 results in a death sentence. Even apart from your objection
16 to that predicting the future question and your inability to
17 do that, you will always vote in answering questions in a way
18 to make sure that life happens rather than death; is that what
19 you're telling me or not?

20 **A. I would not answer the first question just because I
21 don't want to get to the death penalty. That question, on its
22 own merits regardless of what the case is, I could not answer.**

23

24 Q. I'm with you on that part.

25 **A. Okay. And on this one, if I'm just looking at the**

1 **question -- I am a person that believes that a lot of what**
 2 **happens in your life dictates the choices that you make and**
 3 **how you see right from wrong.**

4 Q. Okay. So --

5 A. **I don't think that I would purposefully answer**
 6 **questions so that I made sure that someone didn't get the**
 7 **death penalty.**

8 Q. Okay, okay. That's what I --

9 A. **But I never -- like you said, I'd never get to this**
 10 **one from the first one, and this one I believe that there**
 11 **are -- I believe there are situations when you grow up and the**
 12 **way you learn right from wrong that impact your**
 13 **decision-making ability.**

14 Q. Okay, okay. But what you told me earlier, and I
 15 want to make sure that I heard you right and that I'm
 16 communicating correctly with you, I think you told me that
 17 even in the most extreme case imaginable, which it may not be.
 18 It may be something different, but certainly that Oklahoma
 19 City case has to be way up there?

20 A. Yes.

21 Q. And you told me that's an extreme case where you
 22 think that jury did the right thing?

23 A. Yes.

24 Q. You're telling me that if you had been on that jury,
 25 you couldn't have done what they did?

1 to vote in such a way that would cause a death, or the same
 2 situation, there's no way a death sentence can ever come from
 3 your vote?

4 A. **I think if you look at all the special issues, what**
 5 **the questions are, because of the way I believe I don't**
 6 **think -- I would just never get to the conclusion that would**
 7 **send someone to a death penalty. I do believe there's always**
 8 **issues in someone's life that dictates their behavior.**

9 Q. Sure.

10 A. **And I do believe everyone can be rehabilitated or**
 11 **changed. So for that reason personally, I could not live with**
 12 **not giving that person an opportunity to do that.**

13 Q. Okay. So, even if I could either try to convince
 14 you that you really were able to answer that question, which I
 15 know I can do. We could do this for days, and I couldn't
 16 convince you to change your mind about answering that
 17 probability of threat to society. But even if either I could
 18 convince you that you could answer that question, or even if I
 19 could convince both sides let's come up with another question
 20 instead and replace it because this juror doesn't want to work
 21 with this question, that's not -- I've got another problem.
 22 It's a death penalty case, and my problem in a death penalty
 23 case is no matter what I do or how hard I try or how
 24 straightforward I would be, there's no way to ever get answers
 25 to those questions that would result in death of a defendant.

1 A. **I could not have done what they did.**

2 Q. Okay.

3 A. **Not and live with it personally. Not knowing**
 4 **myself, being able to live with myself that I actually did**
 5 **that. I can't see that for me, no.**

6 Q. And just like jumping off the building, I mean, you
 7 would have done it if it would have been the right thing, but
 8 you know it would have never been the right thing?

9 A. For me.

10 Q. Then even if you didn't -- even if you didn't have a
 11 problem with that first special issue, and I know you do, and
 12 this is a little -- the interesting part of this job is that
 13 we're all so different that we hear just -- the things you say
 14 here other people have said, but maybe other things other
 15 people have said you don't have a problem with. We're just
 16 different. We're all human beings with different backgrounds.

17 What if -- what if -- for example, what if we didn't
 18 ask that question at all? What if we were in a state that
 19 didn't have that -- that's just Texas law, that future danger
 20 question. What if that question were replaced by some other
 21 question that you didn't have a specific problem with on its
 22 own merits. I don't know what that question would be. I'm
 23 just -- but what if you were asked another question that you
 24 were able to answer, that it wasn't any problem answering it
 25 intellectually with you. In such a state, would you be able

1 Is that where we are?

2 A. **I have to be honest to say that because of the way I**
 3 **feel, because I think I would just be completely having to**
 4 **live with that decision the rest of my life. I have to be**
 5 **honest to say I think -- I don't think there's a way I could**
 6 **ever answer all those special issues knowing that if I**
 7 **answered them a certain way it would send someone to their**
 8 **death.**

9 Q. Okay.

10 A. **I don't think I could be fair in that part of the**
 11 **process.**

12 Q. So I have two problems. One problem is that you
 13 reject the notion of answering that special issue on future
 14 danger?

15 A. Right.

16 Q. Absolutely not just because of the death penalty,
 17 but you don't believe in that question?

18 A. **I don't believe in that.**

19 Q. And my second problem is, even if you did, I'm still
 20 not going to get answers that would result in a death
 21 sentence?

22 A. **I'm telling you if I knew -- if I knew if I answered**
 23 **yes or no to that it was going to send someone to their death**
 24 **in the end regardless of what the question was, I don't think**
 25 **I could answer it and send someone to their death.**

1 Q. Okay.

2 A. **I've really thought about this and really struggled**

3 **with it.**

4 Q. Okay. I know you have.

5 THE COURT: Mr. Schultz, I'll give you about a

6 minute and a half to wrap up.

7 MR. SCHULTZ: Yes, sir.

8 Q. BY MR. SCHULTZ: And I could say, well, if you

9 thought it was the right thing to do based on the evidence

10 would you vote that way, then we're still back to jumping off

11 the roof. Sure, but it would never be the right thing to do?

12 A. **Not for me.**

13 Q. Okay.

14 A. **And at that point I'd be selfish, and I would make a**

15 **"me" decision.**

16 Q. Okay, I understand.

17 A. **One I can live with.**

18 Q. I appreciate the honesty.

19 And even if you could, in theory, do it -- I mean,

20 we could go to extreme cases and say, well, what if it was

21 Adolf Hitler and he's getting ready to go out and kill some

22 more people, depending on how you voted. I mean, even if we

23 came up with an extreme case and got you to say, well, maybe I

24 could consider it in that circumstance, your objection -- your

25 personal objections to you personally inflicting the death

1 penalty, if they wouldn't prevent --

2 MR. SCHULTZ: Do you want me to continue,

3 Judge?

4 THE COURT: Hold on just a second.

5 (Brief pause in proceedings.)

6 THE COURT: Please go ahead, Mr. Schultz.

7 Q. BY MR. SCHULTZ: Even if somehow theoretically it

8 wouldn't prevent you from returning a verdict that would

9 result in a death sentence -- and I think you said it would

10 prevent you -- it would substantially impair your ability to

11 even give fair consideration, even if it weren't absolutely

12 impossible, which I think you're saying it is?

13 A. **Yes.**

14 Q. It would be so nearly impossible it would

15 substantially impair your ability to answer those things

16 freely?

17 A. **Ultimately, yes.**

18 MR. SCHULTZ: How much time do I have, Judge?

19 THE COURT: About 30 seconds.

20 MR. SCHULTZ: Thank you. I'll give some of it

21 back to you.

22 We respectfully challenge this juror for cause

23 based upon her answers.

24 THE COURT: All right. Mr. Goeller.

25 MR. GOELLER: Thank you.

1 (No omissions.)

2 CROSS-EXAMINATION

3 BY MR. GOELLER:

4 Q. Good morning, Ms. Stone.

5 A. **Hi.**

6 Q. How are you?

7 A. **Good.**

8 Q. I know you've been up there a while.

9 Can you tell me what kind of thoughts you've had

10 since you filled out your questionnaire? What kind of things

11 have you been thinking about in regards to this case or

12 capital murder, capital punishment, all those kind of things?

13 A. **I've thought a lot about circumstances and what**

14 **would cause someone to commit capital murder, or any murder.**

15 **I've thought a lot about if I sent someone to their death**

16 **would I be able to live with that a year down the road, two**

17 **weeks down the road, and I have a lot of different feelings**

18 **now than I used to because I have someone very close to me**

19 **that's serving a jail sentence now for murder. So, that has**

20 **caused me to think differently about the death sentence, a lot**

21 **of soul searching about that.**

22 THE COURT: Could you repeat that last little

23 bit?

24 VENIREPERSON: Lot of soul searching about

25 that.

1 THE COURT: Thank you.

2 Q. BY MR. GOELLER: Mr. Schultz talked to you kind of

3 about -- a little bit about strategy; peremptory strikes and

4 challenges for cause and all that kind of thing. And he told

5 you that somebody that was very much against the death penalty

6 very much so but could answer -- vote to answer the questions

7 and he was quite honest. He said, you know, probably wouldn't

8 be the kind of juror the State would want, okay?

9 A. **(Nods heads.)**

10 Q. And maybe with you the opposite is true for me. You

11 said you believe in the death penalty in certain cases, but

12 you struggle with it. You struggle with the prospects of

13 serving as a juror in a capital murder case. You're exactly

14 the kind of juror I would want; do you see what I'm saying?

15 A. **Yeah.**

16 Q. And Mr. Schultz was right, anybody -- every person

17 who serves on this jury has to tell the Judge ultimately that

18 they could vote in such a way if the evidence was there and

19 they were convinced beyond a reasonable doubt on all the first

20 phase of the trial and that special issue number one. And

21 however they answer the third special issue, that ultimately

22 in the proper case, in the right kind of case, they could vote

23 in such a way where the death penalty would be imposed. Now,

24 those people can be either very pro death penalty or against

25 the death penalty, but could still vote in such a way that the

1 death penalty may result, okay.

2 Obviously a defendant wants people who may be
3 opposed to the death penalty, but could follow the law and the
4 instructions from the Judge and kind of let the chips fall
5 where they may. In our law -- and that's why Mr. Schultz was
6 asking would it substantially impair your ability. Our law
7 says that you can be against the death penalty and still be on
8 this jury. But what the law contemplates and, you know, quite
9 frankly, I would hope more people would come to this
10 courthouse with your attitude, you know? This is the real
11 deal. That's a real live human being sitting there. This is
12 a -- this weighs on my mind heavily. Unfortunately we have
13 maybe too many people that don't give it a second flip, but I
14 like what I'm hearing from you. But the test is --

15 MR. GOELLER: And if I could approach those,
16 Judge.

17 THE COURT: Yes, sir.

18 Q. BY MR. GOELLER: The ultimate test is -- and mind
19 you, you were answering all the questions up to this point,
20 and you haven't heard one shred of evidence. Does that make
21 it a little difficult to answer those questions?

22 A. Not the special issues.

23 Q. Okay, okay. I seem to -- I'm of the opinion that
24 most of your difficulty with this -- with being a prospective
25 juror comes with this first special issue, correct?

1 course of burglary, killed in course of robbery, any, all --
2 any or all, okay?

3 A. (Nods head.)

4 Q. So assume that happens, then we know the only two
5 punishments are life or death, right?

6 A. (Nods head.)

7 Q. Mr. Schultz has correctly told you a life sentence
8 in Texas is at least 40 calendar hard years; no parole, no
9 probation, any of that kind of thing. You just start clicking
10 off 40 years. Some people are going to die in the joint
11 because of their age. We really -- depending on your age, we
12 really do have life without parole. If you're 40 years old,
13 you know, could you live to be 80 in a Texas joint? I don't
14 know. Who knows.

15 The youngest person that could be sentenced to life
16 is 17. So you add 40 to 17, and the earliest that person
17 could get out -- you know, they would be almost 60 years old,
18 so it almost is life without parole, I guess.

19 But, anyhow when you look at that question, maybe --
20 can you see how that question may be asking, or the argument
21 could be made, will they kill in the penitentiary? Will they
22 do bad, bad things to other people in the penitentiary because
23 that society we know definitely includes the penitentiary,
24 prison society. And if that's the first question in the
25 decision to be made for life or death, can you see how that

1 A. Yes.

2 Q. Now, we know that if somebody -- by the time you get
3 to those questions, a jury will have found beyond a reasonable
4 doubt that somebody is guilty of capital murder. And in the
5 case at hand, that's either going to be a murder committed in
6 the course of a burglary, or a murder committed in the
7 course -- furtherance of a robbery, or a double homicide, two
8 people are dead. The indictment alleges two people were
9 killed.

10 So, to get to those questions in this case, the jury
11 will had to have found beyond a reasonable doubt a lot of good
12 evidence. That's what the State's got to bring you. I don't
13 know if they'll -- I don't know what all their evidence will
14 be. I haven't heard the witnesses. We haven't had a trial
15 yet, so we don't even know if we'll get there. Maybe he'll be
16 acquitted. Maybe he'll be found guilty of something else
17 other than capital murder. Who knows?

18 But for the sake of this individual voir dire, we'll
19 assume, because we have to talk about these special issues,
20 that the jury has found him guilty beyond a reasonable doubt.
21 Don't get me wrong. I'm not conceding that, but I have to --
22 kind of have to have that frame of mind when we talk about the
23 special issues, otherwise they don't make much sense.

24 So, a jury has had to have found in this case, to
25 get to those special issues, killed two people, killed in the

1 question may be asking along those lines about other inmates,
2 guards, preachers, dentists, doctors, nursing staff, music
3 teachers, GED teachers, all the people that kind of make up
4 prison society?

5 And it's okay to have -- and I agree with you.
6 Nobody can predict the future with any certainty, and
7 everybody has the possibility of changing in this world,
8 right?

9 A. (Nods head.)

10 Q. But, if we're going to have a death penalty, I
11 suppose the Legislature needed some question to separate those
12 that would probably commit criminal acts of violence, and that
13 could be, you know, raping another inmate or murder, or
14 hurting a guard or trying to kill a guard. You know, take
15 that George Rivas. They escaped from the penitentiary. I
16 don't know if they really hurt anybody escaping, but they
17 certainly murdered that police officer, from what I've read,
18 over there in Arlington or Irving, wherever it was.

19 But that question maybe focuses in on can they be
20 held in the penitentiary safely, okay?

21 Now, there's all sorts of ways that you can answer
22 that question. You can answer that question based on the
23 evidence you heard in the guilt-innocence phase of the trial.
24 The State is entitled to bring you, if there are such things,
25 other criminal acts, other patterns of behavior. They can

1 bring you, if they choose, maybe an expert witness, a
2 psychiatrist or psychologist that might shed some insight in
3 that. It is an odd question because they have to prove it
4 "yes," beyond a reasonable doubt, okay?

5 Now, beyond a reasonable doubt -- you know, we know
6 that's more than 50 percent of the evidence. We know it's
7 probably more than 75. I could make the argument, based on
8 how I look mathematically at all our burdens of proof, like in
9 a civil case, in a termination of parental rights case and a
10 criminal case, it's up there. The State won't disagree with
11 me. It's not 100 percent. Judge won't say the State has to
12 prove this case beyond any doubt whatsoever. He'll tell you
13 the State has got to prove it beyond a reasonable doubt.
14 That's up there. That's a lot. They recognize that, and they
15 know that.

16 So, they've got to prove that by the same burden of
17 proof in the guilt-innocence phase that there's a probability.
18 I think everybody is going to agree probability means more
19 than 50 percent, or certainly more likely than not. It's more
20 than a possibility. We know that.

21 The Defense, if they so choose, can bring you
22 evidence, too. Maybe an expert witness, maybe other people
23 talk about, you know -- maybe this type of thing is out of
24 character, or maybe the Defendant could be rehabilitated in
25 prison. And we say rehabilitated on a life sentence, I guess

1 we're not talking about classic rehabilitation where maybe you
2 go to the penitentiary for a short time and then get out and
3 on parole, or you get probation, or shock probation, all those
4 kind of things.

5 Rehabilitation in a life sentence in a capital
6 murder really means can you -- can you live peacefully in the
7 penitentiary for probably almost all the rest of your life?
8 Rehabilitation would really be an inner thing, you know, a
9 life sentence in capital murder because you're not doing it to
10 get out. You're probably not. You're either going to die or
11 be an old man when you get out. But can you see how that
12 question can focus on can they be held in the penitentiary?

13 A. Yes.

14 Q. Now, with all the evidence that you would have
15 available to you from the first phase of the trial, and
16 whatever evidence either side decided to bring you, and it
17 would be rare -- I would say it's -- it would be impossible
18 for a jury to find a defendant guilty of capital murder in the
19 punishment phase. The State says we don't have anything else
20 to say and the Defense says we don't have anything else to
21 say. That's not going to happen. You're going to get
22 evidence.

23 Do you think that -- with that explanation of how
24 you may go about answering that question, do you think you
25 could answer that question now?

1 A. I would answer it the same way.

2 Q. Okay, okay. All right. You told Mr. Schultz there
3 were specific reasons, and I wanted to ask you what those
4 were?

5 A. Because my -- I have a good -- a dear friend that's
6 in prison now, and I don't think I really thought about it or
7 understood that what he did before I got to know him and the
8 circumstances and really looked at life on the other side, I
9 would have been able to answer those questions. But now that
10 I know him personally and know what he's been through, I
11 understand that being sent to prison for 40 years or for ten
12 years is a life-changing event.

13 Q. Okay.

14 A. And I can't predict whether it's going to be life
15 changing for a person or not. It's just like asking me,
16 what's the probability of a good person doing something bad?
17 I don't know.

18 Q. I never thought of it that way. That makes sense.

19 Mr. Schultz stated the burden correctly. There's
20 kind of two questions. He used the substantial interest
21 question. There's another question called would you balk?
22 Would you balk, or return untruthful answers, violate your
23 oath on those questions. So, I guess probably one of my last
24 questions to you is no matter what the evidence -- well, let
25 me ask you. Are you going to balk at answering those

1 questions, or answer them knowing going in you may have to
2 answer those questions untruthfully such as to violate your
3 conscience? Do you see what I'm saying?

4 Because many times in Mr. Schultz's questioning of
5 you, you said -- you used the words "I don't think I can," "I
6 might not be able to," but if you're telling the Judge that
7 your views -- your personal views would substantially impair
8 your ability to answer those questions, even if the evidence
9 is there, then that's -- that would probably bring my
10 questioning to a conclusion.

11 A. I'm saying that in guilt or innocence --

12 Q. Not a problem?

13 A. -- not a problem.

14 Q. Okay.

15 A. But when it comes to this particular issue, and when
16 we met before and I knew what the issues were and you guys
17 went over them, this one right here stopped me, and I've done
18 nothing but think about this special issue.

19 MR. SCHULTZ: Excuse me just a moment, Judge.
20 For record purposes, would you let the record reflect she's
21 indicated the first special issue dealing with continuing
22 threat to society.

23 THE COURT: All right.

24 A. I cannot ever see a situation when I could answer
25 differently to that.

1 Q. BY MR. GOELLER: Okay.
 2 A. **Because I just don't know.**
 3 Q. Okay, Ms. Stone. I won't -- sometimes we'll
 4 ping-pong you back and forth and back and forth, but I think
 5 at this point I'm doing you a disservice. I'm wasting your
 6 time and the Court's time to ask you any more questions
 7 because I think it's pretty clear. So, I thank you for your
 8 service. I thank you for your honesty. That's -- even though
 9 it didn't go my way, really; do you know what I'm saying?
 10 A. **The best service I can do in this trial is be**
 11 **honest.**
 12 Q. You bet. You're correct.
 13 A. **So that's where I feel good about it.**
 14 THE COURT: Ma'am, the challenge for cause is
 15 granted, and you are finally excused.
 16 VENIREPERSON: Thank you.
 17 THE COURT: Let's take a ten-minute recess and
 18 come back.
 19 THE BAILIFF: All rise.
 20 (Recess taken.)
 21 THE COURT: The next witness is Cathy True.
 22 MR. SCHULTZ: She's a professed 1. If I
 23 understand that procedure, Mr. Goeller will go first for 20
 24 minutes?
 25 THE COURT: Is that your desire?

1 MR. GOELLER: I would like to do that.
 2 THE COURT: All right.
 3 MR. SCHULTZ: But before we do that, what I'm
 4 thinking is statistically speaking, neither one of us has come
 5 even close to saving a 1 or a 5, wherever the polarity is, and
 6 somehow it may pop up. We got to looking to see if we could
 7 find a 5 down the stack just to avoid the "old college try,"
 8 and we found one, but we had to go down to Number 71, and I'd
 9 be surprised if the Defense had that questionnaire because we
 10 don't, either. What I'd like to do is give us a couple of
 11 minutes and see if we want to agree on a 5 to match out with
 12 this 1 and concentrate on somebody else.
 13 THE COURT: Sure. Do you want me to step down
 14 for a few minutes?
 15 MR. SCHULTZ: Well, it's up to you. I mean, I
 16 don't know how long it takes them.
 17 THE COURT: I tell you what, let me step down
 18 for a few minutes and call me back.
 19 THE BAILIFF: All rise.
 20 (Recess taken.)
 21 THE COURT: All right. Mr. Schultz?
 22 MR. SCHULTZ: Not consenting to the Court's
 23 view on 1s and 5s, but nevertheless, we have negotiated a
 24 trade of Juror Number 59, who is -- I'm sorry -- 64, who is
 25 Cathy True, and trading Juror Number 71, who is from the

1 second panel that we've examined, that being James T.
 2 Rountree. And we do this, of course, conditioned upon the
 3 Defendant's consent.
 4 THE COURT: All right. What says the Defense?
 5 MR. GOELLER: Judge, that is accurate, what
 6 Mr. Schultz said. And I would just ask my client, Ivan, is
 7 that agreeable to you?
 8 THE DEFENDANT: Yes.
 9 THE COURT: All right. Then Number 64 and
 10 Number 71 -- well, Number 64, you can tell her she's finally
 11 excused.
 12 THE BAILIFF: Yes, Your Honor.
 13 THE COURT: And let's tell Janie to get ahold
 14 of Number 71 and tell him not to come in.
 15 So at 1:00 we'll start up with Daniel Blackwell,
 16 Number 59.
 17 MR. GOELLER: Yes, sir.
 18 THE COURT: And see you-all at that time.
 19 MR. GOELLER: Be excused until then, Judge?
 20 THE COURT: Yes, sir.
 21 THE BAILIFF: All rise.
 22 (Off the record at 11:00 a.m.)
 23 (Lunch recess.)
 24 THE COURT: I suppose Daniel Blackwell is
 25 next, Number 59.

1 (Venireperson enters the courtroom.)
 2 THE COURT: You're Daniel Blackwell?
 3 THE DEFENDANT: I am.
 4 THE COURT: I want to remind you a little over
 5 two weeks I put everybody under oath, and the oath was to give
 6 truthful answers to the questions that are asked.
 7 VENIREPERSON: Okay.
 8 THE COURT: So I want to remind you that you
 9 are still under that oath.
 10 VENIREPERSON: Yes, sir.
 11 THE COURT: Please be seated.
 12 VENIREPERSON: Thank you.
 13 THE COURT: Mr. Schultz, are you ready?
 14 MR. SCHULTZ: Yes, sir.
 15 THE COURT: All right. This is Daniel
 16 Blackwell.
 17 **DIRECT QUESTIONS**
 18 BY MR. SCHULTZ:
 19 Q. How are you, Mr. Blackwell?
 20 A. **Fine, Mr. Schultz. Thank you.**
 21 Q. Did you ever get to Houston for that RICO thing you
 22 were working on?
 23 A. **I did.**
 24 Q. Tell me about that a little.
 25 A. **We're still waiting. We've got about nine warrants**

1 sitting out right now, and still haven't -- the DA hasn't
 2 decided if they're going to make it a RICO case yet. They're
 3 examining some additional evidence that we had in some other
 4 of the storerooms.

5 Q. It's been a while since I looked at your
 6 questionnaire, but I don't recall whether you've ever had any
 7 jury service before?

8 A. No. I have been called a couple of times and never
 9 served.

10 Q. Do you recall if you were ever called in a criminal
 11 case before?

12 A. I don't recall. Like I said, I never was selected.

13 Q. Okay. A couple of observations about your
 14 background. I believe you were a former police officer?

15 A. Correct.

16 Q. Can you tell me what department?

17 A. I worked for Amarillo Police Department.

18 Q. For about how many years?

19 A. I got on in '74 and got off in '80.

20 Q. I've always wondered about Amarillo, kind of a city
 21 almost like Texarkana where you might have actually two
 22 jurisdictions that you would serve. Was that complicated for
 23 an Amarillo officer to have two different counties?

24 A. Not really. There's Potter and Amarillo County up
 25 there, but, no, I don't believe it was any more difficult than

1 normal.

2 Q. I guess it depended on which county you made an
 3 arrest in, which jail the arrestee went, is that right, or did
 4 it matter?

5 A. In Amarillo -- actually, either one, most of them
 6 went downtown to Potter County.

7 Q. And did -- I'm assuming as a police officer in
 8 Amarillo, were you a patrol officer during that part of your
 9 life?

10 A. Yes, sir.

11 Q. I'm assuming you had times when you went to court
 12 and testified?

13 A. Yes, sir.

14 Q. And you probably had at least some familiarity with
 15 the process, including what, a lot of people complain, is slow
 16 and a lot of resettlings and things like that?

17 A. That's correct.

18 Q. Did you ever get cross-examined by defense
 19 attorneys?

20 A. Yes, sir.

21 Q. And did you -- and I know it all depends, but in
 22 general would you say the questions were fair, or did you
 23 think they tended to cast you in an unfair light, or how would
 24 you view that?

25 A. I don't know that I would use the term "unfair." I

1 believe in the -- you know, it's the perception of each
 2 individual as to what's fair and what's unfair.

3 Q. Maybe if you had been sitting over at the defense
 4 table you'd have thought the questions were very fair under
 5 the circumstances, depending on how you walk into the
 6 situation; is that right?

7 A. That's correct.

8 Q. Okay. Now, I don't know, I can only speak for
 9 myself and maybe speculate how I might feel in a different
 10 role, but I can certainly understand how people seeing a
 11 former police officer -- and even now you, while not in direct
 12 law enforcement work per se, you probably work somewhat
 13 closely in that area because of your security work; is that
 14 pretty accurate?

15 A. It's pretty accurate. I don't really do a lot of
 16 security work. My function is loss prevention.

17 Q. Okay, okay. I guess I should just ask rather than
 18 assume. Do you, from time to time, involve yourself with
 19 either federal or state law enforcement officers when you've
 20 detected some type of criminal loss that's occurred within
 21 your corporation?

22 A. Yes, I do.

23 Q. And I guess like any other major corporation, you
 24 probably have trouble with maybe people creating phony
 25 invoices and paying money -- do you have those kind of

1 problems as part of corporate work?

2 A. Yes, we do.

3 Q. And you've probably got the usual internal kinds of
 4 things, the paperwork shuffles, and then maybe stealing
 5 computers, all the things that almost every big corporation
 6 has now; is that right?

7 A. That's correct.

8 Q. I guess kind of along with this idea that your work
 9 is maybe at least quasi law enforcement would be the following
 10 notion: I think most people would expect a former police
 11 officer and a loss prevention person in the corporate setting
 12 to be probably more philosophically in line with law
 13 enforcement than -- in a criminal case than the defense.
 14 Doesn't mean that they are, but I think most people would
 15 say -- I'll give you an example. As a prosecutor, if I had a
 16 choice between a police officer or a social worker by
 17 profession, not knowing any more about them than their
 18 professions, I would probably prefer to have the police
 19 officer. Are you with me on that?

20 A. I guess I can agree with that.

21 Q. It doesn't mean I'm even right. That's probably how
 22 most people would think if they didn't -- if I didn't
 23 interview people and talk with them and try to read their
 24 questionnaires and get a feel for what they're really about.

25 A. Right.

1 Q. And it's ironic to say that because before people
2 were police officers, they were just people like anybody
3 else. It's not like there's some -- a bunch of smoke and fire
4 that comes up when they pin a badge on. They're the same
5 folks they were when they were in junior high school, high
6 school, college, if they went to college, all that sort of
7 thing?

8 **A. Correct.**

9 Q. The same thing with the social worker. There's
10 nothing transforming about becoming a social worker that I can
11 see, but the professions people choose might give some insight
12 into how they see the world, I guess is what I'm thinking.

13 **A. Okay.**

14 Q. And even if I'm right -- or as long as I think I'm
15 right, I guess I'll act on it, that doesn't mean that the
16 social worker would not be a qualified juror just because I
17 might believe that this person would have, perhaps, more
18 sympathy and more reliance on how people grew up as an
19 explanation for their criminality than maybe someone else
20 would. I still would examine each one, and they both might be
21 perfectly qualified to be part of that eligible pool of
22 jurors. Do you follow what I'm saying?

23 **A. Yes, sir.**

24 Q. So that's kind of how I look at jurors. It's sort
25 of a two-step process. I look and first say, is this person

1 sexual abuse of children. That's just about as bad as they
2 come. You get a large portion of the population that say you
3 ought to be executed for doing that, even though no death
4 occurred.

5 So we oftentimes find ourselves getting ready for a
6 trial in a sexual abuse of a child case, and we're qualifying
7 the jury on their responsiveness to punishment.

8 **A. Right.**

9 Q. And the questions go like this: You understand that
10 the Legislature gives a broad range of punishment options to
11 the jury if a defendant is found guilty of sexual abuse of a
12 child. And you understand that -- explain that range,
13 depending on exactly what's alleged and whether it's
14 aggravated or not, could be all the way up to life or 99
15 years, and you almost never see a human being that will say I
16 could not consider giving someone 99 years in prison for doing
17 that because all of us could. Are you with me?

18 **A. (Nods head.)**

19 Q. But then you go to the other end of the extreme --
20 the other end of the punishment range, and you say, well, what
21 about five years? And jurors start thinking about that. They
22 really stop and think, yeah, how could I ever -- if somebody
23 has done such a thing, how could five years in prison ever be
24 appropriate? And they oftentimes will say, I don't think I
25 can do that.

1 eligible to even be considered for a jury? How a person would
2 not be eligible to even be considered to be on a jury would be
3 if he had been convicted previously of some form of theft,
4 almost of any degree. That's just one of the statutory
5 disqualifications for some reason.

6 **A. Right.**

7 Q. If they were on the Grand Jury that returned the
8 indictment -- if you were on the Collin County Grand Jury that
9 indicted this Defendant, you're statutorily disqualified. If
10 you were not a resident of the county, for example. Somehow
11 or other you got summoned in, but you live in Rockwall County,
12 and so on. Those kinds of things that the Judge actually went
13 over at an earlier time, so those are the statutory things.

14 And the next thing that would make a juror
15 disqualified would be is if he or she could not follow and
16 give fair expression to all of the laws that might be required
17 to be considered by the juror.

18 **A. Okay.**

19 Q. And they can be varied. There can be different
20 cases. Let's talk, not about a capital murder case, let's
21 talk about another kind of case for a second. I think if you
22 were to talk to jurors in general, and say what's the most
23 awful conduct you could ever imagine anybody doing, and if you
24 exclude from that capital murders and you take that class of
25 crimes away, I think you'd get a huge density of people saying

1 **A. Right.**

2 Q. There's no way I could. That's just too low. If
3 you take enough time, and they're regular people and explain
4 to them that the Legislature has created this punishment range
5 for a reason to include all possible varieties and that our
6 Legislature has said there are some cases, depending upon
7 their circumstances, where five years might be warranted, and
8 actually get the juror to thinking about it, most of us would
9 say, well, I think it would be rare. It would have to be an
10 unusual fact circumstance before I could ever go that low.

11 **A. Uh-huh.**

12 Q. But, number one, I'll give the benefit to (sic) the
13 doubt of the Legislature. There must be such cases if they
14 create a punishment range that it could go that low. And,
15 secondly, my job as a juror is to weigh all the evidence and
16 come back with what's right, and I need to have an open mind
17 as to all of the law, and I need to be able to follow all the
18 law because I take an oath that will I do that, and I just
19 need to put what I think ought to be the law aside for a while
20 and just work within the law. Do you follow what I'm saying?

21 **A. Yes, sir.**

22 Q. And then it gets more involved. And that's -- and
23 most people when they stop and think about it, what they're
24 saying is it would be an unusual circumstance, but I am
25 open-minded, and the thing I'm most open-minded to is doing

1 the right thing and that's considering the evidence and
2 following the law the judge gives me. And if they're the kind
3 of people that would rarely ever give five years, they can
4 still be qualified as long as they would consider it and would
5 be able to vote for it when they saw such a case.

6 **A. Okay.**

7 Q. And it gets even more complicated. Sometimes just
8 in our regular cases, not our capital murder cases, because
9 under our law in Texas you are eligible for probation on any
10 sentence in which the jury gives ten years or less. Doesn't
11 mean you're worthy of it. Doesn't mean that you are going to
12 get it, but you're eligible, and if you're eligible, a person
13 sitting on such a jury has to be fairly able to follow the law
14 and give consideration to the concept of probation even in a
15 sexual abuse of a child case.

16 **A. Agreed.**

17 Q. Yeah, the same thing. I mean, it's just the
18 situations seem like they get more extreme. You start asking
19 people of conscience could you give a child molester five
20 years probation depending upon the evidence? Their first
21 reaction is how could you? How could that make sense?

22 But once again, if it's -- if it's the -- if it's
23 the intelligent juror who has a commitment to not making law
24 from the jury box, but rather to giving effect to the law that
25 we have right now, and they actually stop and think about it,

1 the notion of a death sentence as a possible outcome of a
2 criminal case than probation on a child molestation, or sexual
3 abuse of a child case. I don't know. I'm just -- we have
4 some people that express concern about it, and -- but it's the
5 same kind of process. Once you go through the notion that the
6 jury is here to give effect to our law and to fairly evaluate
7 evidence and do that measurement sort of thing --

8 **A. Okay.**

9 Q. -- most intelligent jurors realize that all that's
10 asking people to do is another variety of following the law
11 and keep the open mind and be able to not have any automatic
12 answers to anything. I guess if you sum it all up, I think
13 the thing that the law requires is that jurors not have
14 anything about what they'll do that would be automatic.

15 **A. Okay.**

16 Q. For example, if you're the kind of man that's
17 sitting there right now and you've looked over at the
18 Defendant, and you've said to yourself, I can look in his eyes
19 and tell he's guilty of what they say, you've created for
20 yourself a situation where you've got an automatic verdict
21 then. Do you follow what I'm saying?

22 **A. (Nods head.)**

23 Q. Instead, what the law obliges all jurors to do is --
24 whether it's this Defendant or any defendant in any criminal
25 case, to be able to say I presume that person innocent because

1 they realize, well, yeah, it would be a rare case but my mind
2 is opened -- my mind is open to all the evidence that's
3 presented, and I'll fairly -- I will fairly give expression to
4 our law according to how I see it. And if there's somebody
5 that's only going to give probation once in 300 times, that's
6 fine. And if it's a social worker that believe everybody on
7 Earth deserves a second chance so they almost always give
8 probation, so? That's fine, too, as long as they're open to
9 going the other direction according to the evidence.

10 **A. Okay.**

11 Q. As you sit there right now, do you see yourself as
12 an open-minded kind of man that would be able to resist the
13 temptation and make law yourself in that kind of case and give
14 fair consideration to all the things that the Legislature
15 wants you to consider and that the judges instruct you to
16 consider?

17 **A. I can. I believe I'm very open-minded. In my
18 position and in my profession, I have to be open-minded
19 examining all the evidence that is -- that surrounds whatever
20 case there is, and then make the determination as to how
21 you're going to pursue that and proceed from there.**

22 Q. You seem like that kind of individual to me, sir.

23 **A. Thank you.**

24 Q. Now, moving into the death penalty question. I'm
25 not sure that we have any more people that are resistant to

1 the law starts us all that way.

2 **A. That's right.**

3 Q. No evidence has been presented and unless and until
4 the State proves he's guilty beyond a reasonable doubt, my
5 verdict would always be not guilty. It's like now, if the
6 Judge hands you a verdict form and says, sir, you're
7 instructed to determine whether the Defendant is guilty or not
8 guilty based upon the evidence you've heard, having heard no
9 evidence, the only thing you could ever fill in is not guilty?

10 **A. That's right.**

11 Q. Does that make sense to you?

12 **A. Yes, sir.**

13 Q. And it's a procedural starting point, and it's a
14 good thing because it's there for you and me and our kids and
15 people that we love, and it's also there for all criminal
16 defendants.

17 **A. Correct.**

18 Q. And we have to prove that the Defendant is guilty of
19 capital murder beyond a reasonable doubt or else some other
20 verdict results; either not guilty altogether or maybe guilty
21 of some lesser crime than capital murder. That's our burden
22 of proof. It's never upon the Defendant -- there are very few
23 burdens of proof a defendant has in the guilt-innocence phase
24 of a trial, and I don't know any of them apply here.
25 Defendants have burdens of proof on things like entrapment.

1 They have burdens of proof on things like insanity. They have
2 burdens of proof on things like necessity, but most things
3 they don't.

4 Most things, even if it's a defensive matter
5 raised, for example, we've got to disprove it if it's raised.
6 Self-defense is a classic example. If evidence is offered in
7 a murder case that the killing occurred and, yes, the
8 defendant did it, but the reason it occurred was he was
9 defending his life. We've got to prove that isn't the case,
10 if that isn't being raised. That's just the rules. That's
11 the way -- the rules of engagement in a criminal trial.

12 Do all of those seem like they're okay to you?

13 **A. Yes, sir.**

14 **Q.** And even if you find something in the law, are you
15 the kind of person you think, well, that's not a good rule. I
16 don't like insanity. I think it's an excuse to get people off
17 of terrible crimes. Are you still the kind of man that could
18 fairly give effect to that law since our Legislature has
19 created the defense of insanity?

20 **A. Again, I would have to say yes. I think you have to
21 examine all the evidence and look at all circumstances
22 surrounding that case.**

23 **Q.** Okay. Now, for the most part, how you look at
24 witnesses is your individual business, you know, based upon --
25 based upon your life on this planet. For example, you may

1 **Q.** Okay. Now, we probably all, in our society, have
2 people that we are more impressed with just because they have
3 common interests with us than others. Let me give you an
4 example. If I were an avid fisherman, and I had a juror that
5 seemed like he was also an avid fisherman, I might feel like I
6 had some type of bond or understanding of that person, and I
7 might have a more favorable response to that person than I
8 would if there weren't that fishing bond. Are you with me?

9 **A. Yes, sir.**

10 **Q.** If the Judge will permit me, if the Judge were
11 sitting on a jury sometime he might have more connection with
12 a judge, for example, than another juror might have. He may
13 know about judicial conferences, he may know about the
14 training that's required, the burdens and the sacrifices that
15 you have to make to become a judge instead of a lawyer that
16 would certainly have a more lucrative career in many ways. So
17 we all respond to people that we seem to have common interests
18 or bonds with.

19 **A. Correct.**

20 **Q.** And I say that because it occurs to me that you're
21 going to be listening to evidence that's going to come from
22 police officers. And although you're not a police officer
23 now, you have been in the past. You've not told me this, but
24 I'll bet you, in general, respect law enforcement and think
25 it's important, correct?

1 have, because of your experience, learned more or think you've
2 learned more about how to tell when somebody is lying or
3 somebody isn't. As a police officer, let's face it, you get
4 lied to all the time. This is my car when it's not. I've got
5 insurance when I don't. I'm not Johnny; I'm Fred. You know,
6 that's a way of life for police officers, and so, you probably
7 in many ways, have developed certain instincts about that, and
8 you kind of -- maybe you're more cynical than other people
9 about who's telling the truth and not. But that's okay. How
10 you view credibility is your business.

11 What's important is, as a juror that you be able to
12 resist telling war stories to other jurors. Because if you're
13 seated on this jury, you're going to know stuff about the
14 criminal justice system that the rest of them will not know
15 because it might not be presented as evidence about how jails
16 work, or who keeps logs of this and that in the jails. You'll
17 understand that; they won't. And while it's okay for you to
18 come in with whatever knowledge you might have, it's improper
19 for you to share other stuff because it almost becomes like
20 evidence you're giving the rest of the jury, and they don't
21 have a chance to cross-examine it, and nobody can object
22 because they don't know what's happening, that kind of thing?

23 **A. That's correct.**

24 **Q.** You can do that, right?

25 **A. Right. I understand the instruction from the Judge.**

1 **A. I respect the position.**

2 **Q.** So a question could be asked of you this way. It
3 could say, well, sir, would you automatically give more
4 credibility to a police officer testifying than somebody else
5 testifying? And before you answer that, there are a couple of
6 ways that could be approached. If I were sitting where you
7 are, and somebody said, well, would you give more credibility
8 to a police officer than somebody else, my answer would be, I
9 think I would, and that doesn't make me a disqualified juror.

10 How I go about gauging credibility of an individual
11 witness would be my business. In other words, if I think
12 being a police officer is an important thing, an important
13 indication of credibility, maybe I'm thinking they've been
14 screened. They get fired for crimes, but if I'm thinking in
15 that way, nothing wrong with that question, and nothing wrong
16 with my answer. I'm still qualified, and I can say that.

17 If somebody says would you give more credence to a
18 priest testifying than the average person, I think I would. I
19 mean, I would tend to look at the vows a priest has taken, and
20 the choices he's made -- it would have to be he. It wouldn't
21 be he or she -- the choices he's made in his life --

22 **A. Uh-huh.**

23 **Q.** -- and I would see that as important, and all other
24 things being equal, I would give more credibility; that is,
25 believability to the honesty of that witness than probably the

1 average person. If I'm an atheist, maybe I would go the other
2 way. Maybe I would say, gosh, no, they're a priest. They're
3 against my religion. I might go the other way. All of which
4 is okay, because, remember what I said, the problem is if we
5 have automatic -- automatic responses that control how we view
6 evidence.

7 **A. Okay.**

8 Q. Now, it may be instead that your answer to that
9 question wouldn't even be, yes, I would give more credibility
10 to police officers, because let's face it, if you and I were
11 talking -- well, we talk publicly about the matter. You've
12 known some police officers, either in your Amarillo work or
13 otherwise, that aren't as honest, right?

14 **A. That's correct.**

15 Q. You've seen them do dishonest things. You've
16 probably seen them write reports. You were there, too, and
17 the things they put in the reports aren't the way you remember
18 it, and we all understand that can happen?

19 **A. Correct.**

20 Q. Those are people that have been -- just people in
21 the community beforehand. And so, yes, if you would give more
22 credence to a police officer than somebody else, if that's all
23 there was, so what? It's like me thinking a police officer is
24 a better juror than a social worker. The notion, though, is
25 to be able to look at the person, look at the evidence, and be

1 capable of saying I see that police officer, and, yes, I used
2 to be a cop myself and I like police, but I believe he's
3 lying, and have the ability to say that guy is lying. And
4 you've got that ability?

5 **A. Yes, sir.**

6 Q. Same thing with a priest. I mean, yeah, that priest
7 may look better, but there have been some significant
8 misbehavior by some priests, a very small minority -- but
9 maybe every barrel has a bad apple in it, and -- you know,
10 five bushels of good apples and maybe one bad apple, but you
11 still recognize there can be bad ones or dishonest ones?

12 **A. That's correct.**

13 Q. And that's really a question of credibility because
14 credibility just has to do with whether somebody is telling
15 the truth or not. Then we've got the reliability question,
16 because you call me to testify about some guy that's had a
17 heart attack and whether the doctor did a good job or not. If
18 you start asking me questions, I'll give truthful answers, but
19 I don't know anything. I don't understand hearts. I don't
20 understand x-rays or EKGs. I'd be just as truthful as I could
21 be, but my evidence wouldn't be worth anything because I'm not
22 a doctor. Are you with me?

23 **A. Yes, sir.**

24 Q. And so when we say, would you automatically give
25 credibility to a person because he's a police officer, that

1 just means do you think police officers are magically truthful
2 compared to other citizens? And most people say, no, they are
3 citizens just like everybody else. There's good and there's
4 bad.

5 The reliability question might depend on what they
6 were testifying about. You've got a police officer testifying
7 about a crash scene, and when he's done some measurements and
8 skid marks and stuff, that person may be more reliable than
9 some guy that was, you know, just walking down the street when
10 it happened, just kind of looked around, never had any
11 training. So, there's -- there are those issues.

12 I guess my real question is could you fairly
13 consider what a police officer had to say and be willing to
14 recognize that it could be untruthful on purpose or untruthful
15 because the officer is incorrect?

16 **A. Yes. I could do that.**

17 Q. And you could do that with any other witness?

18 **A. I can do that with anybody. Like I said, my
19 profession calls on me to examine the evidence, which that's
20 what I base my profession on what the evidence presents.**

21 Q. Okay. Now, if we prove to you beyond a reasonable
22 doubt the Defendant's guilty of capital murder, the proper
23 verdict, the only acceptable verdict, if we do that, is
24 guilty.

25 **A. Correct.**

1 Q. And I need to be able to absolutely count on 12
2 people who, if I do my job will do their job, and that is vote
3 guilty for capital murder. If I do my job properly by
4 convincing and producing enough evidence beyond a reasonable
5 doubt.

6 Mr. Goeller and Mr. High, the defense attorneys,
7 need the same thing. They need to know that if I don't do my
8 job, or if, through their skill, they're able to somehow
9 undermine how I've done my job by exposing my witnesses to
10 ridicule or suspicion, for example, or by making my evidence
11 look to be silly or weak or not what it is or by anything else
12 that they may do in the practice of their admirable craft,
13 then I need to know that -- and they need to know that you'll
14 do what's

15 required, and that is vote according to the evidence, and --

16 **A. That's correct.**

17 Q. -- you would do that?

18 **A. Yes.**

19 Q. And on the subject of which, I want to make one
20 quick statement. I do this with a lot of jurors. I think
21 defense attorneys catch a lot of ill-will from some parts of
22 the public. Probably not you. I don't get that sense from
23 you, but a lot of the public seems like they make defense
24 attorneys the scapegoats for all that goes wrong in criminal
25 justice. It's always how could you do that? How could you

1 represent somebody charged with that? How could McVeigh have
2 any lawyer represent him when he blows up a courthouse? How
3 could Manson ever have anybody sit at the table with him and
4 represent him?

5 And I always say I think it's real unfair. Nobody
6 ever asks the doctor, you know, how could you treat McVeigh if
7 he has appendicitis and he's hurting? Nobody ever asks the
8 dentist, how could you fix his tooth if it was aching? Every
9 other professional gets to do their job, and nobody comes down
10 on them. I think sometimes people lose sight of the fact that
11 lawyers are practicing a profession that our society says
12 everybody is entitled to have.

13 **A. Correct.**

14 **Q.** And, you know, maybe -- I don't know your
15 background. You say you don't have any ill-will towards
16 defense attorneys. Do you understand what I'm saying? They
17 don't deserve any more criticism than the doctors or the
18 priests or anybody else who are professionals ministering to
19 the needs of people charged with crimes. If you don't agree
20 with me, at least I hope you see that as a reasonable way to
21 look at it.

22 **A. No, I agree with you. I think everybody is entitled
23 to their own opinion and to pursue their objectives.**

24 **Q.** Okay. And you don't have any problem with the
25 defendant not testifying. You understand that's his

1 **Q.** And it's possible, not often, but sometimes in the
2 heat of this kind of business, which is extremely
3 high-pressured, one side or the other can behave a little less
4 admirably perhaps than we wish we would, and I'm talking about
5 lawyers. I've done it, and I don't know, but I'm sure
6 probably every lawyer in this courtroom has done it at some
7 point. It's high-pressure stuff. You lose perspective,
8 adrenaline starts pumping, and you end up saying things or
9 treating a witness sometimes badly.

10 Then you -- then for rest of the trial you worry,
11 did I treat him so badly that the jury will take it out on me
12 and not look at the evidence because they want to punish me
13 for my breach of decorum.

14 **A. Okay.**

15 **Q.** Are you the kind of man that if I do something or
16 Ms. Falco does something that you think is not professional or
17 unfair to a witness or treat somebody bad, you can overlook
18 that and realize we're not the ones on trial? And if it
19 becomes a trial of how Mr. Goeller or I are behaving,
20 that's -- you know, we're not the ones on trial. It's the
21 Defendant and the State that are on trial here.

22 **A. I have three daughters at home, so I've seen my
23 share of battles, and I understand that in the heat of the
24 moment other people say things, and it's in the pursuit of
25 what they're doing, not directed personally.**

1 Constitutional right?

2 **A. That's correct.**

3 **Q.** And if he doesn't testify, you can't hold it against
4 him, or ask yourself what's he hiding over there because
5 that's forbidden. That's like a forbidden thought even to
6 have. Are you okay with that?

7 **A. Fine, no problem with that.**

8 **Q.** And they don't have to do anything over there at
9 all except behave. I mean, they can't. They've got to be
10 here, and the Defendant has to be here for the trial, but as
11 long as they're orderly, they can -- if they choose to, they
12 can ignore what we're doing here.

13 **A. That's correct.**

14 **Q.** That's absolutely their right, and you can't hold
15 that against them because that doesn't change the burden of
16 proof. The State has got to prove it beyond a reasonable
17 doubt?

18 **A. Correct.**

19 **Q.** You all right with that?

20 **A. I'm fine with that.**

21 **Q.** Maybe they have got to make objections and maybe
22 they have to get the jury excused to do what their profession
23 teaches them they need to do, and that's okay. Are you all
24 right with that?

25 **A. I'm fine with all that.**

1 **Q.** Okay. People say -- when they say they favor the
2 death penalty, they do it for a variety of reasons, and it's
3 interesting because I don't meet many people that say that
4 they favor the death penalty because they think it's
5 wonderful, or because they're thrilled with it or they have
6 some ghoulish fascination with being able to cause someone's
7 death.

8 People express their support for the death penalty
9 in a number of ways. Some have that Biblical concept of
10 society's measured response; the eye-for-an-eye concept. If
11 you do a little crime, you get a little punishment; if you do
12 a huge crime, you get huge punishment; and if you do a crime
13 that's so far over the line that society says that's too much,
14 you pay the ultimate price, which is with your life?

15 **A. Right.**

16 **Q.** Other people say, well, that's okay, but as long as
17 we're going to get religious about it all, I'm a New Testament
18 kind of person and I -- and if you start reading it, that's a
19 lot more forgiving and overlooking. If all you're looking at
20 is the Bible, the New Testament calls for you to turn the
21 other cheek and forgiveness and offer mercy and all that kind
22 of stuff. I'm not coming from a Biblical stance. I'm coming
23 from society's right to self-defense, and I'm thinking that we
24 need the death penalty in this society, number one, to protect
25 us from people who are dangerous. We don't ever need them in

1 our society. Your three daughters don't need dangerous
2 capital murderers ever possibly being around them in our
3 society, and further, I can protect society by making an
4 example of this Defendant that if you do certain, awful
5 crimes, this is what happens to you, and that's kind of a
6 notion of deterrence.

7 **A. Okay.**

8 Q. Do either of those concepts have importance to you
9 as you view the death penalty and support it?

10 **A. I think they hold -- I support both. I believe**
11 **there is a Biblical standard there, but I believe if you take**
12 **that Biblical standard of an eye-for-an-eye, some of that has**
13 **been taken out of context, and there are much deeper matters.**
14 **That Scripture that read some death is not punishable by**
15 **death, or causing of death is not punishable by death,**
16 **depending on the circumstances. And if you look at it as a**
17 **deterrent, I don't know if somebody is so far gone in capital**
18 **murder, or so unstable that they would commit further murders,**
19 **then I don't know that even the death penalty would work as a**
20 **deterrence. So, I support both sides of that. But again, my**
21 **basis is that -- you know, let's review the evidence, and**
22 **let's hear both sides and make a determination based on that.**

23 Q. And then finally another -- understand that does
24 not -- the unusual notion of what punishment is for obviously
25 doesn't fit the death penalty, and that's rehabilitation.

1 Whatever else you say about the death penalty, it's not
2 designed to rehabilitate offenders?

3 **A. Correct.**

4 Q. I guess it rehabilitates them in the sense that it
5 stops their criminality. They won't -- but they haven't
6 learned a lesson that they've just been (sic) done is the way
7 it's happened. And yet, the concept of rehabilitation will
8 work its way into how you answer these questions even though
9 there's nothing in the statute that talks about
10 rehabilitation. I don't know how any juror could look at
11 either of those two special issues and not consider
12 rehabilitation and the possibility of it as part of answering
13 those questions. Let me show you what I mean.

14 The rest of the time that I'm going to be speaking
15 with you, you're going to assume the Defendant has been found
16 guilty of capital murder by a jury. They have not conceded
17 it. We still have to prove it beyond a reasonable doubt.

18 **A. I understand.**

19 Q. But I think you'll find, and Mr. Goeller will tell
20 you, that they're not conceding that issue at all. But what
21 we're here for is to talk about how to handle punishment
22 questions and what that would mean?

23 **A. Okay.**

24 Q. Let's presume that we produced sufficient evidence,
25 and you considered all of it, and the jury found he's guilty.

1 **A. Okay.**

2 Q. We should probably ask you this question along with
3 your verdict. There could be two questions at the
4 guilt-innocence phase. The first question is whether or not
5 the Defendant is guilty of capital murder, and if you found
6 that he was, whether or not beyond a reasonable doubt there's
7 a probability that he would commit acts that would
8 constitute -- criminal acts that would constitute a threat to
9 society. And probably many times that question could be
10 answered yes or no with the same evidence that you used in
11 finding the Defendant guilty of capital murder.

12 **A. Okay.**

13 Q. Because the notion is that looking at what a person
14 has done is perhaps the best predictor of what that person
15 will probably do in the future.

16 **A. History repeats itself.**

17 Q. Right. That's the thinking. That's the thinking.
18 And so it is recognized that a jury may -- doesn't have to --
19 but a jury may base the answer to that question, yes, solely
20 on the basis of the facts of the crime itself; that that could
21 be enough for a jury. Doesn't have to be.

22 **A. Okay.**

23 Q. In the real world, I don't -- I don't know if
24 there's ever been a capital murder trial in Texas where there
25 hasn't been evidence offered at the second phase of the trial.

1 But if there ever has been, it would be very rare, and both
2 sides have a right to offer evidence at the second phase of
3 the trial. Neither side has to, and we still have the burden
4 of proof. We, the State of Texas, have the burden of proof on
5 that first special issue to prove to you the answer should be
6 yes beyond a reasonable doubt. We have to prove beyond a
7 reasonable doubt that the question should be answered yes.

8 Now, why I say that question could be answered at
9 the guilt-innocence phase of the trial is because our law does
10 authorize a jury, if it's convinced from it, to base a yes
11 answer solely on the facts of the crime, or, of course, to
12 base a no answer solely on the facts of the crime.

13 Now, some jurors express the view that if somebody
14 could do a capital murder -- like, let's take our case. A
15 burglary murder, a robbery murder, or a double murder because
16 it's all the same event that we're alleging. We just have
17 different ways of charging. It's almost kind of -- you know
18 how they do in the federal system, how they have 58 counts of
19 stuff, and it's all pretty much the same kind of stuff. But
20 it provides the insurance -- it provides the flexibility that
21 if for some reason there's a problem with one juror, five
22 jurors, whoever, on one you've still got lots of other
23 paragraphs.

24 Unlike the federal system where you might get 58
25 convictions for 58 counts, you get 58 guiltyies. In Texas, you

1 end up with one verdict form, and it's if you find this or
2 you find this, or you find this, then your answer is guilty.
3 If you fail to find any of those, it's something else.

4 **A. Okay.**

5 Q. But some jurors say, well, how could anybody who
6 could do such a crime, a crime of double murder, let's say,
7 how could anybody ever not be a continuing threat to society
8 who could do that. And that's kind of where that willingness
9 to recognize their other situations come in.

10 Everybody knows who Dr. Jack Kevorkian is?
11 Everybody knows that name?

12 **A. Correct.**

13 Q. The so-called suicide assisting doctor, the Doctor
14 of Death.

15 Let's assume, for example, that someone calls
16 Dr. Kevorkian -- he's in the pen now because he won't stop.
17 Let's assume someone calls Dr. Kevorkian, and says I'm
18 elderly. This is going to be my last phone call because I'm
19 in the throws of a terrible neurological disorder. My hand is
20 shaking now so much I can't hold the phone. Tomorrow it's
21 going to be even worse, so can you get down here,
22 Dr. Kevorkian, and put me away. It's what I want I'm saying,
23 and I want your help because I don't want to go out wired to
24 some machines. That's not how I want it.

25 He says fine, I'll be there, and then you say, you

1 it -- and the State proves it. I mean, that's not a hard case
2 to prove anyway.

3 And then you get to that special issue. It may be
4 that although he's been found guilty of capital murder, you'd
5 look at this and you'd say, I don't find that's true. I don't
6 find that's a criminal act of violence if it's consensual with
7 a person. It may be murder, but I don't -- I view violence as
8 doing something to somebody that they don't want done to
9 them. That's how I define criminal acts of violence. You
10 might say, no, near as I can tell, Dr. Kevorkian has never
11 committed any criminal acts of violence. He's committed
12 murders, but his special variety of murder don't meet that
13 statue. They're not murders of violence. They're murders of
14 compassion, and a hundred years from now people look back on
15 us like they look back on slavery and say, how could they put
16 a guy like Kevorkian in prison for doing that. Do you see
17 what I say? It's not an automatic just because you've been
18 convicted of capital murder.

19 **A. I agree with that.**

20 Q. I mean, gosh, you might have committed the world's
21 most atrocious murder, and the police officers get in a
22 shoot-out with you, and you're trying to kill them because
23 you're such a savage, such a beast, that you're trying to kill
24 the policemen after you've done a capital murder. They shoot
25 you first, and they paralyze you from the forehead down

1 can't come to the front door because they know you. They
2 won't let you in. They know what your kind of medicine is,
3 and they won't let you in the nursing home so you've got to
4 sneak in. He says, okay, I'll do that. He comes down there
5 and cracks a window in one of the upper floors and breaks into
6 the hospital for the purpose of coming in there and putting
7 you to death, okay?

8 **A. Okay.**

9 Q. That's burglary. He's entered that building. It
10 doesn't have to be a habitation, and I guess maybe that is a
11 habitation, maybe. He's entered this building for purposes of
12 committing a felony; that is, murder. He comes in there, and
13 he kills you. And even though you want to die, that's still
14 murder in Texas.

15 **A. Right.**

16 Q. In most jurisdictions, if not all of them. If
17 that's the case, if it's a burglary plus a murder, that is a
18 capital murder.

19 And maybe you're the kind of juror that says, you
20 know, if I were making the laws, I'd say that ought to be
21 legal. If a guy wants to die, and it's legal to kill himself,
22 why can't he hire somebody to do it for him? But you've taken
23 an oath that, I'm going to put my personal views about that
24 aside. I think that ought to be the law, but it's not so I
25 can find Dr. Kevorkian guilty of capital murder and prove

1 because they put a bullet in your spine. And as a result,
2 you're not going to be dangerous to anybody ever again.
3 I mean, the only thing you're going to be able to do is take
4 liquids through a straw kind of thing, if you're lucky.

5 **A. Right.**

6 Q. Intravenous, maybe. I don't know if you can even
7 drink through a straw if you're paralyzed from the forehead --
8 I'm not a doctor, so I don't know.

9 You know how to answer that question. Even though
10 this guy would have been the world's most dangerous person,
11 but because of circumstances he's not dangerous anymore?

12 **A. Correct.**

13 Q. So you see how the jury can answer that question yes
14 or no, depending on the evidence presented?

15 **A. Right.**

16 Q. Again, not automatic.

17 And here's where rehab comes in, rehabilitation.
18 While we may all be cynical of rehabilitation of people that
19 begins after they've gotten arrested for a serious crime, I
20 know you're the kind of man who would agree with me that it
21 can happen. People can have a metamorphosis even after
22 they've done a terrible thing?

23 **A. I agree with that.**

24 Q. Okay. And while you and I might be the cynical guys
25 looking at the jailhouse conversions saying this is a show for

1 somebody and it's not really true, if we back off our high
2 horse for a minute and think about it, it might be rare, but
3 it could happen. We're not prepared to say that about every
4 human being. There were people in the Bible that were awful
5 in terms of their behavior and they got changed --

6 **A. That's true.**

7 Q. -- just an overnight kind of thing, right?

8 **A. Right.**

9 Q. And it may be -- depending on how you look at it,
10 you may be the kind of person that would say, well, if a
11 person has genuinely been cleansed by the saving grace
12 available to him and it's genuine, you might be the kind of
13 person who would equate nondanger to that acceptance -- to
14 that acceptance of Christian teaching, and you might not be.
15 I'm just saying, the argument could be made if a person has
16 become a Christian, that person wouldn't be dangerous, that
17 argument can be made because the person wouldn't do criminal
18 acts of violence to our society. That person may genuinely be
19 a Christian. Other people might say they may be two different
20 things. You can be a Christian and still do some pretty bad
21 things. I think some of those Nazis, for example, were
22 probably Christians, or at least claim to be, and those things
23 are bad.

24 But there are some people who could say that it's
25 genuine, and that's -- in their minds that can be

1 rehabilitation. And other people would say, no, that's not
2 rehabilitation. That's just a spiritual conversion. How do
3 you feel about that concept, if it's a genuine Christian
4 conversion?

5 **A. It's a pretty broad spectrum. I believe that people
6 can change. I believe that there are people that are
7 remorseful for their acts of crimes, or their acts of violence
8 and crimes they've committed. I believe there are people that
9 have actual conversions where Christianity changes their
10 entire outlook and their life, but doesn't pardon them from
11 the crime that they committed, but it's not a guarantee that
12 they're not going to commit another crime, either.**

13 **I think it was Mr. Goeller that said in the previous
14 visit that I was out here, that the threat to society, at that
15 point looking at life in prison versus the death penalty,
16 society would be the prison inmates to that person at that
17 point. So, in taking what you've said and looking at the word
18 violence and threat to society and conversion and no further
19 threat, et cetera, you're asking me to say a yes or a no to a
20 very wide --**

21 Q. Absolutely.

22 **A. -- spectrum there. I think all those things are
23 possible. But then on the other side, that's not for me to
24 determine if they -- if that individual will or will not
25 commit a crime further. It's up to me to make a determination**

1 **based on the history and the projection and the evidence based
2 on that particular crime if my opinion is that individual will
3 continue to be a threat to society or that they are
4 rehabilitable.**

5 Q. Quickly, on the vagueness. One of the reasons -- I
6 mean, I'm not deliberately vague, but I can't give you
7 specifics in this case. It would almost make me be like a
8 witness. I can't say, well, if I proved to you the Defendant
9 did A, B, C, D and E, how would you vote, because that's
10 trying to commit a juror to a fact situation. I might be
11 saying it wrong, or it may -- it's not fair. So, we have got
12 to go through this convoluted process of talking abstractly.

13 **A. I understand.**

14 Q. I'm not sure I wish it would be a different way
15 because I think it's probably a better way to understand you
16 to keep it hypothetical and keep the evidence from you until
17 the proper time.

18 **A. Okay.**

19 Q. I guess you recognize there are circumstances where
20 a person could commit a capital murder, and the fair answer to
21 that question would be no, for a number of reasons?

22 **A. That's correct.**

23 Q. Certainly the motive for the capital murder would be
24 important to you, wouldn't it, in trying to figure that out
25 and decide is this person -- if the motive is so unusual that

1 the motive might never happen, and plus the motive is
2 something that you can understand could never happen, that
3 might be the kind of thing that would bear on answering that
4 question no.

5 **A. That's correct.**

6 Q. The example I like to use a lot is the parent that
7 sees the killers of his children get out of court laughing
8 because of a technicality, and they go get a gun and kill
9 those people. It's capital murder. It's as wanton and
10 intentional as could be. You might stall them for a week
11 until you catch up with them.

12 And, yet, you might answer that question, this guy
13 has been fine all his life. He's never done anything wrong,
14 and but for those two killers, he'd be working at his job and
15 going to his church and live the rest of his life just fine.
16 And while I can't excuse what he did, I can't say I don't
17 understand what he did because I've got kids that I love. I
18 can't say I don't understand what he did, and I can't say that
19 that odd fact situation convinces me beyond a reasonable doubt
20 that he's going to be a danger to anybody. Do you know what I
21 mean?

22 **A. I do.**

23 Q. So you're not an "I go along with the death penalty"
24 so that you're always going to answer those questions so you
25 make sure this Defendant gets it, are you?

1 A. No.

2 Q. Can you walk out of this courtroom feeling -- can
3 you walk out of this courtroom with self-respect for yourself
4 knowing, whatever the verdict is in this case -- can you do
5 that -- I mean --

6 A. Yes, I can.

7 Q. And that means if you acquit this Defendant and let
8 him walk out with you, and you don't necessarily like that
9 result, but you weren't convinced beyond a reasonable doubt,
10 you'd still have your self-respect for doing that, right?

11 A. Yes.

12 Q. And if you vote for a death sentence, and you know
13 some day he's going to die if you vote in a way that will
14 result in death, you'd have your self-respect?

15 A. Yes.

16 Q. And if you vote in a way that's going to cause a
17 life sentence, same thing?

18 A. That's correct.

19 Q. If you answer that question no, if you fail to find
20 beyond a reasonable doubt that the Defendant is going to be a
21 continuing threat to society, then what's the result of that
22 answer, if the jury's answer is no?

23 A. If I find that the answer to the acts of violence is
24 no?

25 Q. Uh-huh.

1 A. That's correct.

2 Q. Doesn't mean you speculate on whether a particular
3 defendant's going to escape or not, but it does mean that
4 makes them look at all of our society all the more reasonable
5 because it could be that way?

6 A. Right. That the chance does exist he'll get back
7 out?

8 Q. Yeah, in a number of ways. It may be remote. He
9 could get pardoned by the Governor. Any defendant could get
10 pardoned of his capital murder life sentence by the Governor.
11 All kinds of things could happen. Wouldn't even have to be an
12 escape. There could be -- there might be opportunities to be
13 around inmates. There might be families of inmates there that
14 are civilians. There are guards. There are civilian workers.
15 There's are all kinds of opportunities.

16 If the question meant to limit itself only to prison
17 society, obviously it wouldn't be phrased that way. It would
18 say, do you find beyond a reasonable doubt the defendant could
19 not be safely held in prison?

20 A. Right.

21 Q. The question seems to actually be asking you to
22 measure this person's danger at the present time and see
23 whether or not there's a probability of committing criminal
24 acts of violence in the future. You consider what he did in
25 answering that question. You can consider other crimes that

1 A. Then assuming that he's guilty?

2 Q. Right. You found him guilty. You don't get to that
3 question --

4 A. We're in the second phase here?

5 Q. Uh-huh.

6 A. Assuming my answer based -- assuming on what we've
7 already said, then it would probably be a life sentence.

8 Q. And you're absolutely right. It's a life sentence.
9 That's automatic. Everybody but the Defendant goes home, and
10 the Defendant goes to the Texas Department of Criminal Justice
11 to begin serving a life sentence, which in Texas is not until
12 he's dead, but it's a minimum of 40 years. And even
13 thereafter until such time as the Board of Pardons and Paroles
14 acts upon -- acts upon the requested parole, it's certainly a
15 long time. It's not forever, and certainly there are other
16 considerations to be made.

17 Mr. Goeller is correct. You certainly may consider
18 prison as a society, but it's also correct to say that that
19 question does not limit itself to prison society --

20 A. That's also --

21 Q. -- for a lot of reasons. I'm not talking about this
22 case. Let's face it, try as we might, we see examples of it
23 frequently. People do escape. We can't quite engage in the
24 willing suspension of disbelief that they could ever be in our
25 society because we know that can happen?

1 he may have committed, any defendant -- any hypothetical
2 defendant you can consider that. You can consider non -- you
3 can consider nonviolent crimes, if it helps you in
4 understanding the character of a person, and that's maybe
5 what's going to control whether he commits future acts of
6 violence or not.

7 A. Okay.

8 Q. Like thefts, some of those internal thefts that you
9 work on in your business that are certainly not crimes of
10 violence. I mean, invoice fraud is not a crime of violence,
11 but that would maybe perhaps give people a lot of insight into
12 the character of somebody charged with capital murder in terms
13 of what's this person willing to do to help him or herself or
14 to advantage him or herself.

15 A. Correct.

16 Q. Does that make sense to you?

17 A. It does.

18 Q. I mean, there could be other things that go both
19 ways. Military gallantry, for example, could be extremely
20 important. You can have a Navy Cross with Three Oak clusters
21 or something like that, and that might be a demonstration that
22 a person might be good for our society, might not be such a
23 threat. You can have -- a person can be a cowardly deserter,
24 and that might be some evidence of what personality that
25 person has. What's this person willing to do for society for

1 his own base purposes, I guess, is kind of the notion?
 2 **A. Right.**
 3 Q. Does that all make sense to you?
 4 **A. Yes, sir.**
 5 Q. Do you view wife beating as a crime of violence?
 6 **A. Do I view wife beating as a crime of violence? Yes,**
 7 **I do.**
 8 Q. The reason I say that is because that's come more
 9 to the forefront in recent years, and most people now kind of
 10 realize that that's been an overlooked kind of criminal
 11 activity that we've kind of taken hands off, that domestic
 12 violence stuff. You didn't -- I bet a bunch of your time as a
 13 patrol officer involved that very thing when you were doing
 14 that in Amarillo, didn't it?
 15 **A. That's correct.**
 16 Q. And yet, you probably remember that the attitudes
 17 might have been somewhat different then than they are now --
 18 or were?
 19 **A. It was probably a little more nonchalant.**
 20 Q. And yet, you believe that's a serious thing?
 21 **A. I do, yes.**
 22 Q. Now, if the question is answered yes beyond a
 23 reasonable doubt, years ago that would have been the end of
 24 the inquiry, but it is not now, and it's a good thing. It's
 25 not a bad thing. Now, the jury will be asked an additional

1 question, but only if it's first answered that -- that first
 2 special issue yes, and that's the so-called mitigation
 3 question. And that's really, I believe, even more than the
 4 future danger, that's where religious conviction -- that's
 5 where --
 6 THE COURT: I think there's a screw on the
 7 right side or some sort of latch of some kind.
 8 (Discussion off the record.)
 9 Q. BY MR. SCHULTZ: That's the mitigation question. I
 10 always say it's for the benefit of the jury, and it
 11 incidentally benefits the Defendant by a last-look or a --
 12 kind of a different view on the evidence than has been taken
 13 before. Have you read it?
 14 **A. Yes, sir.**
 15 Q. It's kind of in line with what I've been telling you
 16 all along. The jurors are supposed to have no automatic
 17 answers, and what this question really means is it's not an
 18 automatic death sentence for a defendant who's been convicted
 19 of capital murder and been found to be a danger to our society
 20 beyond a reasonable doubt.
 21 **A. Okay.**
 22 Q. And it's the notion that there could be
 23 circumstances -- we'll call it that for the moment because
 24 that's the statutory wording -- there could be circumstances,
 25 which when weighed by the jury and fairly evaluated by the

1 jury could be mitigating, could be lessening.
 2 **A. Right.**
 3 Q. And I bet you every human being on this earth has
 4 things in his or her background, which we would all agree
 5 are -- to some degree are mitigating.
 6 **A. Right.**
 7 Q. I mean, not all of us are of equal heath. Not all
 8 of us are of equal intelligence. Not all of us are of equal
 9 good looks or equal wealth. There are many things that the
 10 inequities of our situation may resolve. There are many
 11 circumstances in which these inequities may result in
 12 misfortune for us. I don't even need to ask you to know that
 13 you can look back on your life, if you were of the mind to,
 14 and you can think of things that didn't go the way they should
 15 have, or that you got some unfair treatment by somebody or
 16 something. Something serious might not have gone right in
 17 your life. We're all that way.
 18 I mean, the person that grew up -- this is going to
 19 sound sort of funny, the person that grew up with a perfect
 20 life, if there was such a thing, oftentimes isn't even
 21 prepared for what happens in adulthood. I mean, they get the
 22 hammer dropped on them the first time something goes wrong
 23 because they were so protected. And I think you would agree
 24 with me, Mr. Blackwell, that how a person grows up, the kind
 25 of family structure they have and the kind of situation has

1 much to do with the kind of people that they become. Don't
 2 you agree with that?
 3 **A. I agree with that, to a degree.**
 4 Q. Okay. I mean, if you took a hundred people and
 5 divided them into two groups and 50 of them got put into
 6 families as children that drank and partied and were going to
 7 the pen all the time and beating each other up and illiterate
 8 and always getting evicted because they didn't pay their rent
 9 because they didn't work. And you took the other 50 and put
 10 them in a home that had a spiritual basis and a couple of
 11 parents that believed that a big part of their role in life
 12 was to make a new generation better than the one they came
 13 from and make our society better and kinder and more
 14 enlightened.
 15 I guess we'd all expect those 50 kids in the nice
 16 environment would generally do better than the 50 kids in the
 17 sty; don't you agree with me?
 18 **A. Overall, yes.**
 19 Q. And yet, at the same time, there could be people
 20 that came out of that awful environment, the one with
 21 everybody going to jail and doing drugs and fornicating
 22 everybody that comes walking through the door and all that
 23 sort of thing, nevertheless those people -- some of them could
 24 emerge and do very, very well in our society?
 25 **A. Correct.**

1 Q. And you could take some of those other people that
2 had the perfect lifestyle, and they'd turn out to be bad and
3 do bad things?

4 A. I agree with that.

5 Q. Have you ever done any thinking about what might be
6 the reason that people emerge from their environment in ways
7 different than what we expect? Why do you think that is?

8 A. Based on what I do for a living, yes, I've thought
9 about that in a number of cases, and I've seen a number of
10 cases close to what you dissimilated a minute ago where bad
11 people turn good and good people turn bad. I think a lot of
12 it is choices that we make, circumstances at the time.
13 There's a lot of different reasons why people do what they
14 do. I don't know that that answers your question, but I think
15 a lot of it is circumstances, and what we choose to do with it
16 at that particular time, an individual choice.

17 Q. Okay. Does that mean you have no compassion for
18 people who have grown up in really bad circumstances as kids?
19 Does that mean you just say, well, that's how it goes? Are
20 you that way?

21 A. No. I actually have a lot of compassion for people
22 that are less fortunate, or in those circumstances.

23 MR. SCHULTZ: May I have just a moment, Judge?
24 (Brief pause in proceedings.)

25 Q. BY MR. SCHULTZ: Now, it's not for me to say

1 sad. If you stop and think about it for a minute. Hitler
2 seems like the kind of guy that probably grew up about half a
3 loser as a kid, if you just stop for a minute and think about
4 it, and he was. He couldn't play soccer. He couldn't do
5 anything right. He was sick half the time. He was frail.
6 Other kids teased him all the time and made fun of him. He
7 had a dad that was some petty bureaucrat with the German
8 Government that made fun of him for being weak and about
9 half-small, sissy, and that kind of stuff.

10 And I guess, not helping this image of being a
11 sissy, he ends up in art school and goes and tries to do that
12 for a while, not that there's anything sissy about that, but
13 some people look down on that and say that's not real manly
14 for a German and that kind of a thing. The next thing you
15 know, they kick him out of art school and say, Hitler, you're
16 not even good enough to be here, and he gets the boot. And he
17 seemed to have all kinds of trouble with relationships with
18 people, women included. They say he said some kind of a
19 condition -- some psychological condition, he couldn't let
20 anybody touch him. If you touched him, he'd get all upset and
21 withdraw because he was all -- he was about half-nuts, if not
22 all nuts, he was about half-nuts.

23 And the truth is, in some context most of us could
24 have compassion for Hitler. I mean, if things weren't bad
25 enough for the man, somebody gives him syphilis years later

1 how a juror would think, but it occurs to me that when we use
2 the term "mitigation," things like a really messed-up family
3 unit with no support and people so self-absorbed with their
4 own misery, not having time for you, I think most of us would
5 say, well, that -- if mitigating is something that evokes
6 sympathy in us or compassion, I think we'd say that's
7 mitigating. That's some mitigating evidence. Do you follow
8 what I'm saying?

9 A. Yeah.

10 Q. And so my -- our burden -- we are not required in
11 order for there to be a no answer to that question to prove to
12 the jury that there is no mitigating evidence on the
13 background of a defendant. Do you follow what I'm saying?

14 A. Right.

15 Q. Because you've got mitigating evidence. I submit I
16 do. Adolf Hitler, he had all kinds of mitigating stuff. They
17 made fun of --

18 THE COURT: Say, excuse me, Ms. Falco, I'm
19 going to ask you not to do that during court.

20 MS. FALCO: I'm sorry.

21 THE COURT: That's all right.

22 Go ahead, Adolf Hitler.

23 MR. SCHULTZ: Yes, sir.

24 MR. GOELLER: No, that's Mr. Schultz.

25 Q. BY MR. SCHULTZ: He had some stuff that was pretty

1 and that destroys whatever rest of his brain he has got left.
2 And so many of us could have compassion for him. You know, in
3 the abstract, we could say that was an awful life. His dad
4 was a mean, stern fellow, and they shouldn't have kicked him
5 out of art school. We might feel that way.

6 But you get to this part. This is the measurement
7 part of the question, Mr. Blackwell, and it says whether there
8 is sufficient mitigating circumstance, or circumstances to
9 warrant that a sentence of life in prison rather than death be
10 imposed. So you go back to the rest of the question. Taking
11 into consideration all the evidence, including the
12 circumstance of the offense. He killed six million people for
13 their faith.

14 A. Right.

15 Q. The Defendant's character. Well, maybe he had a
16 good character; maybe not. If you read Mein Kampf, that's
17 kind of some soul searching he's doing, and that doesn't look
18 like very good character. You look at his background and
19 that's tragic and mitigating, absolutely. And his personal
20 moral culpability, maybe you could say, well, they shouldn't
21 have kicked him out of art school. You know, that's how it
22 happens. But you look at all of those things, and you add up
23 all the mitigating evidence, and the simple answer to that is
24 that's not sufficient --

25 A. Right.

1 Q. -- to warrant a life sentence. Are you with me?
 2 A. Yes, sir.
 3 Q. That kind of evidence might be sufficient in some
 4 other fact situation, or it might not. All that Hitler stuff
 5 that I've talked about, in another kind of capital case might
 6 be good evidence. If it's Dr. Kevorkian's capital murder, and
 7 you heard that's how Kevorkian turned into the blood thirsty
 8 ghoul that he's become, you might say, well, I understand
 9 that, and that is sufficient mitigating because he wasn't
 10 really killing people without their consent, anyway. So, it
 11 might depend on the fact situation whether something might be
 12 sufficient or not. Does that make sense?
 13 A. I believe the key word is sufficient, yes.
 14 Q. Exactly. That implies some type of measurement.
 15 What it does not imply is I just don't want to kill anybody,
 16 so I'll just call it sufficient because once again, then we're
 17 not measuring. We're almost making law unto ourselves.
 18 A. Right.
 19 Q. Are you the kind of man that recognizes, first of
 20 all, why that is a good thing for a jury of decent human
 21 beings to have available to them?
 22 A. Yes.
 23 Q. Because wouldn't it be awful for a jury to find
 24 somebody guilty of capital murder and find that the person was
 25 probably going to be a continuing threat to society, and yet

1 go walking out of here, looking at each other, and saying, we
 2 did the wrong thing. We answered the questions truthfully,
 3 but that's a wrong, wicked, evil thing that's occurred. And
 4 that is this person, because of his circumstances, should not
 5 have died.
 6 A. Right.
 7 Q. And that gives the jury that opportunity to give
 8 effect to that situation, and it benefits the defendant -- but
 9 that's fine. If it benefits the defendant, it benefits the
 10 jury.
 11 Now, if somebody were to ask the question of a
 12 juror, what in your mind would be sufficient mitigating
 13 evidence to knock out a death sentence to make it a life
 14 sentence, you couldn't answer that question anyway. That's
 15 one of those hypothetical things. First of all, you'd have to
 16 say, well, I need to know what the crime is before I can
 17 answer that question, because if it's Hitler's crimes, I might
 18 have a different answer than if it's the parent who lost two
 19 children to the jackals that go laughing out of the court. Do
 20 you follow what I'm saying?
 21 A. Yes, sir.
 22 Q. So first of all, if somebody said what would be
 23 sufficient mitigating evidence, the question is unfair. You'd
 24 have to know, well, what's the capital murder before I can
 25 know whether it's sufficient or not.

1 A. Right.
 2 Q. And secondly, you may not know, as you sit there
 3 right now, exactly what sufficient mitigation evidence would
 4 be at any time. If I said, well, how much proof is beyond a
 5 reasonable doubt? You don't know. You couldn't tell me how
 6 much proof you need to find him guilty. All you know is it
 7 would have to be a bunch, and you'd know it when you see it
 8 kind of a thing?
 9 A. That's probably correct.
 10 Q. I guess my real question to you -- and I'm about
 11 ready to pass you to the other side is -- are you the kind of
 12 man who realizes that the Legislature has said there are cases
 13 in which mitigation is sufficient to deprive the State of its
 14 quest for a death sentence?
 15 A. Yes.
 16 Q. And you are the kind of man who could have enough
 17 self-respect to vote against the State if you found sufficient
 18 mitigating evidence?
 19 A. If in my mind I was satisfied that was sufficient,
 20 yes.
 21 Q. And even if you can't think of one right now, you do
 22 recognize there could be such cases for you as a juror?
 23 A. I believe so, yes.
 24 Q. Do you have any questions of me, sir?
 25 A. Not at this time.

1 MR. SCHULTZ: I sincerely appreciate your
 2 courtesy. Thank you very much. I'll pass the juror now.
 3 THE COURT: Thank you, Mr. Schultz. Is
 4 Mr. High going to take this witness?
 5 MR. GOELLER: I'll ask the questions.
 6 THE COURT: Are you? Okay.
 7 CROSS-QUESTIONS
 8 BY MR. GOELLER:
 9 Q. Mr. Blackwell, I think from your questionnaire you
 10 work for Petco Company?
 11 A. Yes, sir.
 12 Q. And what is that again?
 13 A. It's an animal supply company.
 14 Q. Okay. Actually, I may have just a very few
 15 questions for you. Where were you in 1997-1998?
 16 A. '97-'98?
 17 Q. Yeah.
 18 A. Here in Dallas.
 19 Q. Where were you living then?
 20 A. The same place I'm living now.
 21 Q. You live on what, Canoe?
 22 A. Canoe Street -- Canoe Road.
 23 Q. How long have you lived there?
 24 A. Since '95, '96.
 25 Q. Do you recall going to a Holigan Home model in '97

- 1 or '98?
- 2 **A. That's who built our house, yeah.**
- 3 Q. Do you recall talking to some -- well, who do you
- 4 recall -- when you first went in there looking for maybe a
- 5 loan or talking about loans, who do you recall talking to?
- 6 **A. Larry -- Larry somebody.**
- 7 Q. Was his name Mr. Larry Murphy?
- 8 **A. Yeah.**
- 9 Q. And who hooked you up with Larry Murphy?
- 10 **A. We did. We just walked in.**
- 11 Q. Do you recall you having an issue about you wanted a
- 12 a lower percentage rate loan?
- 13 **A. I don't recall that, no.**
- 14 Q. Take -- I know you said you haven't -- you don't
- 15 recognize him. Take a good, hard look at Ivan here. Do you
- 16 remember talking to him when you went into the Holigan Home
- 17 model and talking about mortgage loans, and Larry Murphy and
- 18 another guy name Rusty Davis?
- 19 THE DEFENDANT: Actually, Rusty is a female.
- 20 MR. GOELLER: Shhh.
- 21 Q. BY MR. GOELLER: I'm sorry, another female, Rusty
- 22 Davis. Do you recall that?
- 23 **A. I don't recognize him, no.**
- 24 Q. Okay.
- 25 **A. I don't remember dealing with Davis, either.**

- 1 Q. Okay. Were you self-employed in '97 or '98?
- 2 **A. No.**
- 3 Q. Who were you working for?
- 4 **A. Office Depot.**
- 5 Q. Office Depot?
- 6 **A. No, wait a minute, '97? No, I was with Petco in**
- 7 **'97.**
- 8 Q. Around the time you were in this Holigan home, did
- 9 you end up buying a home from them?
- 10 **A. Yeah.**
- 11 Q. And who did you secure the lending with?
- 12 **A. We originally went with -- I think it was Country**
- 13 **Wide.**
- 14 Q. Okay. Do you recall discussions you had about you
- 15 wanted a lower rate?
- 16 **A. I really don't recall that, no. Because I bought my**
- 17 **house in -- when I dealt with Larry Murphy it was in '94,**
- 18 **whenever we got moved back from Los Angeles.**
- 19 Q. And it may have been '94.
- 20 Do you recall wanting kind of a special loan, a loan
- 21 that may have given you some points off, lower APR, something
- 22 like that with Mr. -- maybe Mr. Murphy and others?
- 23 **A. The only time that we made any changes on that was**
- 24 **whenever the foundation split, and they were going to rebuild**
- 25 **our house. That's only the only conversation I recall with**

- 1 **any of that. But I don't recall when we built our house**
- 2 **asking anybody for any special --**
- 3 Q. You don't recall, or you just didn't do it?
- 4 **A. I don't recall doing it.**
- 5 Q. Okay. So you ended up going with Country Wide?
- 6 **A. Yes.**
- 7 Q. Mr. Murphy was not with Country Wide, correct?
- 8 **A. That's correct.**
- 9 Q. And how did you end up with Country Wide?
- 10 **A. My wife worked for Country Wide.**
- 11 Q. Okay. Did you -- how far did you get in school,
- 12 Mr. Blackwell?
- 13 **A. I went two years -- actually, I've gone to school.**
- 14 **I did not graduate from college. I attended a couple of**
- 15 **different schools after high school.**
- 16 Q. Okay. I notice you put on your questionnaire, you
- 17 said grade 13?
- 18 **A. Right.**
- 19 Q. I didn't know what that meant.
- 20 **A. Well, 13 years is what I was referencing.**
- 21 Q. You've been involved in law -- well, I guess you've
- 22 been involved in law enforcement, in one sense or another,
- 23 either loss prevention or patrol officer, for about how many
- 24 years now six, seven, eight? Were you in loss prevention over
- 25 at Office Depot?

- 1 **A. Yes. I've done this since I got out of police work.**
- 2 Q. Okay. You wrote down if someone is accused of
- 3 capital murder he should have to prove his innocence, and you
- 4 circled agree. And I know you took an oath, and you swore to
- 5 tell the truth, and I'm sure you listened to the Judge very
- 6 carefully before you filled out this questionnaire, and if
- 7 that's your honest opinion, then I'll live with it. And I've
- 8 got to believe you told the truth when you circled that,
- 9 right?
- 10 **A. I believe I told the truth, yes.**
- 11 Q. Okay. Did you tell the truth, or do you believe you
- 12 told the truth?
- 13 **A. I told the truth.**
- 14 Q. So you do believe if someone is accused of capital
- 15 murder, he should have to prove his innocence?
- 16 **A. Well, I think the context in which I understood the**
- 17 **question may be different than what you're trying to interpret**
- 18 **it --**
- 19 Q. I'm not trying to interpret it.
- 20 **A. -- or interpret my answer.**
- 21 Q. I'll read it to you exactly as it's stated. If
- 22 someone is --
- 23 **A. No, sir. I said you're --**
- 24 Q. -- accused of capital murder --
- 25 **A. -- trying to interpret --**

- 1 Q. Let me finish my question, Mr. Blackwell.
 2 If someone is accused of capital murder, he should
 3 have to prove his innocence. Now, how did you interpret that
 4 question?
 5 A. I interpret that that everybody has that same right,
 6 as the State has the burden of proof to prove it, he has that
 7 same proof to prove his innocence, by presenting evidence that
 8 he was not there -- or, you know, the mitigating
 9 circumstances, or whatever case. I think he has that same
 10 burden of proof.
 11 Q. So you're sitting there telling me based on that
 12 statement, if someone is accused of capital murder, he should
 13 have to prove his innocence, and that's how you interpret it,
 14 whatever you just put in that record? That's how you thought
 15 that question read?
 16 A. Yes.
 17 Q. Just so the record is clear, when you say he should
 18 have to prove his innocence, you equate that with him being
 19 able to -- if a defendant chose to, to do what? Say that
 20 again. I still don't understand.
 21 A. The State has -- my understanding is the State
 22 has the burden of proof to prove guilt or innocence --
 23 Q. Okay.
 24 A. -- based on evidence.
 25 Q. Yeah.

- 1 A. At the same time, I believe the Defendant has that
 2 same right to prove his innocence by presenting whatever
 3 evidence he has to support his claim that he wasn't there or
 4 he's not guilty, and I believe that's his right as well.
 5 Q. Oh, uh-huh.
 6 So, tell me how you got that out of he should have
 7 to prove his innocence? He should have to prove his
 8 innocence. Still not making your connect.
 9 A. All right. Maybe I am misinterpreting that
 10 sentence, or that -- I believe that everyone has the right to
 11 prove their guilt or their innocence.
 12 Q. What did you say, everybody has the right to prove
 13 their guilt or innocence?
 14 A. That's correct.
 15 Q. Explain that one to me. That's a new one. I've
 16 never heard that one.
 17 A. You don't believe that your client has the right to
 18 prove that he's innocent?
 19 Q. But I'll ask the questions. Explain what you meant
 20 he has the right to prove his guilt or innocence.
 21 A. I'm explaining it to you in that question. That's
 22 my understanding, he has the right to prove his innocence,
 23 just as the State has that right to prove his guilt.
 24 Q. You didn't say that. You said he has the right to
 25 prove his guilt or innocence.

- 1 MR. SCHULTZ: Excuse me, Judge. I'm going to
 2 object to him arguing with the juror. That wasn't even a
 3 question. He's just making an assertion of what he said.
 4 He's just arguing with him.
 5 THE COURT: Sustain. If you would, just ask
 6 the question.
 7 MR. GOELLER: I don't have anything else for
 8 him, Judge.
 9 THE COURT: Anything else from the State?
 10 MR. SCHULTZ: Yes, sir.
 11 THE COURT: All right.
 12 REDIRECT QUESTIONS
 13 BY MR. SCHULTZ:
 14 Q. You understand that question was asked to you
 15 before anybody explained the law to you; that the
 16 questionnaire -- nobody had talked to y'all yet about your
 17 service. You're doing the questionnaire first?
 18 A. That's correct.
 19 Q. It seemed like when you and I were talking you
 20 understood the burden of proof stays on the State?
 21 A. It does.
 22 Q. And when you say that you interpret that question,
 23 do they have the -- however you interpret the question, they
 24 have the right to present evidence. Of course, they do if
 25 they want to?

- 1 A. That's correct.
 2 Q. But are you still in the same place and you agree
 3 that if they don't produce evidence, that failure doesn't go
 4 on the scales of justice in any regard. The only thing to
 5 measure then is what the State has produced.
 6 A. That's correct.
 7 Q. And they don't have to do anything, but they can; is
 8 that what you're saying?
 9 A. Right. And what I was trying to explain is it's my
 10 understanding that he has that same right to prove that --
 11 prove his innocence.
 12 Q. Right.
 13 A. If that's not correct, then I stand corrected. But,
 14 if somebody is accusing me of something, I believe I have the
 15 right to defend that and to present evidence that shows that
 16 I'm not guilty.
 17 Q. Okay.
 18 A. I have -- so I agree with that statement that I
 19 have that right to prove that I'm not guilty.
 20 Q. Right. And they have -- see, the State has an
 21 obligation. I guess we have the right to not put on evidence
 22 if we don't want. I mean, I guess -- I can't imagine looking
 23 at the Judge after eight weeks of this stuff, and he says put
 24 on your evidence, and I say we don't have any.
 25 MR. GOELLER: I'd be there for that.

1 (Laughter.)
 2 Q. BY MR. SCHULTZ: I can't imagine that happening, but
 3 he can't make me. I mean, he might make me wish I had some
 4 evidence, but he can't make me put on any evidence. But, if
 5 that's the case, then the verdict has to be not guilty because
 6 there's no evidence.

7 A. Correct.

8 Q. The presumption of innocence remains.

9 So, really, practically speaking, I do have an
 10 obligation to put on evidence, unless I just want to --

11 A. Throw the case.

12 Q. Yeah, and have all the political and other kinds of
 13 consequences, I guess.

14 But, the Defense, while they have the right to put
 15 on evidence, doesn't have the obligation.

16 A. I understand that.

17 Q. And you wouldn't -- you're not creating some law
 18 that's putting an obligation on them that our law says they
 19 don't have. That's not what you meant by your answer. You
 20 didn't mean that you're expecting them to prove something, or
 21 they better prove something. You're not like that?

22 A. No. And that's what I was trying to explain to
 23 Mr. Goeller that his interpretation of my answer was not what
 24 my answer was, but that's fine.

25 Q. But in fairness to Mr. Goeller, you can understand

1 wrong, she's paraphrased that they intend to prove several
 2 home mortgage lending improprieties or scams -- help me, Gail.
 3 Tell me where it's at.

4 MS. FALCO: Scams.

5 MR. GOELLER: Scams.

6 MS. FALCO: Or fraud -- fraudulent
 7 transactions.

8 MR. GOELLER: Fraudulent transactions.

9 I don't know how to do this. I guess, I'm an
 10 officer of the court, and I'll just tell the Court. My client
 11 knows this person.

12 MR. SCHULTZ: Excuse me, just a moment. I know
 13 he's an officer of the Court, but unless he has personal
 14 knowledge, and not relating knowledge somebody else has given
 15 him, I'd object to you considering that as evidence. If he's
 16 got some extrinsic evidence he wants to offer somehow related
 17 to this juror's fitness, that's fine. But just because -- I
 18 believe he's not deceiving the Court by what he's saying, but
 19 the form of his evidence is not competent unless he has
 20 personal knowledge of it.

21 In other words, I guess what I'm saying is if the
 22 Defendant has something to say about his involvement with this
 23 juror, the only person that can do that talking is the
 24 Defendant. I can't -- we can't have the attorney offering
 25 substantive evidence of what the Defendant would or would not,

1 why he could have looked at it and said, gee, you're going to
 2 make me have to produce evidence that my guy is innocent. You
 3 can see how he would have thought that maybe from the answer?

4 A. I can see that, yes.

5 Q. And you don't have any hard feeling with Mr. Goeller
 6 for that interpretation?

7 A. I have no hard feelings with anybody.

8 MR. SCHULTZ: That's all we have, Judge.

9 THE COURT: All right. Anything else from the
 10 Defendant?

11 MR. GOELLER: No, Your Honor.

12 THE COURT: Why don't you step down for a few
 13 minutes, and we'll invite you back in just a minute.

14 Sir, I will also advise you, there are other jurors
 15 in there, I'm sure. If you would, don't say anything to them
 16 about anything that's been asked of you or anything that
 17 you've answered.

18 THE DEFENDANT: I understand.

19 THE COURT: All right.

20 (Venireperson exits the courtroom.)

21 THE COURT: Let's see here, all right.

22 MR. GOELLER: Judge, I'm in a position I have
 23 to make a challenge for cause for this witness. The State has
 24 provided me with several pages of their 404(B) punishment
 25 evidence. In there Ms. Falco -- and, Gail, correct me if I'm

1 or might be going to say that could be evidence in this case.
 2 I'm not trying to inhibit his ability to offer any evidence he
 3 wants to, but in my judgment, respectfully, it's improper for
 4 him to be offering evidence he knows nothing about.

5 THE COURT: Overruled.

6 MR. GOELLER: I think on preliminary matters
 7 like this under the Rules of Evidence --

8 THE COURT: Listen, anything you're telling me
 9 isn't evidence. Tell me whatever you want to tell me.

10 MR. GOELLER: That's correct. I would state to
 11 the Court that I have very good reason to believe -- granted I
 12 don't have personal knowledge, but I think everybody can
 13 figure where it's coming from. My client worked in the
 14 mortgage lending business, that's undisputed. The State has
 15 notified us of 404(B) improprieties in those loans. And I
 16 have good faith reason to believe that my client and this
 17 person had a one-on-one regarding a loan, and there was some
 18 dissatisfaction on the part of this prospective juror that the
 19 client could get him the right kind of loan he was looking
 20 for, and then he got passed off to the very person he named
 21 next, which was Mr. Murphy and Ms. Davis.

22 Anyhow, the basis for my challenge for cause at this
 23 point is that he's a prospective witness in this case.

24 THE COURT: The juror?

25 MR. GOELLER: The juror could possibly be. I

1 don't think the State has subpoenaed. Probably nobody knows
2 about this, but the problem is he could be a juror and be a
3 witness -- not witness in the sense that he's called to the
4 witness stand to testify, but he now has personal knowledge
5 maybe of some of their 404(b) material. I don't know where
6 that could go, but I think he's -- I think he should be
7 stricken for cause at this point.

8 THE COURT: Anything else?

9 MR. GOELLER: May I have just a second, Your
10 Honor?

11 THE COURT: All right.

12 MR. GOELLER: Furthermore, Your Honor, if I
13 could just add, we're in the position right now, we have no
14 way to gauge, and we run a very bad risk that if he were
15 seated as a juror in this case, it's too late if all the
16 sudden he says -- he were to say to himself, you know what, I
17 do remember Ivan Cantu. I think there's indicia of a problem
18 right now. He's told the Court, yeah, Holigan Homes.
19 Yeah, I dealt with Larry Davis. I can't call the State as a
20 witness, but they probably know Ivan worked there and was
21 doing loans at that time.

22 Again, this is one of those situations that 35.16 in
23 the 35 series, who could have thought of such a thing coming
24 up? And that's why I cut right to the chase with him because
25 I don't think he's a qualified juror. I think in the interest

1 I'll deny the challenge.

2 MR. SCHULTZ: If I could just respectfully, I'd
3 like to renew my objection to anything Mr. Goeller said as
4 evidence, and I believe I understood that you recognized that
5 was not evidence.

6 THE COURT: The only evidence I heard was from
7 the witness --

8 MR. SCHULTZ: From the juror.

9 THE COURT: -- from the juror who said he had
10 no recollection. And also that his dealings with regard to
11 the mortgage were, I took the evidence to be, minimal. So, at
12 any rate, for that reason, I deny the challenge.

13 What says the State?

14 MR. SCHULTZ: He's acceptable.

15 THE COURT: What says the Defendant?

16 (Laughter.)

17 THE COURT: Was that a silly question from the
18 Court?

19 MR. GOELLER: Never silly from the Court, but
20 it was just kind of funny the way you said it.

21 Obviously, we'd use our Peremptory Number One on
22 him, Judge.

23 THE COURT: Excuse me?

24 MS. FALCO: Seven.

25 MR. GOELLER: I'm sorry, was it seven?

1 of justice, a challenge for cause ought to be struck because
2 this juror is a potential disaster on this jury. Who knows,
3 it could be against the State, too.

4 But in any event, I don't think I should be forced
5 to use a peremptory strike on something like this where I'm
6 not able to sit down with my client and say, okay, let's --
7 you decide whether to use a strike based on whether or not --
8 let's face it, in this case his views on capital punishment
9 and all that, I'd be forced to use a peremptory strike on a
10 guy who could very well be a witness -- a witness to some
11 evidence they may produce, and he's sitting in the jury box,
12 (snaps fingers), that's right, I was there, or I know how that
13 went. And maybe that's why he said this to me, or if he
14 recalls even seeing him. I don't know if this Larry Davis or
15 Larry Murphy is going to come into play. I don't know. So I
16 think if anything, it's a problem. It's a problem, Judge, and
17 I'd ask you to grant the challenge for cause.

18 THE COURT: Deny the challenge, and also state
19 that I suppose that's always a possibility with any juror
20 that, you know, some event may occur during the trial where
21 they look back to 20 years ago, and say, oh, yes, now I
22 remember that I had dealings with Mr. High, and I just thought
23 he was marvelous, but I didn't remember it before.

24 But, anyway, I don't think there is any more of a
25 chance with regard to this juror than with any other juror,

1 MS. FALCO: Yes.

2 THE COURT: All right. Well, I tell you what,
3 I don't think I'll bring Mr. Blackwell back in. If you would
4 just thank him for his service and tell him he's finally
5 excused. And we've got one other witness, so if you-all want
6 to, we can take a ten-minute break at this time.

7 THE BAILIFF: All rise.

8 (Recess taken.)

9 THE COURT: Sir, are you Fred Noddin?

10 VENIREPERSON: Yes, I am, sir.

11 THE COURT: Perhaps you recall, I placed all
12 the jurors under an oath, and the oath was to give truthful
13 answers to the questions that are asked. And I just
14 want to remind you to give truthful answers. Please be
15 seated.

16 Ms. Falco?

17 MS. FALCO: Thank you, Your Honor.

18 DIRECT QUESTIONS

19 BY MS. FALCO:

20 Q. My name is Gail Falco, and I'm an Assistant District
21 Attorney here in Collin County. And probably, as I'm
22 speaking, the man that will be sitting next to me on my right
23 would be Mr. Bill Schultz. He's the man that spoke to you two
24 weeks ago. He's my boss. He's the first Assistant District
25 Attorney here in Collin County. And on my left is

1 Ms. Jami Lowry. She's also an Assistant District Attorney
2 here in Collin County.

3 Seated at the other table closest to me is the
4 defendant, Ivan Cantu.

5 THE DEFENDANT: Good afternoon.

6 MS. FALCO: Seated next to him is his lawyer,
7 Mr. Don High. He's a local private practitioner here in
8 Collin County, and probably coming in while I'll be talking is
9 Mr. Matt Goeller, the man that spoke to you a couple of weeks
10 ago. He's also a private practitioner here in Collin County.

11 I take it from two weeks ago that you do not know
12 any of us; is that correct?

13 A. That's correct.

14 Q. Mr. Noddin, I want to talk to you a little bit about
15 this process. Obviously, this is, I guess, at least your
16 third time to be here, maybe at least your second time, and
17 understanding that probably the number one answer put down on
18 a questionnaire when asked what's the biggest problem with the
19 criminal justice system? They said the process is too slow,
20 or it takes too long. But understand, the only time we do
21 this individual voir dire is when the State is seeking the
22 death penalty, and for obvious reasons, the consequences are
23 life or death for this Defendant.

24 What do you think of the process so far? Do you
25 think we're being too careful, too cautious, it's too time

1 process that results in somebody's death.

2 Have you had an opportunity in these past two weeks
3 to do some thinking about this?

4 A. Yes.

5 Q. Okay. And looking at your questionnaire that -- you
6 answered yes, you're in favor of the death penalty, and in
7 some cases you could return a verdict resulting in death if it
8 was the proper case. Is that still your opinion?

9 A. Yes.

10 Q. And over the past two weeks, what have your thoughts
11 been regarding this type of case?

12 A. I think my thoughts have been that if I was selected
13 as a juror, I'd like to think that we wouldn't have to return
14 a death penalty.

15 Q. Okay. And that's probably a pretty common notion.
16 I think we would all like to be able to turn on our TV and
17 not hear about any murders and like to live in a world where
18 we didn't have to use the death penalty because those type of
19 crimes didn't occur. And I think you're exactly right. I
20 think most jurors probably would hope the evidence would show
21 this ought to be a life sentence instead of a death sentence
22 because nobody wants to do that. And nobody -- I can tell you
23 nobody at this table and nobody at that other table enjoys
24 being here, and if we had our choice, we would all like to
25 live in that world where we didn't have to seek the death

1 consuming, or what are your thoughts on that?

2 A. No. I think -- you know, the little bit I know
3 about the process, you're doing fine.

4 Q. Okay. When you first showed up a couple of weeks
5 ago, obviously you probably didn't know what you were being
6 called for initially, but obviously at some point in time you
7 realized this was a capital murder case. What were your
8 thoughts when you realized this was a capital murder?

9 A. It's a lot more serious than the last time I was
10 called here and that was settled before we even got called as
11 a jury. So, I mean obviously, it's something very
12 significant.

13 Q. Now, I know when you filled out the questionnaires,
14 you were given those questionnaires before anybody had -- any
15 of the lawyers talked to you about the law, and you were also
16 having to fill out those questionnaires without really a lot
17 of time for reflection. It pretty much said, what's your name
18 and what do you think about the death penalty. I know you've
19 had some time since you were here two weeks ago to think about
20 your position, and we also understand that it's one thing to
21 talk about the death penalty if you're sitting in your living
22 room and something comes on TV, and you're with your family
23 and talk about how you feel about it. And so, obviously it's
24 a completely different ball game to ask, can you personally be
25 involved in a system that results in somebody's death, or a

1 penalty because those type of crimes didn't occur. So, I
2 think you're right on with those type of thoughts, and I think
3 you're probably in the norm.

4 Given all that, tell me why you are in favor of the
5 death penalty.

6 A. I -- I think at some level there has to be a penalty
7 that an individual involves himself in certain crimes have to
8 pay to convince others not to be involved to that level of
9 criminal activity. I mean, it's, I guess you could say, the
10 ultimate penalty, and there are more than likely certain cases
11 where that will stop some people from doing things that would
12 result in death. It won't in all cases, but I just feel that
13 there's certain people, certain crimes that that is the only
14 recourse.

15 Q. Okay. And given that, in this jury selection
16 process both sides are looking for 12 jurors who can be fair
17 and impartial, who can look at the evidence with an open mind
18 and return a sentence of life, if that's what the evidence
19 shows, or return a sentence of death, if that's what the
20 evidence shows, and bottom line be able to take the oath that
21 they take when they're sworn in as a juror and follow the law
22 and swear to return a verdict that's in accordance with the
23 facts and the law.

24 With regard to what you've been thinking about as
25 far as involving yourself in a process that could result in a

1 death sentence and understanding that you would like it to be
2 in a way that resulted in a life just because that's an easier
3 situation, could you involve yourself in a process that
4 resulted in the death of a defendant?

5 **A. Yes.**

6 **Q.** Okay. I want to go ahead and take you step by step
7 through the trial assuming you were picked as a juror.
8 Obviously, we have a bifurcated system in Texas. The first
9 phase of the trial is the guilt-innocence phase, and with
10 regard to the guilt-innocence phase, the burden of proof is on
11 the State, and we have to prove to you beyond a reasonable
12 doubt that a defendant committed the offense of capital
13 murder.

14 As Mr. Schultz explained to you, as far as our
15 purposes are concerned, there's three situations in which
16 murder becomes capital murder in which the death penalty is an
17 option. And the first one of those is murder in the course of
18 a burglary. Do you remember him talking about what burglary
19 is and murder in the course of that? Understand that that's
20 the law and that the death penalty is an option in that
21 situation. Do you agree with that type of a crime the death
22 penalty should at least be an option?

23 **A. As an option, yes.**

24 **Q.** And that's what I'm saying. It's not automatic or
25 not a guarantee, but at least be an option depending on what

1 punishment phase, and like you were told, it's not a situation
2 where you just say life or death. First you have to answer a
3 series of questions, and depending on how you answer those
4 questions it automatic -- it results in a death sentence, or a
5 life sentence depending on how you answer the questions.

6 With regard to the first question, and I'm sure you
7 recall it from two weeks ago. It's what we call the future
8 dangerousness question; do you remember that?

9 **A. Yes.**

10 **Q.** Now, obviously the Legislature envisioned certain
11 situations that a person might not be a future danger. In
12 other words, the death penalty is not an automatic situation,
13 and that just because a jury could find a defendant guilty of
14 capital murder doesn't automatically mean that they're a
15 future danger. Mr. Schultz kind of covered some of those
16 situations, such as the parent whose child is killed, and then
17 the killers get off and as they're walking out of the
18 courtroom they laugh at the parents, and one of the parents
19 hunts them down and kills them.

20 Or maybe you have a situation with a man who goes in
21 to rob a liquor store. He goes in, robs the liquor store,
22 kills the clerk, but on his way out the police are there. He
23 gets in a shoot-out with the police, and he gets in a
24 shoot-out, and he's paralyzed from the neck down, physically
25 can't move, physically he can't do any danger to anybody

1 the facts may show?

2 **A. (Nods head.)**

3 **Q.** And the same with regard to murder in the course of
4 a robbery, do you think that is a situation -- a crime in
5 which the death penalty should at least be an option?

6 **A. An option, yes.**

7 **Q.** And the same with a double homicide, do you think
8 that's the type of crime in which the death penalty should at
9 least be an option?

10 **A. Yes.**

11 **Q.** Now, assuming that the State proves their case, and
12 they prove it to you beyond a reasonable doubt, and you
13 understand that during the guilt-innocence phase the burden
14 never shifts; it's always on the State? The Defense has no
15 burden at all, has no duty at all, except for to show up. As
16 long as they show up, that's all the law requires. As far as
17 the Fifth Amendment, a defendant does not have to testify.
18 They can testify if they want to, they can put evidence on if
19 they want to, but they have no duty or no burden to do that.
20 And the if judge told you that's the law, and you're not to
21 hold it against them if they don't testify, could you do that?

22 **A. Yes.**

23 **Q.** Let's assume that the jury as a whole finds the
24 State proved their case beyond a reasonable doubt. They find
25 the Defendant guilty of capital murder. They move on to the

1 anymore.

2 Or maybe even the Dr. Kevorkian situation. Maybe
3 it's an elderly couple who decides that they don't want -- one
4 doesn't want to live without the other, and they want to be
5 able to leave this world at the same time, and they get --
6 their health gets to such a point where they can't care for
7 themselves, and they can't care for one another so they
8 solicit the help of Dr. Kevorkian, and he comes in and helps
9 them both to die. In Texas that's murder; because it's two of
10 them, it's capital murder. Maybe that's a situation where you
11 might say, well, they're the ones that asked for it. It
12 wasn't like Dr. Kevorkian came in and killed them without
13 their consent. Maybe he's not a future danger there.

14 But anyway, the Legislature has contemplated there's
15 got to be situations that the jury could find that person
16 guilty of capital murder, but then turn around and look at
17 this question and look at the evidence and say, but we don't
18 think he's a future danger. And in understanding that when
19 you get to this question, you understand it's not automatic
20 that you find this question yes, he's a future danger? It's
21 kind of asking the jury to relook at the evidence. Do you
22 understand that?

23 **A. Yes.**

24 **Q.** Now, it may be that the jury does relook at the
25 evidence and looks at the facts of the crime and just the

1 crime alone, and say just based on that alone, I think he's
2 going to be a future danger. And that's okay, too. They can
3 base their answers to this question solely on the facts of the
4 case. And obviously you can take into consideration all the
5 evidence you hear during the punishment phase as well.

6 Now, with regard to this first question, again the
7 burden of proof is going to be on the State, and we're going
8 to have prove to you beyond a reasonable doubt there's a
9 probability the Defendant will commit criminal acts of
10 violence in the future. A couple of things about this
11 question. First of all, it doesn't say whether there's a
12 certainty. It doesn't say will the Defendant commit criminal
13 acts of violence? It also doesn't say is there a possibility.
14 So, I guess you would agree with me anything is possible. It
15 could snow tonight if a cold front came through.

16 **A. Anything is possible.**

17 **Q.** Anything is possible. So, it's obviously something
18 more than a possibility; something less than a certainty.

19 With regard to the word "probability," it's a word
20 that is undefined. When you get the Court's charge at the end
21 of the case, and the Court's charge contains all the law that
22 you need to know to decide the case. When you get the Court's
23 charge, there will be no definition of probability. It's
24 going to be up to you as a juror to decide what that means and
25 if the State proved it.

1 Some people may look at that word and say, well,
2 being more mathematically minded, to me that's a percentage.
3 Some percentage, it's a probability. Other people may look at
4 that and say, well, to me that means more likely than not.
5 What do you think of that word "probability?" What does that
6 mean to you?

7 **A. I'd tend to say more likely than not.**

8 **Q.** And as you move along in that sentence, the next
9 phrase that you get to that, again, is not going to be defined
10 for you, but again frequently debated as to what it might mean
11 or include, is criminal acts of violence. I think all of us
12 would agree that violence to a person, such as murder,
13 aggravated sexual assault, that's a criminal act of violence.
14 I'm assuming you'd agree with me that beating up your wife is
15 a criminal act of violence. Would you agree with me?

16 **A. I would agree with you.**

17 **Q.** It gets a little fuzzier when you start talking
18 about property. If I were to go outside right now with a
19 baseball bat and just start smashing windshields in the
20 parking lot because I was mad and just started tearing them up
21 with that baseball bat, some people would say, well, that's a
22 criminal act of violence because you're angry and that's rage,
23 and you're taking that out on a car and that violence.

24 Other people may take the position, well, that's
25 property. It doesn't really matter one way or another. I

1 don't see it as violent. Where do you fall in that continuum?

2 **A. In the context of deciding whether or not to have**
3 **the State kill somebody, I think that I'd fall into violence**
4 **against people, not violence against property.**

5 **Q.** Okay. And with regard to that, if you were to hear
6 evidence that you may not think is a criminal act of violence,
7 like smashing up a car, or even things that are clearly not
8 violent, like theft, somebody that just steals or running from
9 the police, lack of authority -- or lack of regard for any
10 type of authority, do you think you could take those incidents
11 and apply that to this question by saying, well, that tells me
12 about their character? It gives me some insight into their
13 character and gives me some insight as to whether or not
14 there's a probability they'll commit criminal acts of
15 violence. Would that apply to you?

16 **A. I don't know. Do you want to ask the question a**
17 **different way?**

18 **Q.** Okay. And even though you might say that damaging
19 property or taking a baseball bat to a car is not a criminal
20 act of violence in your opinion with regard to that question,
21 do you think it might help you understand a defendant's
22 character? It might help you answer that question as to
23 whether or not in the future they might commit a criminal act
24 of violence against a person?

25 **A. It would help define their character, yes.**

1 **Q.** It gets a little fuzzier still if you start talking
2 about drugs, and whether you're talking about delivery of
3 drugs or just a person taking drugs. I'm talking about
4 illegal drugs, such as cocaine, methamphetamine. Some people
5 may say, well, if you take drugs into your body, that's
6 obviously going to do violence to your body. It's going to do
7 bad things. If you take those drugs, it could lead to violent
8 results because you're on those drugs, and so, therefore,
9 that's a criminal act of violence to me.

10 Somebody else may say, no, it really should involve
11 that person and their own body, and what they do to themselves
12 is of no consequence, and it's not threatening anybody, so
13 it's not. Where do you fall on that continuum?

14 **A. Once again, if the question is in regards to**
15 **deciding to have the State put an individual to death, if it's**
16 **a question of their use of drugs themselves, my view is that**
17 **that's violence to themselves. It's not violence to society.**

18 **Q.** Okay. And I guess, again going back to kind of,
19 like, smashing up the cars, if you saw somebody selling drugs
20 or doing drugs, do you think that might give you some insight
21 into character which might help you decide?

22 **A. Yes, it would.**

23 **Q.** And the last word that we get to in that sentence
24 that's, again, undefined, but will be frequently debated and
25 that's the word "society." This question obviously does not

1 limit itself to prison society. It doesn't have that word
 2 prison in that sentence. It doesn't ask can the defendant
 3 safely be locked up in prison. It just says will he be a
 4 continuing threat to society. That society could include the
 5 society you and I live in, the everyday world of the person
 6 driving the school bus, the person selling ice cream in the
 7 ice cream store. It can include the outside world as well.
 8 Do you understand that?
 9 **A. Yes.**
 10 Q. Okay. With regard to this question -- well, you
 11 tell me what type of things would you be looking at to
 12 determine whether or not there was a probability someone would
 13 commit a criminal act of violence?
 14 **A. I think what things I'd look for would be -- and I'm**
 15 **making an assumption here -- that some of that individual's**
 16 **past history is shared. If they have a history of violence,**
 17 **of beating people up, getting arrested for violent acts, that**
 18 **kind of information would influence me.**
 19 Q. Okay. And this would be the punishment phase, so
 20 all good things, bad things about a defendant would be offered
 21 at that point, so you would have those type of things to look
 22 at.
 23 You also may hear some evidence, and you may have
 24 read this or heard this before, but in these type of cases
 25 where either the State or the Defense calls a psychiatrist to

1 testify. And assuming they're not testifying about a brain
 2 disease or a brain tumor or some physical manifestation of the
 3 body, assuming they're just talking about, well, I looked at
 4 this pattern of behavior, and this pattern of behavior tells
 5 me this person will be a future danger. On the flip side, I
 6 looked at this pattern of behavior and that tells me this
 7 person will not be a future danger. How important do you
 8 think that type of testimony is?
 9 **A. I honestly don't know. A more full answer would be**
 10 **that I've grown up. I've watched television shows. You've**
 11 **seen all these things, and I'd have to admit, like my question**
 12 **is, are these psychiatrists so brilliant that they actually**
 13 **effectively can predict that? I mean, if they were, I sort of**
 14 **have the feeling that we'd have a few different management**
 15 **controls in place in society today. I mean, I believe that**
 16 **there are some psychiatrists that are very capable, very**
 17 **competent and very good, and to a large extent they -- because**
 18 **of the fact that they've studied human behavior all of their**
 19 **life, they do have better ability to predict something than**
 20 **the normal person does. But the question always, from my**
 21 **point of view, is that individual really the one that's done**
 22 **all that study?**
 23 Q. Do you think that if the Defense called a
 24 psychiatrist to take the stand and say, well, I've looked at
 25 all this evidence, and in my opinion I don't think he would be

1 a future danger, do you think the State could turn right
 2 around and find a psychiatrist to say just the opposite?
 3 **A. Yes.**
 4 Q. Do you see how that could just end up being a battle
 5 of the experts?
 6 **A. Yes.**
 7 Q. With regard to that question regarding future
 8 dangerousness, like I told you, the burden of proof is on the
 9 State. If all 12 jurors say, yes, I think that there's a
 10 probability he'll be a future danger, you are still in the
 11 process of assessing a death sentence. If ten or more jurors
 12 say, no, we don't think there's that probability, then the
 13 trial is over. It's an automatic life sentence at that point.
 14 So let's assume that you've answered that question
 15 yes. You would then move on -- and you probably remember
 16 Mr. Schultz talked about there was another question regarding
 17 the law of parties, and whether or not if someone was the
 18 getaway driver as opposed to a shooter. Do you remember him
 19 talking about that? Well, that question may or may not apply.
 20 Since we don't think it would apply, we're not going to spend
 21 much time on it. We're going to move on to the next question.
 22 If you answer this probability question yes, you will have to
 23 answer this question, what we call the mitigation question.
 24 If you want to take just a moment and read back over that and
 25 refresh your memory.

1 **A. (Complies.)**
 2 Q. Do you remember that question?
 3 **A. Yes, I do.**
 4 Q. Okay. Again, like I said, it's what we call the
 5 mitigation question, which, I guess, the common usage of the
 6 word mitigation means to reduce, or lessen, to reduce the
 7 defendant's moral blameworthiness, or guiltiness.
 8 With regard to this question, there's no burden of
 9 proof on either side. The State doesn't have to prove to you
 10 there's no mitigating evidence. The Defense doesn't have to
 11 prove to you that there is any mitigation. Basically what
 12 this question is asking the jury to do is weigh all the
 13 evidence, and it's up to you as a juror to assign whatever
 14 weight you want to, to the evidence. You can give the crime
 15 itself whatever weight you want to. You can give any evidence
 16 you hear regarding the Defendant's character and background,
 17 good or bad, you can give that whatever weight you want to.
 18 You can give whatever weight to the personal moral culpability
 19 of the Defendant. You can give whatever weight you want to
 20 that, and you weigh it all. And in the end, you have to
 21 decide is there sufficient mitigating evidence to warrant a
 22 life sentence to lessen anything else that you gave great
 23 weight to; do you understand that?
 24 **A. Yes, I do.**
 25 Q. Okay. And with regard to this question -- as far as

1 mitigating evidence, again you're not going to be given any
2 kind of a list saying, here's mitigating evidence for you to
3 consider. It's going to be up to you as a jury to decide
4 what's mitigating.

5 And with regard to that, it gets back to -- we'll
6 use drugs again. Drugs is a perfect example of what somebody
7 might say is mitigating, another person might say is
8 aggravating. Somebody might say, well, the Defendant only
9 did this crime because he was on drugs. He got hooked on
10 drugs. He was in a downward spiral, he was a complete addict,
11 and it changed his personality completely and he was on drugs
12 when he committed the offense, and because that's not the way
13 he normally is, that's mitigating to me.

14 Another juror may look at the same evidence and say,
15 I disagree. I think it's aggravating because we're told as a
16 society don't do drugs, and the reason we're told don't do
17 drugs is because they're bad for you, they could lead to bad
18 results, and so you knew what you were doing wrong, and not
19 only were you doing drugs, but you committed this horrific
20 crime. That's aggravating to me. And it's up to you as a
21 jury to decide what you think is mitigating and what you think
22 is aggravating.

23 And with regard to that, with regard to drugs, where
24 do you fall on that continuum? If somebody said, you know, I
25 did this because I was on drugs, but I don't do drugs anymore.

1 I quit, and I'm not that person I was. What kind of weight
2 does that carry with you?

3 **A. Well, I guess the way I'd look at it is the**
4 **individual got into the situation because they were on drugs,**
5 **and for them now to say, well, you know, I don't do that**
6 **anymore, it's like but you did do that. So, I'd more than**
7 **likely tend, to come down with your example of mitigating and**
8 **aggravating, I'd more than likely be viewing that as an**
9 **aggravating trait.**

10 Q. Okay. And probably if any one of us were on trial
11 for our life or just for a crime that we might commit, we
12 could all probably think of a circumstance in our life that we
13 could call mitigating. We probably all have something sad or
14 sympathetic that has happened to us along the way. I mean,
15 some kind of health issue or family background, something we
16 could call mitigating. So it's not a matter of is there any
17 mitigating evidence? It's weighing it with everything else,
18 is it sufficient to warrant a life sentence. Do you
19 understand the difference?

20 **A. Okay. Yes, I do.**

21 Q. Now, let's talk a little bit -- you have children,
22 correct?

23 **A. Yes, I do.**

24 Q. And let's assume that -- if your children were of an
25 adult age and committed a crime, I mean, you love your child

1 and probably -- love your children and support them,
2 regardless. And let's assume that they end up on trial, and
3 I'm sure being a parent and a caring parent, you would love
4 and support your child and testify if necessary. You would
5 say I love my child, I support my child and try to help your
6 child out.

7 **A. Yes, I would.**

8 Q. And would you naturally expect the same thing from
9 a person who might be on trial for capital murder?

10 **A. Yes, I would.**

11 Q. That they would have a parent or a family member
12 that says I love my child, I support my child, please don't
13 execute my child?

14 **A. Yes, I would.**

15 Q. How would that argument sit with you if there was a
16 mother up there and obviously upset, and just basically
17 saying, I love my child, please don't kill my child? How
18 would that argument sit with you?

19 **A. I don't think that would necessarily influence my**
20 **decision. It's what I'd expect a parent to do.**

21 Q. Okay. In looking at this question regarding
22 mitigation, other than the phrase "circumstances of the
23 offense," there's really nowhere else to factor in a victim,
24 or the victim's character or anything about the victim. The
25 focus of that question appears to be on the defendant; the

1 defendant's character, the defendant's background, the
2 defendant's moral culpability.

3 Do you remember Mr. Schultz talking about the
4 difference between the nun in the church praying --

5 **A. Yes, I do.**

6 Q. -- versus a drug dealer on the street? Does that
7 make a difference to you, the victim's character?

8 **A. I think what would make more difference is the**
9 **circumstances the victim was in at the time, rather than the**
10 **character.**

11 Q. Okay.

12 **A. Okay. If, for instance, they were involved in a**
13 **drug deal and they all had their guns out, and they decided to**
14 **shoot each other, yeah, that would make a difference to me.**

15 Q. Okay.

16 **A. But if somebody's at home, they're sleeping, they're**
17 **burglarized, they wake up, they go to fight, somebody gets**
18 **killed, that's different --**

19 Q. Okay.

20 **A. -- if they're a drug dealer or not.**

21 Q. Let me extend that a little bit further. Let's
22 assume I just want to live the good life, and I don't want to
23 have to work for it, so I just decided to rob a 7-Eleven.

24 And you're probably laughing because you'd never do that.

25 But let's just assume for my hypothetical that I

1 decide that, and I decide that I just -- I'm going to pick out
 2 a 7-Eleven on my way home without regard to who's working
 3 there. I don't know those people working there, and I walk in
 4 and I hold the place up and I take all the money, and when I'm
 5 done, I kill the clerks. I don't want any witnesses. And I
 6 don't know that clerk, and I don't know if he has a family or
 7 not. I don't know anything about him.

8 Compare that to, let's say, I grew up here, and I'm
 9 going to pick the 7-Eleven that's in my neighborhood where I
 10 grew up, and it's a family that I'm close friends with. And I
 11 know that family and that family has fed me and they've
 12 sheltered me, and they've helped me out when I needed help.
 13 But, because I know the people that work there, I know how
 14 much money they keep there, and I know whose working when and
 15 when I can get the most money. That's who I decide to pick.
 16 And I go in that 7-Eleven, and again I take all the money
 17 because I know how much my friend keeps there and then I kill
 18 my friend. Does that make a difference to you; the stranger
 19 versus killing people that you know is going to impact the
 20 family, you know that family?

21 **A. I think in the example you give, to me it would**
 22 **indicate an individual who's a lot colder, has less regard for**
 23 **people than an individual that at least goes off to do the**
 24 **same crime with somebody he doesn't know.**

25 Q. Okay. Let's talk a little bit while we're still on

1 this question. This question, obviously it asks you to take
 2 into consideration all the evidence, so it can include a
 3 plethora of things. Have you ever heard the phrase "there's
 4 no atheists in fox holes?"

5 **A. Yes.**

6 Q. What does that phrase mean to you?

7 **A. When it comes down to the situation where everybody**
 8 **has the opportunity to be killed, all the sudden it's an awful**
 9 **pleasing thought to believe there's somebody larger than you,**
 10 **that there is a God, that there is life after death, that for**
 11 **that to be the end of it is rather cold.**

12 Q. And you're exactly right. And do you see how that
 13 phrase, or that thinking might carry over to somebody on trial
 14 for capital murder?

15 **A. Yes, I can.**

16 Q. And let's assume in our hypothetical if you're on
 17 the jury, you hear evidence that somebody says, well, since
 18 I've been arrested, I've found God and I've developed this
 19 relationship with God. And I guess ultimately whether that's
 20 real or not is not for us to decide, but if you heard evidence
 21 about that, about, well, now -- don't kill me now because I'm
 22 a believer in God and I can do good things. How does that
 23 argument -- does that make a difference to you?

24 **A. No.**

25 Q. Okay. Why not?

1 **A. The individual still committed the crime. It's as**
 2 **simple as that.**

3 Q. What about youth? If a person appears young, but
 4 assuming they're old enough to know better. They're of an
 5 adult age to be prosecuted for a crime, but they're in their
 6 20s, does youth make a difference to you?

7 **A. In regards to this question?**

8 Q. In regards to the mitigation question?

9 **A. I don't think so.**

10 Q. And I asked you at the beginning, Mr. Noddin, let's
 11 assume that you sat on the jury, and you find the Defendant
 12 guilty of capital murder, and you answered that first
 13 question, that probability question yes, because the State
 14 proved to you beyond a reasonable doubt that the Defendant
 15 would likely commit criminal acts of violence in the future.
 16 You get to this second question. First of all, could you keep
 17 an open mind? The law says you've got to keep an open mind.
 18 You've got to -- you know, to follow the law you've got to
 19 fairly answer each question, depending on how the evidence
 20 plays out. When you get to this mitigation question, could
 21 you do that? Could you keep an open mind?

22 **A. I believe I could keep an open mind.**

23 Q. And if the facts warrant that a life sentence -- the
 24 mitigating evidence is sufficient that a life sentence should
 25 result, you could do that?

1 **A. Yes, I could.**

2 Q. And if you find that there's not sufficient
 3 mitigating evidence, you could answer that question no,
 4 knowing that a death sentence could result?

5 **A. Yes, I could.**

6 Q. Let me take a moment just to go through your
 7 questionnaire here.

8 (Discussion off the record.)

9 Q. BY MS. FALCO: Not to interrupt, Mr. Noddin, do you
 10 remember what you might have been in here for?

11 **A. Yes, I do.**

12 Q. Okay. Not to be personal or embarrassing, but if I
 13 could ask to (sic) what reason that might have been?

14 **A. My son was involved with another playmate, he set a**
 15 **school on fire, and after a year's worth of back and forth**
 16 **with lawyers, we finally got to sit down in front of a judge,**
 17 **and the judge says, why are you guys here? The children are**
 18 **under 11 years old. There's no case. I believe that was this**
 19 **room.**

20 THE COURT: I tell you what, all these --
 21 well, there are how many? Six of these courtrooms, so could
 22 have been --

23 THE DEFENDANT: Could have been --

24 THE COURT: -- any number of them. I thought
 25 that Ashford might have gone to school with my boy.

1 Q. BY MS. FALCO: Anything about that situation with
2 your son that would keep you from being fair and impartial to
3 the State?
4 **A. I don't think anything that would keep me from being**
5 **fair and impartial.**
6 Q. Do you have bad feelings, I guess, toward the State
7 because of what happened to your son?
8 **A. No.**
9 Q. Anything, I guess, that would keep you from being
10 just fair and impartial juror on this case, or could you set
11 your son's case aside and look at the facts of this case and
12 base your answers on the facts of this case alone?
13 **A. I would like to think that I could. My son has**
14 **nothing to do with this case.**
15 Q. Right. And you understand the difference and you
16 can set this --
17 **A. Yes, I do.**
18 Q. Mr. Noddin, in your question it asked you, best
19 argument in favor of the death penalty and best argument in
20 opposition of the death penalty. And when you had best
21 argument in opposition of the death penalty, you said "a
22 person may not be guilty." Can I just assume that means a
23 person may be wrongfully put to death?
24 **A. Yes.**
25 Q. And you understand that obviously the State has to

1 prove beyond a reasonable doubt the defendant's guilty before
2 you move on to the punishment phase?
3 **A. I understand that.**
4 Q. I definitely agree with your statement about
5 prosecutors are overworked. I agree with that.
6 And you did -- this is the number one answer. The
7 biggest problem in the criminal justice system is the slowness
8 of the system. I guarantee nine people out of ten put that
9 down.
10 And with regard to your son, you don't recall who
11 the attorney might have been, either the defense attorney that
12 worked --
13 **A. No.**
14 Q. Mr. Goeller doesn't look familiar to you? Mr. High
15 doesn't look familiar?
16 **A. No.**
17 Q. And I say that because Mr. Goeller has done a lot of
18 juvenile --
19 **A. No. The only -- I can't even remember our lawyer**
20 **anymore, other than why did it take us nine months of this**
21 **process only than to find out there wasn't a case.**
22 MR. GOELLER: Couldn't have been me then.
23 (Laughter.)
24 **A. However, he did get a good fee.**
25 Q. BY MS. FALCO: Do you know if it was just a civil

1 case only, or if there was actually, like, a juvenile
2 prosecutor that was handling --
3 **A. No. It was a civil case only. The school district**
4 **was after us for reparation.**
5 Q. What brought you from San Jose, California to
6 Dallas?
7 **A. Northern Telecom. I've wondered many times why I'm**
8 **not still there.**
9 Q. Why are you still here?
10 **A. However, Texas grows on you, right?**
11 Q. It does. It does.
12 THE COURT: Say, was it Nathan White
13 representing you in that case, by any chance?
14 VENIREPERSON: I honestly don't remember. It
15 was a lawyer out of Plano.
16 THE COURT: Nathan White seemed to have done
17 some of that sort of stuff, a fellow I know pretty well.
18 VENIREPERSON: The other family involved also
19 had counsel. And I mean, we wanted to settle with the school
20 district. I mean, damage was done, needed to be reparations,
21 and the other family was like, no way! And her legal counsel
22 says, A-ha, if you go, guess what, you owe it all. Anyway, so
23 excuse me. But side issue, you know, my one experience with
24 the legal process wasn't all that encouraging. It's -- it
25 summarized up as to why did it take us ninth months to find

1 out that the judge really knows the law, and neither of these
2 lawyers do, let alone the prosecution. You know, the facts
3 are pretty much simple facts, right?
4 THE COURT: I suppose.
5 Q. BY MS. FALCO: Mr. Noddin, I notice on your
6 questionnaire you were raised Pentecostal, and you appear to
7 be very involved with your church, but I'm unfamiliar with
8 your church. What's that --
9 **A. Baruch Hashem.**
10 Q. Yes.
11 **A. It's a messianic --**
12 Q. Jewish --
13 **A. -- Jewish congregation.**
14 THE COURT: Mr. Noddin, I notice that one of
15 your hobbies is carpentry.
16 VENIREPERSON: Yes.
17 THE COURT: I've got to ask you, have you ever
18 seen these bumper stickers that say, "My boss is a Jewish
19 carpenter?"
20 VENIREPERSON: Yes, I have.
21 (Laughter.)
22 THE COURT: Do you find any humor in those?
23 VENIREPERSON: I understand, obviously, where
24 the bumper sticker comes from. Yes, there's a little bit of
25 humor in it.

1 MS. FALCO: Your Honor, may I have one moment,
 2 please?
 3 THE COURT: Yes.
 4 (Brief pause in proceedings.)
 5 MS. FALCO: Thank you, Mr. Noddin. Pass this
 6 juror.
 7 THE COURT: Mr. High, go ahead.
 8 MR. HIGH: Yes, sir, Judge.
 9 CROSS-EXAMINATION
 10 BY MR. HIGH:
 11 Q. Hi, Mr. Noddin. My name is Don High, and I
 12 represent Ivan Cantu, along with Mr. Goeller. Nice to talk to
 13 you today. I have a few questions for you as well.
 14 A. Okay.
 15 Q. Tell me where Bath, New Brunswick, Canada is?
 16 A. You know where Main is?
 17 Q. Yeah.
 18 A. So if you go across the Canadian border from Main,
 19 you hit New Brunswick.
 20 Q. Okay.
 21 A. That's the providence residing on it. Bath is
 22 about, if you can find Holton, Main on a map, Bath is more
 23 than likely about 75 miles north-westerly from Holton.
 24 Q. And you were born there. How long did you live
 25 there?

1 A. I don't think I lived in Bath at all.
 2 Q. Oh, you didn't?
 3 A. No. That was just the hospital.
 4 Q. Okay.
 5 A. Maybe answering more than you asked, and I shouldn't
 6 do that. I lived in New Brunswick as a Canadian citizen for
 7 13 years, and then we moved to California and moved from
 8 California in school to Pennsylvania. In 1969, I moved back
 9 up to Ontario, Canada for ten years, and then moved back up to
 10 California.
 11 Q. All right. So you were 13 when you moved from
 12 Canada the first time?
 13 A. Yeah.
 14 Q. Spent your childhood in Canada?
 15 A. Yeah.
 16 Q. Are you a hockey player?
 17 A. Oh, I used to play hockey. When I went back up, I
 18 played hockey, too. I got a number of cuts and decided that
 19 wasn't a fun game. Hockey sticks in the eye aren't fun. But
 20 that was a friendly league.
 21 Q. That was a friendly league?
 22 A. That was a friendly league, yes.
 23 Q. I don't see how there could be a friendly hockey
 24 league.
 25 A. Hum. Well, if that was a friendly league, you don't

1 want to get involved in the rough ones.
 2 Q. I never did skate well enough to play hockey, so...
 3 A. My brother said I didn't, either.
 4 Q. Mr. Goeller has played some hockey. I think he
 5 spent some time up in that area, and that's interesting.
 6 Do you also -- do you speak French, by any chance?
 7 A. Nope. However, my French teacher in California
 8 thought that because I came from Canada I must speak French,
 9 so she gave me As. It was good for a year.
 10 (Laughter.)
 11 MR. GOELLER: He's not from Quebec?
 12 VENIREPERSON: Not from Quebec.
 13 MR. GOELLER: He's not a Quebecwan (phonetic).
 14 Q. BY MR. HIGH: Do you have dual citizenship?
 15 A. I have dual citizenship as far as Canada is
 16 concerned. The United States, unless something has changed,
 17 doesn't recognize dual citizenship. So, no, I'm an American.
 18 Q. And I wasn't clear, did you go to college in
 19 California or college in Pennsylvania?
 20 A. Pennsylvania.
 21 Q. Did you go to Penn?
 22 A. Carnegie.
 23 Q. What did you study there?
 24 A. Electrical engineering.
 25 Q. We've had a bunch of those guys on our panel.

1 You're probably number five, five or six.
 2 How far did you go in electrical engineering?
 3 A. Year and a half in the program.
 4 Q. Okay. So, did you get a college degree?
 5 A. No, I didn't.
 6 Q. All right. And did you go to the service at that
 7 point, or --
 8 A. No. That's when I went back to Canada.
 9 Q. What took you back to Canada the second time, to
 10 Ontario?
 11 A. My father had died, which is why I left school, and
 12 my mother was in Ontario. So, at that point in time I went
 13 back and didn't have any funding for Carnegie.
 14 Q. Okay.
 15 A. So they invited me up, and I went up.
 16 Q. All right. Did you have any military service?
 17 A. No. I was in -- I was in ROTC when I was in CMU,
 18 but I wouldn't call that military service.
 19 Q. All right. You put down that criminal defense
 20 attorneys are expensive.
 21 A. Well, I don't know about criminal, but civil, at
 22 least, are expensive.
 23 MR. GOELLER: Yeah, those guys are expensive.
 24 Q. BY MR. HIGH: I wish that was true across the board.
 25 Unfortunately, it's not. Do you know anything about appointed

- 1 counsel, criminal appointed counsel?
 2 **A. I understand that if a defendant can't afford**
 3 **counsel, that's appointed, yes.**
 4 Q. Okay. Well, we're appointed in this case, okay. So
 5 that may or may not be true. That's yet to be determined
 6 whether or not we're expensive. But you understand that's --
 7 you look at a criminal defense attorney, and that's just not
 8 all -- that's just not always the case. Sometimes --
 9 **A. Generalizations never are.**
 10 Q. -- we as taxpayers have to pay for it; do you
 11 understand that?
 12 **A. Yes, I do.**
 13 Q. Okay. And also, if the attorney's ethical and
 14 honest, he's going to work as hard on his appointed cases as
 15 his highly retained cases, at least we hope so. It's not
 16 always the case, but I guess in an ideal world, that's what
 17 we'd expect from an attorney. But you'd agree with that,
 18 wouldn't you?
 19 **A. I'd agree with that.**
 20 Q. And you mentioned that your son was charged with an
 21 assault case but never prosecuted?
 22 **A. That's correct.**
 23 Q. And is this the same son that was involved in this
 24 other situation that you talked about?
 25 **A. Yes, it is.**

- 1 Q. And I'm not real sure what his name is?
 2 **A. Asher.**
 3 Q. Is it Asher?
 4 **A. Yes.**
 5 Q. Okay. And he's now a telecom installer?
 6 **A. (Nods head.)**
 7 Q. Who does he work with?
 8 **A. Butler Telecom.**
 9 Q. That doesn't mean anything to me. Where is Butler
 10 Telecom?
 11 **A. Well, Butler headquarters are out of St. Louis.**
 12 **Their office is out of Irving, and basically what they are is**
 13 **a body shop contractor to, you know name it; Southwestern**
 14 **Bell, Verizon, whoever.**
 15 Q. Sure, okay. And so is he an independent contractor,
 16 sort of? I mean, he --
 17 **A. Well, he's not an independent contractor in terms of**
 18 **he's salaried by Butler. Close to an independent contractor.**
 19 Q. Okay.
 20 **A. That's the way I'd describe it from a benefits**
 21 **situation.**
 22 Q. And he's 21 years old?
 23 **A. Yes, he is.**
 24 Q. And is he still on your payroll, or does he live on
 25 his own now?

- 1 **A. No. He lives with us, but he's on his own payroll.**
 2 Q. Okay. That's good.
 3 So we've got a couple of incidents; we've got the
 4 fire situation and the assault. Did you have to hire an
 5 attorney on the assault case?
 6 **A. No.**
 7 Q. That just somehow resolved itself where he didn't
 8 get charged or something? How did that resolve itself?
 9 **A. Well, I talked to the District Attorney involved a**
 10 **couple of times. Asher had some other people that were**
 11 **involved there write some letters to the District Attorney to**
 12 **explain the situation, and the outcome is two years later he**
 13 **still hasn't been charged, so I don't know what the situation**
 14 **is.**
 15 Q. Where was that?
 16 **A. At our home.**
 17 Q. Where, what city?
 18 **A. Oh, Plano.**
 19 Q. In Plano?
 20 **A. Uh-huh.**
 21 Q. So it would be this District Attorney's office --
 22 **A. Uh-huh.**
 23 Q. -- that would be doing the prosecution?
 24 **A. Yeah.**
 25 Q. Okay. And I take it you're glad that he hadn't been

- 1 prosecuted yet?
 2 **A. Yes.**
 3 Q. Obviously, you're glad about that?
 4 **A. Yes.**
 5 Q. Okay. And you're hoping he won't be?
 6 **A. I'm hoping he won't be.**
 7 Q. Okay. Not anything about that, the potential for
 8 prosecution, that would affect your jury service, would
 9 there? I mean, you understand that these people would be the
 10 same folks that would be prosecuting your son in the event he
 11 was charged? I don't suppose that would affect you, or how
 12 you view the evidence or how you view this case? And I know
 13 you're thinking, gee, this guy is really probing me.
 14 And here's what I mean by this: Would you feel
 15 compelled to give them the verdict that they want in the hopes
 16 that maybe if they had a decision to make as to whether or not
 17 to prosecute your son that maybe they would choose not to
 18 prosecute your son? I mean, I'm not trying to impugn your
 19 integrity, but I'm also trying to get to the heart of matter.
 20 I mean, you certainly don't want to see your son prosecuted in
 21 the future. Is that ever going to affect your decision-making
 22 ability in this case, or could it? Could it in any way?
 23 **A. I don't believe that it could. I haven't thought**
 24 **about that in terms -- I haven't thought that anybody is going**
 25 **to offer me a quid-pro-quo, if that's what you're asking.**

- 1 Q. I understand that. I'm not saying they will.
 2 A. Okay.
 3 Q. I'm not trying to accuse anybody of anything. I'm
 4 just trying to talk about human nature basically.
 5 A. Uh-huh.
 6 Q. Now that you have thought about it, would that be in
 7 the back of your mind? Would that be a consideration for
 8 you, a concern or --
 9 A. No.
 10 Q. -- would you be able to set that completely out of
 11 your mind and vote your conscience, regardless of what
 12 happened to your son?
 13 A. I believe that I could.
 14 Q. Okay. I apologize I had to get so close in there on
 15 you, but you understand I've got a man's life that we're
 16 looking out for here?
 17 A. Yes, I do.
 18 Q. We've got to ask some touchy -- we've got to ask
 19 some hard questions at times.
 20 Who was he arrested by?
 21 A. Plano Police.
 22 Q. And is his bond money, is it -- did you ever get the
 23 bond money back?
 24 A. (Shakes head.)
 25 Q. You posted bond?

- 1 A. Posted bond.
 2 Q. So the bond is still up and still posted somewhere?
 3 A. I guess.
 4 Q. Did you post the bond?
 5 A. How do you mean?
 6 Q. Okay. I know you don't live in my world. Did you
 7 go and bond him out, bail him out of jail?
 8 A. Yeah.
 9 Q. Did you put up a cash bond, or did you get --
 10 A. I had a bonds --
 11 Q. A bondsman put it up?
 12 A. Yes.
 13 Q. Okay. You were laid off from your job?
 14 A. Uh-huh.
 15 Q. And you had spent 30 years with Northern Telecom?
 16 A. 32.
 17 Q. Tell me about that. Tell me how that impacted you.
 18 A. Well, so far --
 19 Q. When were you laid off?
 20 A. I was laid off effective, oh, the -- I think it was
 21 14th of July. They'd given me a year's paid vacation, so at
 22 the moment it hasn't impacted me. At some point in time I'm
 23 going to have to go out and get another job.
 24 Q. Sure.
 25 A. I'm enjoying a vacation.

- 1 Q. Sure, okay.
 2 A. Unlike an awful lot of other people that aren't. I
 3 mean, you know, at this time Northern has laid off 15,000,
 4 20,000 people.
 5 Q. So you own a bunch of Northern Telecom stock?
 6 A. Uh-huh.
 7 Q. It's gone in the tank, hasn't it, about six dollars
 8 a share?
 9 (Venireperson laughs.)
 10 A. You obviously got too much time to look at the stock
 11 market, Guy.
 12 Q. Well, I own some of it, too, and I don't like it.
 13 A. Well, let's see, yesterday it was like 5.30. It's
 14 not good.
 15 Q. Okay. Is there any possibility of you going back to
 16 work for them?
 17 A. If they called at some point in time and said come
 18 on back to work, I'd go back to work for them. They're a good
 19 company. I mean, I didn't stay there for 32 years because I
 20 thought they were a slock (sic) outfit.
 21 Q. And tell me exactly -- give me an idea what you did
 22 for them. What was your work?
 23 A. Well, my last job was on Worldcom Account Team,
 24 which is basically a sales team basically responsible for
 25 moving all the products through to a particular customer. In

- 1 our particular case it was Worldcom. My job was, number one,
 2 to sell services, okay? All the equipment that you can
 3 imagine that we've got out there -- we've done business with
 4 Worldcom for 15, 20 years -- my job was to sell services for
 5 maintenance, operation and support of that equipment. That
 6 was the primary job.
 7 The secondary job was developing an e-commerce
 8 relationship between the account team, Northern Telecom, and
 9 Worldcom. Worldcom is installing a company that maybe owns
 10 stock in (inaudible) for B-2-B, business-to-business commerce
 11 system, and I was working with the technical, got catalogs and
 12 stuff like that to get that system up and operative for them.
 13 Q. Okay. And Worldcom was projected to have tremendous
 14 growth, and their stock has kind of gone in the tank as well?
 15 A. Worldcom a year ago had tremendous growth with
 16 Nortel.
 17 MR. SCHULTZ: Excuse me, Judge. Might we have
 18 a very brief recess outside the juror's presence for a point
 19 of law?
 20 THE COURT: Sure. Let me ask you to step down
 21 for about 2 or 3 minutes, and then we'll have you back in?
 22 VENIREPERSON: All right. Thank you.
 23 (Venireperson exits the courtroom.)
 24 THE COURT: All right. The juror is outside.
 25 MR. SCHULTZ: We've heard enough. We agree.

1 MR. GOELLER: I think he falls -- I was going
 2 to make a motion, I told Mr. Schultz, I think he falls in with
 3 Mr. Bolin. He's got a family member, pending case with the
 4 DA's office in Collin County. That was going to be my spin.
 5 MR. SCHULTZ: We don't agree with that
 6 assertion. We just agree we don't need him on the jury.
 7 THE COURT: And that's your impression?
 8 MR. GOELLER: No, it is. But he has to agree
 9 to what I agree to -- no. We agree to excuse that juror.
 10 MR. SCHULTZ: That's assuming it's okay with
 11 the Defendant, Your Honor.
 12 THE COURT: Have you spoken to your client?
 13 MR. GOELLER: Yes. Ivan, would you tell the
 14 Judge whether or not you agree to excuse that juror?
 15 THE DEFENDANT: You can excuse him.
 16 THE COURT: That's your desire?
 17 THE DEFENDANT: Yes, Your Honor.
 18 THE COURT: All right. Would you tell
 19 Mr. Noddin he is finally excused. We appreciate his jury
 20 service.
 21 All right. Then we're striking Mr. Noddin by
 22 agreement. Is there anything else from either side?
 23 Anything else?
 24 MR. GOELLER: I'm thinking, Judge.
 25 MS. FALCO: No, Your Honor.

1 MR. GOELLER: No, Your Honor. Thank you.
 2 THE COURT: All right. Then everybody is
 3 finally excused, and I hope you-all have a nice, long
 4 weekend.
 5 (End of Volume 16.)
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1 REPORTER'S CERTIFICATE
 2 THE STATE OF TEXAS *
 3 *
 4 COUNTY OF COLLIN *
 5
 6 I, Lisa M. Renfro, Official Court Reporter in and
 7 for the 380th District Court of Collin County, State of Texas,
 8 do hereby certify that the above and foregoing contains a true
 9 and correct transcription of all portions of evidence and
 10 other proceedings requested in writing by counsel for the
 11 parties to be included in this volume of the Reporter's
 12 Record, in the above-styled and -numbered cause, all of which
 13 occurred in open court or in chambers and were reported by me.
 14
 15 I further certify that this Reporter's Record of the
 16 proceedings truly and correctly reflects the exhibits, if any,
 17 offered by the respective parties.
 18
 19 I further certify that the total cost for the
 20 preparation of this Reporter's Record is contained in
 21 Volume 53 and was paid by Collin County.
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 23 WITNESS MY OFFICIAL HAND this the 11th day of
 24 January, 2003.
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0	107:12	34:24 35:5,21	141:24 142:18	actual 103:9	ago 8:2 31:5
0 98:1	40-year 38:15	50:13 55:10,15	146:10 147:18	actually 8:16	32:12 110:23
00787450 2:4	400 2:15,15	58:6 65:8 87:3,4	148:12 149:2,2	21:15 25:19,25	114:10 135:21
08059260 2:12	404(b) 131:24	133:2 151:19	149:3 150:20	26:1 32:23	137:24 138:10
09605050 2:13	133:15 134:5	173:22	151:1,3 152:16	34:25 51:4	138:11 139:5,19
	423-4518 2:16	able 10:5 19:14	152:19 156:24	70:21 71:5	144:7 177:15
	4534 1:17 180:18	21:25 22:12	157:3 158:7	75:12 77:8	agree 12:12,13
	180:23	36:10 37:1	159:21,21 160:3	78:25 108:21	26:2,5 27:4 33:7
1	4661 180:21	42:20 51:4,24	162:1 163:4	114:21 121:14	46:14 61:5
1 66:22 67:5,12	5	51:25 52:14	166:22,23	122:19 124:13	62:18 67:11
1:00 68:15	5 3:7 67:5,7,11	56:16 64:9 65:6	169:21,25	151:12 164:1	73:20 90:19,22
10 35:10 38:10	5.30 176:13	77:17 78:5,13	170:24 173:3,7	add 60:16 117:22	100:19 101:20
100 45:4 62:11	5.30 1:11	79:12 80:11,25	173:24 174:4,6	134:13	101:23 112:4,23
11 161:18	50 1:1 35:9 62:6	83:11 86:25	175:17 176:7	addict 154:10	113:2,3,17
11:00 68:22	62:19 113:5,9	89:1,8 93:6	177:21	additional 70:3	114:4 125:4
12 36:17,17 37:13	113:15,16	101:3 126:19	above 180:6	110:25	129:2,18 142:21
89:1 141:16	180:12	135:6 140:16	above-entitled	admirable 89:12	146:14 147:12
152:9	52 23:19	141:20 145:5	1:12	admirably 92:4	147:14,15,16
120 3:11	548-4323 2:9	174:10	above-styled	admissible 40:4	163:4,5 170:17
128 3:11	548-4661 1:18	ABNER 1:5	180:8	admit 151:11	170:19 177:25
13 124:17,20	56 3:7 5:12	about 7:10 8:17	absolutely 20:12	Adolf 54:21	178:5,6,8,9,14
167:7,11	57 4:20 5:2	9:11,13,19 10:3	29:20 35:17	115:16,22	agreeable 68:7
135 3:12	58 4:19 5:3 97:18	10:4,12,14,24	53:16 55:11	adrenaline 92:8	agreed 4:19 78:16
136 3:12	97:24,25,25	11:23 13:7,11	89:1 91:14	adult 155:25	agreement 3:4,6
137 3:13	59 67:24 68:16,25	14:12,25 15:9	103:21 107:8	160:5	3:9,10,14 4:22
14 1:1,8 3:4,5,7,8	5s 67:23	15:22 16:21	117:19	adulthood 112:21	178:22
3:10,11,13,17	6	17:12,25 18:4,4	absolved 27:3	advantage 109:14	agreements 4:8
179:4	60 60:17	18:5,6 19:7 20:1	abstract 117:3	advantageous	4:24 5:5
14th 175:21	64 67:24 68:9,10	20:10 21:8,19	abstractly 104:12	33:6	ahead 10:5 12:9
15 33:2 177:4	66 3:7	21:19 23:3,6,9	abuse 76:1,6,11	advantages 6:21	55:6 115:22
15,000 176:3	67 3:9,10	23:14 26:22	78:15 80:3	advise 131:14	142:6 166:7
166 3:13	69 3:11	29:2,4,8,21 30:7	accept 36:21	affect 173:8,11,21	ahold 68:13
17 10:19 60:16,16	6th 1:11	30:10,18,21	acceptable 16:10	affirmative 13:4	alcoholics 19:22
178 3:14	7	31:10,13,17	88:23 136:14	affirmatively	22:21
17841800 2:3	7-Eleven 157:23	35:7 36:9 37:11	acceptance	13:5	alcoholism 20:15
180 3:16	158:2,9,16	37:21 39:6	102:13,14	afford 170:2	alleged 8:12
1969 167:8	71 67:8,25 68:10	40:24 41:24	accidental 16:22	after 4:14 8:2	76:13
1997-1998 121:15	68:14	42:22 45:16,17	accidentally 17:2	33:17 38:15	alleges 59:8
1s 67:23	74 70:19	46:13,20 48:23	accordance 8:19	43:18,19 46:22	alleging 97:16
	75 62:7 166:23	49:13 52:16	141:22	100:24 101:19	almost 7:3 9:18
	75069 1:18 2:8	54:2,5 55:19	according 79:4,9	101:21 124:15	13:24 16:17
	180:21	56:11,13,15,20	89:15	129:23 159:10	18:2,14 20:15
	75075 2:16	56:21,24 57:3,3	account 176:23	161:15 164:4	21:22 23:7
	8	59:19,22 61:1	177:8	afternoon 12:22	42:23 43:24
	80 60:13 70:19	62:23 63:1,24	accurate 68:5	138:5	48:22 60:17,18
	9	64:6 65:18	72:14,15	again 16:19 78:22	63:7 70:21 73:5
	9:00 1:11	66:13 69:24,25	accuse 174:3	82:20 94:20	75:4 76:15 79:7
	94 123:17,19	70:13,18,20	accused 125:2,14	101:2,16 118:16	83:19 97:17
	95 121:24	73:17,24 74:10	125:24 126:2,12	121:12 126:20	104:7 118:17
	96 121:24	75:20,21 76:1	accusing 129:14	134:22 146:6	alone 146:1,1
	97 121:16,25	76:21,21 77:8	aching 90:8	147:9,10 149:14	162:12 165:2
	123:1,6,7	77:23 78:25	acquit 30:3 106:7	149:18,24 153:4	along 6:25 36:6
	972 1:18 2:9,16	80:4,14 83:2,7,9	acquitted 59:16	154:1,6 158:16	61:1 73:8 96:2
	972/424-1460	83:13,15 84:13	across 166:18	against 9:17 11:5	105:23 111:16
	180:21	84:13 85:10	169:24	11:11,22 12:3,6	147:8 155:14
	98 121:16 122:1	86:11 87:16	act 74:15 100:6	19:2,5 21:4 22:5	166:12
	123:1	88:6,7 92:4	147:13,15,22	28:22 29:23	already 32:4
	99 76:14,16	93:17 95:1,9,21	148:6,20,23	39:15,20 45:2,5	44:25,25 48:24
	A	99:23 102:2,3	149:9 150:13	57:5,24 58:7	107:7
	A-ha 164:22	103:3 107:21	action 22:13	86:3 91:3,15	alternative 12:8
	a.m 1:11 68:22	114:5,9 116:1,2	activity 110:11	120:17 135:3	although 13:19
	ability 19:12	116:3,8,12,21	141:9	143:21 148:4,4	46:10 84:22
	20:25 21:3	116:22 118:5	acts 31:16 61:12	148:24	100:4
	29:25 31:19	120:10 122:5,11	61:25 96:7,8	age 10:14 60:11	altogether 81:20
		122:17 123:14	100:9,11 102:18	60:11 155:25	always 4:24 17:12
		124:23 128:16	103:7,7 106:23	160:5	19:18 40:12
		131:16 132:22	107:14,14	aggravated 76:14	48:5 49:17 52:7
		133:4 134:2	108:24 109:5	147:13	70:20 79:7 81:5
		138:14 139:3,15	146:9,13 147:11	aggravating	89:25 90:5
		139:18,19,21,23	148:14 150:17	154:8,15,20,22	105:24 111:10
		139:23 140:3,17	160:15	155:8,9	113:8 135:19
4					
4 3:4,6					
40 35:12 60:8,10					
60:12,16 64:11					

143:14 151:20 170:8,16 Amarillo 70:17 70:20,23,24 71:5,8 86:12 110:14 Amendment 143:17 America 19:6 American 13:14 13:17 46:4 168:17 ammunition 24:19 amount 9:5 analogy 27:21 Angeles 123:18 anger 39:15,20 angry 147:22 animal 121:13 announce 38:11 announcements 4:11 6:10 another 6:4,20 10:25 32:10 33:10 39:2,4 51:23 52:19,21 61:13 64:21 75:21 80:10 84:12 94:23 103:12 118:5 122:18,21 124:22 145:7 147:25 152:16 154:7,14 161:14 175:23 answer 5:14 7:4 13:1,8 21:5 24:7 24:17 28:23 29:25 31:19,20 31:22 34:11,20 35:21 36:1,10 37:1,13,15,22 38:3,6,17,19 42:20 43:16,21 44:11 47:3,11 47:25 48:5,22 49:2,11,14,20 49:22 50:5 51:24 52:14,18 53:6,25 55:15 57:6,6,21 58:21 61:21,22 63:25 64:1,9 65:1,2,8 65:24 85:5,8,16 86:8 95:8 96:19 97:5,11,12 98:2 101:9,13 104:20 105:12,24 106:19,22,22,23 107:6 115:11 117:23 119:14 119:17,18 125:20 130:19 130:23,24 131:3 138:17 144:2,3 144:5 148:22 151:9 152:22,23 160:19 161:3 163:6 answered 8:14	18:1 37:5,9 48:17 53:7,22 96:10 97:7,8 110:22 111:1 119:2 131:17 140:6 152:14 160:12 answering 37:24 39:16,20 47:7 49:17 51:24 52:16 53:13 58:19 63:24 64:25 95:12 105:3 108:25 167:5 answers 28:15 31:3 37:23 52:24 53:20 55:23 64:22 69:6 80:12 87:18 111:17 114:14 137:13 137:14 146:3 162:12 anybody 7:12 20:14 25:7 27:3 34:16 35:6 39:23,24 40:11 40:21 46:11,13 57:16 61:16 74:2 75:23 88:18 90:3,18 98:5,7 101:2 105:20 116:20 118:15 124:2 128:15 131:7 139:14 144:25 149:12 173:24 174:3 anybody's 38:15 anyhow 60:19 133:22 anymore 32:13 101:11 145:1 154:25 155:6 163:20 anything 4:5 6:11 16:21 19:7 31:23 32:20 45:16 63:19,20 80:12,14 87:19 87:21 89:11 91:8 105:13 116:5,12 128:7 128:9 129:7 131:9,15,16,16 133:8 134:8 135:16 136:3 146:14,16,17 153:22 156:24 158:7 162:1,4,9 169:25 171:9 173:7 174:3 178:22,23 anyway 12:9 24:9 34:11 38:16 100:2 118:10 119:14 135:24 145:14 164:22 anywhere 6:10 apart 47:13 49:15	apologize 14:8 174:14 apparently 46:10 appeals 28:5 appear 165:6 appears 156:25 160:3 appendicitis 90:7 apple 87:9,10 apples 87:10 applies 30:8 apply 19:12,14 33:20 81:24 148:11,15 152:19,20 appointed 169:25 170:1,3,4,14 appreciate 54:18 121:1 178:19 approach 9:1,2 43:22 58:15 approached 85:6 appropriate 22:24 40:4 76:24 approval 4:24 approved 5:6 APR 123:21 area 72:13 168:5 aren't 86:13,17 167:19 176:2 arguing 128:2,4 argument 60:20 62:7 102:15,17 156:15,18 159:23 162:19 162:19,21 Arian 27:25 Arlington 61:18 around 34:4 44:5 88:10 94:2 108:13 123:8 145:16 152:2 arrest 71:3 arrested 101:19 150:17 159:18 174:20 arrestee 71:3 art 116:11,15 117:5,21 articulate 48:13 Asher 171:2,3 172:10 Ashford 161:25 aside 77:19 99:24 162:11 asked 7:1 8:2,3,8 18:11,18 36:9 49:6,7 51:23 69:6 85:2 110:25 128:14 131:16 137:13 138:18 145:11 160:10 162:18 167:5 asking 14:8 34:24 36:1 39:10 49:7 58:6 60:20 61:1 64:15 78:18 80:10 87:18 103:19 108:21	124:2 145:21 153:12 173:25 asks 31:7,12,13 90:6,7 159:1 aspect 11:14 assault 147:13 170:21 172:4,5 assertion 128:3 178:6 assessing 152:11 assign 6:8 153:13 assigned 6:4,7 Assistant 2:7 5:23 6:7 137:20,24 138:1 assisting 98:13 ASSOCIATES 2:15 assume 48:16 59:19 60:4 72:18 95:15 98:15,17 143:23 152:14 155:24 156:2 157:22,25 159:16 160:11 162:22 assuming 71:7,11 107:1,6,6 142:7 143:11 147:14 151:1,3 160:4 178:10 assumption 150:15 assure 28:23 atheist 86:1 atheists 159:4 atrocious 24:1 100:21 attack 87:17 attempt 42:12 attend 14:6 attended 124:14 attention 13:15 20:7 attitude 58:10 attitudes 18:3,22 19:7,9 110:16 attorney 6:7,19 6:20,22 132:24 137:21,25 138:1 163:11,11 170:7 170:17 172:5,9 172:11 attorney's 170:13 172:21 attorneys 2:2,7 2:11 4:25 5:24 18:6 45:19 71:19 89:6,21 89:24 90:16 169:20 Auschwitz 28:13 authority 148:9 148:10 authorize 97:10 automatic 38:8 80:11,14,20 86:5,5 100:17 101:16 107:9 111:16,18 142:24 144:4,12	145:19 152:13 automatically 38:17 48:17 85:3 87:24 144:14 available 63:15 102:12 118:21 average 85:18 86:1 avid 84:4,5 avoid 16:10 67:7 aware 11:17 away 24:15 32:12 75:25 98:22 awful 24:1 33:22 41:19 47:19 75:23 94:4 102:4 113:20 117:3 118:23 159:8 176:2 awkward 48:22 B B 104:9 B-2-B 177:10 back 4:3 9:14 10:6 15:20 16:18 17:10 24:10,22,23 26:15,16,17,24 30:17 37:20 38:10 54:10 55:21 66:4,4,18 67:18 77:16 100:14,15 102:1 108:6 112:13 117:10 123:18 131:13 135:21 137:3 149:18 152:24 154:5 161:15 167:8,9 167:17 169:8,9 169:13 174:7,23 176:15,18,18 177:21 background 39:7 39:22,24,25 40:18 70:14 90:15 112:4 115:13 117:18 153:16 155:15 157:1 backgrounds 51:16 bad 24:25 33:12 41:18 46:5 47:19 60:22,22 64:16 76:1 87:9 87:10,11 88:4 92:17 102:20,23 110:25 114:2,3 114:10,11,18 116:24 134:14 149:7 150:20 153:17 154:17 154:17 162:6 badge 74:4 badly 92:9,11 bail 175:7 BAILIFF 5:8 66:19 67:19	68:12,21 137:7 bailiffs 45:19 balk 64:21,22,25 balking 33:25 ball 139:24 barrel 87:9 Baruch 165:9 base 22:1 88:20 96:19 97:10,12 110:1 146:3 162:12 baseball 147:19 147:21 148:19 based 40:13 42:7 47:25 54:9 55:23 61:22 62:7 81:8 82:24 82:25 94:22 104:1,1 107:6 114:8 126:11,24 135:7 146:1 basically 153:11 156:16 171:12 174:4 176:24,24 basis 94:21 96:20 113:10 133:22 bat 147:19,21 148:19 Bath 166:15,21 166:22 167:1 battle 152:4 battles 92:23 bear 105:3 beast 100:23 beating 110:5,6 113:7 147:14 150:17 became 47:17 become 49:14 84:15 102:16 113:1 118:8 becomes 83:19 92:19 142:16 becoming 74:10 befall 41:15 before 1:12 4:6 7:1 20:8 21:21 23:2 28:9,17 64:7 65:16 67:3 70:7,11 74:1 77:10 85:5 111:13 119:16 119:24 125:6 128:15 135:23 139:10,14 150:24 163:1 beforehand 42:9 86:21 begin 7:1 107:11 beginning 160:10 begins 38:13 101:19 behave 91:9 92:3 behaving 92:19 behavior 47:19 52:8 61:25 102:5 151:4,4,6 151:18 being 7:20 8:21 10:16 12:25 17:23 18:15
--	---	--	---	---	---

19:1,2 21:2 23:1 24:5 26:9,11 27:24,24,24,25 27:25 29:20 30:15 34:4 35:23 36:3 42:20 46:9,20 51:4 58:11,24 64:11 68:1 76:15 82:10 85:12,24 93:6 94:2 102:4 112:3 116:8,10 126:18 138:25 139:5 140:24 147:2 152:4 156:3 162:2,4,9 beings 15:16 20:1 51:16 118:21 believability 85:25 believe 7:15 11:6 12:15 15:1 18:22 21:15,18 29:11 41:19 45:7,8,11 46:16 46:25 50:10,11 52:5,7,10 53:17 53:18 57:11 70:14,25 72:1 74:17 79:6,17 87:2 94:10,11 103:5,6,8 110:20 111:3 118:13 120:23 125:8,10,11,14 127:1,4,10,17 129:14 132:18 133:11,16 136:4 151:15 159:9 160:22 161:18 173:23 174:13 believed 113:11 believer 159:22 believes 50:1 Bell 171:14 belong 9:23 benefit 77:12 111:10 benefits 111:11 119:8,9,9 171:20 best 7:24 66:10 96:14 162:18,19 162:20 bet 35:13 66:12 84:24 110:12 112:3 better 7:25 10:1 10:19 19:25 86:24 87:7 104:15 113:12 113:13,16 130:21 151:19 160:4 between 73:16 157:4 177:8 beyond 8:10 22:22 57:19 59:3,11,20 62:4 62:5,12,13 81:4	81:19 88:21 89:4 91:16 95:17 96:6 97:6 97:6 105:19 106:9,20 108:18 110:22 111:20 120:4 142:11 143:12,24 146:8 160:14 163:1 Bible 15:14 16:12 16:19 17:15 47:16 93:20 102:4 Biblical 15:3 17:16 93:9,22 94:11,12 bifurcated 142:8 big 26:21 73:5 113:11 biggest 138:18 163:7 bill 2:3 5:23 137:23 Billy 5:7 bit 8:16 14:12 28:25 36:6 37:19 56:23 57:3 138:14 139:2 155:21 157:21 158:25 165:24 blackwell 3:11 68:15,24 69:2 69:16,19 112:24 117:7 121:9 124:12 126:1 137:3 blameworthiness 153:7 bleeding 24:21 blew 46:4 blood 118:7 blows 90:2 blubbing 46:12 board 38:16 107:13 169:24 body 23:12 149:5 149:6,11 151:3 171:13 Bolin 178:3 bomb 46:3 Bombing 46:1 bond 84:6,8 174:22,23,25 175:1,2,4,7,9 bonds 84:18 175:10 bondsman 175:11 boot 116:16 border 166:18 born 166:24 boss 137:24 165:18 both 5:14 8:23 11:12 28:23 33:2 36:20,21 39:21 40:1 44:15 52:19 74:20 94:10,20 94:22 97:1 109:18 141:16	145:9 bottom 28:10 34:10 141:20 bought 123:16 bounced 34:4 box 41:17 78:24 135:11 boy 41:18 161:25 brain 117:1 151:1 151:2 breach 92:13 break 4:17 7:25 137:6 breaks 99:5 brief 31:11 55:5 114:24 166:4 177:18 brilliant 151:12 bring 5:7 59:12 61:24 62:1,21 63:16 65:9 137:3 broad 76:10 103:5 brother 168:3 brought 164:5 Brunswick 166:15,19 167:6 brutally 41:25 Buddhism 12:4 Buddhist 12:2 building 44:5,8 44:13 51:6 99:9 99:11 built 122:2 124:1 bullet 101:1 bullets 24:14 bumper 165:18 165:24 bunch 74:3 110:12 120:7 168:25 176:5 burden 42:18,22 62:16 64:19 81:21 91:15 97:3,4 115:10 126:6,10,22 128:20 142:10 143:13,15,19 146:7 152:8 153:8 burdens 62:8 81:23,25 82:1,2 84:14 bureaucrat 116:7 burglarized 157:17 burglary 31:19 59:6 60:1 97:15 99:9,17 142:18 142:18 burn 17:14 bus 150:6 bushels 87:10 business 6:9 14:9 16:7,11 46:7 82:24 83:10 85:11 92:2 109:9 133:14 177:3 business-to-busin...	177:10 Butler 171:8,9,11 171:18 buying 123:9 <hr/> C <hr/> C 1:1 2:1 4:1 104:9 calendar 60:8 California 164:5 167:7,8,10 168:7,19 call 31:1 67:18 87:16 98:18 111:23 118:16 134:19 144:7 152:23 153:4 155:13,16 169:18 called 33:1,11 64:21 70:8,10 134:3 139:6,10 139:10 151:23 176:17 calls 88:19 93:20 98:15,17 150:25 came 1:11 54:23 113:12,20 145:12 146:15 168:8 camp 27:23 camps 26:19 27:6 Canada 166:15 167:9,12,14 168:8,15 169:8 169:9 Canadian 166:18 167:6 Canoe 121:21,22 121:22 cantu 1:5 6:14 134:17 138:4 166:12 capable 87:1 151:16 capital 1:8 7:17 8:11 17:4 23:23 29:12,19 30:3,4 30:7,9,11,17 36:8,15,17,24 38:18 39:9 40:22 41:12,24 46:23 56:12,12 56:14 57:13 59:4,17 63:5,9 63:18 75:20,24 78:8 81:19,21 88:22 89:3 94:2 94:17 95:16 96:5,11,24 97:14 99:18,25 100:4,18,24 104:20,23 105:9 108:10 109:12 111:19 118:5,6 118:24 119:24 125:3,14,24 126:2,12 135:8 139:7,8 142:12 142:16 143:25 144:14 145:10	145:16 156:9 159:14 160:12 car 20:5 83:4 147:23 148:7,19 care 20:1 46:13 145:6,7 career 84:16 careful 23:24 138:25 carefully 125:6 caring 156:3 Carnegie 168:22 169:13 carpenter 165:19 carpentry 165:15 carried 8:19 carry 16:1 24:19 155:2 159:13 cars 149:19 case 6:25 8:24 17:5 21:3 22:2,3 22:20 28:20 29:1 31:18,20 31:24 33:6,15 33:19 34:21 36:8 37:21 44:19 45:3,6,16 45:22,23,24,25 46:1,16,17 47:21 49:22 50:17,19,21 52:22,23 54:23 56:11 57:13,22 57:22 59:5,10 59:24 62:9,9,10 62:12 70:2,11 73:13 75:20,21 76:6 78:5,15 79:1,13,20 80:2 80:3,25 82:7,9 82:22 97:14 99:17 100:1 104:7 106:4 107:22 118:5 126:9 130:5,11 133:1,23 134:15 135:8 139:7 140:8,11 143:11 143:24 146:4,21 146:22 161:18 162:10,11,11,12 162:14 163:21 164:1,3,13 170:4,8,16,21 172:5 173:12,22 177:1 178:3 cases 19:18 23:1 23:23 34:8,10 36:17,18 38:18 45:8,13,14 54:20 57:11 75:20 77:6,13 78:8,8 114:9,10 120:12,22 140:7 141:10,12 150:24 170:14 170:15 cash 175:9 cast 71:23 catalogs 177:11 catch 89:21	105:11 Catholic 11:19 13:12,18,19,21 cathy 3:8 66:21 67:25 caught 20:18 cause 1:2,12 3:7 3:12 4:3 22:13 33:11 52:1 55:22 56:14 57:4 66:14 93:6 106:16 131:23 133:22 134:7 135:1,17 180:8 caused 56:20 causes 28:11 causing 94:15 cautious 138:25 cease 14:15 center 28:21 ceratin 17:21 Cert 180:23 certain 9:5 12:11 15:19 33:20 34:5,6 53:7 57:11 83:7 94:4 141:7,10,13,13 144:10 certainly 6:12 11:20 13:13,16 14:18,18 39:5 46:16 50:18 61:17 62:19 72:10 84:16 104:23 107:14 107:15,17 109:9 173:20 certainty 61:6 146:12,18 certificate 3:16 180:1 certify 180:6,9,11 cetera 103:19 challenge 3:7,12 33:2,10,11 55:22 66:14 131:23 133:22 135:1,17,18 136:1,12 challenges 57:4 chamber 25:9 chambers 22:10 180:8 chance 25:17 79:7 83:21 108:6 135:25 164:13 168:6 change 34:12,24 34:25 35:5 42:1 52:16 91:15 103:6 changed 35:14 52:11 102:5 154:11 168:16 changes 103:9 123:23 changing 61:7 64:15 character 39:7 40:19 62:24 109:4,12 117:15
--	--	---	--	--	--

117:16,18 148:12,13,22,25 149:21 153:16 156:24 157:1,7 157:10 charge 27:12 146:20,21,23 charged 90:1,19 109:12 170:20 172:8,13 173:11 charging 97:17 Charles 1:13 chase 134:24 check 93:21 cheek 16:15 chief 6:3 child 33:19,21 76:6,12 78:15 78:19 80:2,3 144:16 155:25 156:4,5,5,6,12 156:12,13,17,17 childhood 167:14 children 26:24 46:6 76:1 105:7 113:6 119:19 155:21,24 156:1 161:17 chips 58:4 Chisholm 2:15 choice 15:10 17:20 73:16 114:16 140:24 choices 50:2 85:20,21 114:12 chose 62:1,21 74:11 91:11 114:15 173:17 chose 15:2 126:19 chosen 21:23 Christ 11:4,17,23 14:23 15:11 Christian 102:14 102:16,19,20 103:3 Christianity 103:9 Christians 102:22 CHRONOLOGI... 3:1 church 11:4,17 11:19,23 12:2,3 12:6,7,8,10,10 12:13,13 13:12 13:12,18,24 14:6,16,23 15:11,11 105:15 157:4 165:7,8 churches 13:22 circled 17:20,20 125:4,8 circumstance 11:7 54:24 77:10,24 117:8 117:12 155:12 circumstances 17:22 22:25 40:18 43:6,11 56:13 64:8 72:5 77:7 82:21 94:16 101:11	104:19 111:23 111:24 112:11 114:12,15,18,22 117:8 119:4 126:9 156:22 157:9 citizen 167:6 citizens 88:2,3 citizenship 168:14,15,17 city 22:6,9,10,16 46:1 50:19 70:20 172:17 City's 22:14 civil 22:3 62:9 163:25 164:3 169:21 civilian 108:14 civilians 108:14 claim 26:19 102:22 127:3 class 75:24 classic 63:1 82:6 cleansed 102:11 clear 15:15,15 66:7 126:17 168:18 clearly 148:7 clerk 144:22 158:6 clerks 158:5 clever 25:5 clicking 60:9 client 68:6 127:17 132:10 133:13 133:16,19 135:6 178:12 close 56:18 67:5 114:10 158:10 171:18 174:14 closely 72:13 closer 7:15 closest 138:3 clothing 48:13 clue 35:13 clues 35:8 clusters 109:20 CMU 169:17 cocaine 149:4 cold 23:13 146:15 159:11 colder 158:22 college 14:20 67:7 74:6,6 124:14 168:18,19 169:4 collin 1:5,13 2:7 75:8 137:21,25 138:2,8,10 178:4 180:3,5 180:12,19,20 combat 16:2 come 10:7 26:20 27:15 30:17 36:23 38:10 39:7 52:2,19 58:9 66:18 67:4 68:14 76:2 77:16 83:18 84:21 98:9 99:1 110:8 135:15 155:7 176:17	comes 16:8,24 32:16 58:25 65:15 74:4 90:9 99:4,12 101:17 113:22 139:22 145:8 159:7 165:24 comfort 8:7 coming 7:6 16:8 26:24 32:15 93:22,22 99:6 133:13 134:23 138:8 Commandments 15:21 17:11 comment 42:7 commerce 177:10 commit 31:15 40:11 56:14 61:12 94:18 96:7 103:12,25 104:10,20 146:9 146:12 148:14 148:23 150:13 155:11 160:15 commitment 78:23 commits 109:5 committed 40:22 59:5,6 100:11 100:11,20 103:8 103:11 109:1 142:12 154:12 154:19 155:25 160:1 committing 99:12 108:23 common 32:22 84:3,17 140:15 153:5 communicating 12:24 29:1 50:16 community 86:21 company 121:10 121:13 176:19 177:9 Compare 158:8 compared 88:2 compassion 22:8 22:21 100:14 114:17,21 115:6 116:24 117:2 compassionate 23:8,22 compelled 173:15 compensated 9:7 competent 132:19 151:17 complain 28:6 71:15 complains 23:14 complete 154:10 completely 11:4 53:3 139:24 154:11 174:10 complexity 6:12 complicated 6:13 70:22 78:7 Complies 38:24 153:1	Computer-Assisted 1:15 Computerized 1:14 computers 73:5 conceded 95:16 conceding 59:21 95:20 conceivable 40:8 concentrate 67:12 concept 14:11 16:16 78:14 93:9,10 95:7 103:3 concepts 94:8 concern 80:4 174:8 concerned 142:15 168:16 conclusion 52:6 65:10 condition 116:19 116:19 conditioned 68:2 conduct 75:23 conferences 84:13 confusing 17:15 congregation 165:13 connect 127:8 connection 84:11 conscience 7:18 36:4 65:3 78:19 174:11 conscientious 16:2 consensual 100:6 consent 68:3 118:10 145:13 consenting 67:22 consequence 149:12 consequences 130:13 138:22 consider 29:9 32:20,21 33:20 38:19 39:11,11 39:15,16,19,23 43:6,9,15,24,25 54:24 76:16 78:4 79:15,16 88:13 95:11 107:17 108:24 108:25 109:2,2 109:3 154:3 consideration 40:17 41:1 55:11 78:14 79:14 117:11 146:4 159:2 174:7 considerations 107:16 considered 41:5 75:1,2,17 95:25 considering 39:13 78:1 132:15 constitute 31:16 96:8,8	Constitutional 91:1 consuming 139:1 contained 180:12 contains 146:21 180:6 contemplated 145:14 contemplates 30:25 58:8 context 94:13 116:23 125:16 148:2 contingent 4:24 continue 35:1 36:3 55:2 104:3 continuing 31:16 37:24 38:2,5 65:21 98:7 106:21 118:25 150:4 continuum 148:1 149:13 154:24 contractor 171:13,15,17,18 control 6:23 18:4 21:5 28:1 86:5 109:5 controlling 14:24 controls 151:15 convene 23:23 conversation 123:25 conversion 103:2 103:4,18 conversions 101:25 103:9 convicted 18:16 75:3 100:18 111:18 conviction 41:6 111:4 convictions 97:25 convince 52:13 52:16,18,19 141:8 convinced 44:9 57:19 97:10 106:9 convinces 105:19 convincing 89:4 convoluted 104:12 cop 87:2 core 19:21 corporate 73:1,11 corporation 72:21,23 73:5 correct 4:21 10:21 30:22 48:19 58:25 66:12 70:15 71:17 72:7 73:7 74:8 81:17 83:23 84:19,25 86:14,19 87:12 88:25 89:16 90:13 91:2,13 91:18 95:3 98:12 101:12 104:22 105:5	106:18 107:17 107:18 108:1 109:15 110:15 113:25 120:9 124:7,8 127:14 128:18 129:1,6 129:13 130:7 131:25 133:10 138:12,13 155:22 170:22 180:6 corrected 129:13 correctly 19:15 50:16 60:7 64:19 180:10 cost 180:11 counsel 164:19,21 170:1,1,3 180:7 count 89:1 counties 70:23 country 24:17 123:12 124:5,7 124:9,10 counts 97:18,25 county 1:5,13 2:7 70:24 71:2,6 75:8,10,11 137:21,25 138:2 138:8,10 178:4 180:3,5,12,19 180:20 couple 8:1 23:20 31:5 32:12 67:10 70:8,13 85:5 113:10 124:14 138:9 139:4 145:3 146:10 172:3,10 course 59:6,7 60:1,1 68:2 97:11 128:24 142:17,19 143:3 court 1:2,3,17,17 4:2,3,9,12,16 5:1,5,10,12,17 6:4,5,7 13:2 38:11 42:14 45:19 54:5 55:4 55:6,19,24 56:22 57:1 58:17 65:23 66:14,17,21,25 67:2,13,17,21 68:4,9,13,18,20 68:24 69:2,4,8 69:11,13,15 71:11 105:7 111:6 115:18,19 115:21 119:19 121:3,6 128:5,9 128:11 131:9,12 131:19,21 132:10,10,13,18 133:5,8,11,24 134:8,11,18 135:18 136:6,9 136:15,17,18,19 136:23 137:2,9 137:11 161:20 161:24 164:12 164:16 165:4,14
---	--	---	--	---	---

165:17,22 166:3 166:7 177:20,24 178:7,12,16,18 179:2 180:5,5,8 180:19,19 Court's 66:6 67:22 146:20,21 146:22 courtesy 121:2 courthouse 2:7 46:7 58:10 90:2 180:20 courtroom 5:9 6:11 13:23 32:1 69:1 92:6 106:2 106:3 131:20 144:18 177:23 courtrooms 161:21 courts 6:9,9 covered 144:15 cowardly 109:23 cracks 99:5 craft 89:12 crash 88:7 cream 150:6,7 create 23:24 77:14 created 77:4 80:19 82:19 creating 72:24 130:17 credence 85:17 86:22 credibility 83:10 85:4,7,10,13,24 86:9 87:13,14 87:25 crime 7:22 20:14 27:23 40:9,10 40:11,13,18 81:21 93:11,12 93:12 96:20 97:11,12 98:6,6 101:19 103:11 103:12,25 104:2 109:10 110:5,6 119:16 142:21 143:4,8 145:25 146:1 153:14 154:9,20 155:11 155:25 158:24 160:1,5 crimes 24:1 75:25 82:17 85:14 90:19 94:5 103:7,8 108:25 109:3,9 119:17 140:19 141:1,7 141:13 criminal 2:7 18:4 31:16 61:12,25 62:10 70:10 72:20 73:13 80:2,24 81:15 82:11 83:14 89:24 96:8 100:6,9,11 102:17 107:10 108:23 110:10 138:19 141:9	146:9,12 147:11 147:13,15,22 148:6,14,19,23 149:9 150:13 160:15 163:7 169:19,21 170:1 170:7 criminality 74:19 95:5 criminals 18:11 18:19,20 32:17 32:17 criticism 90:17 Cross 109:20 CROSS-EXAMI... 56:2 166:9 cross-examine 83:21 cross-examined 71:18 CROSS-QUESTI... 121:7 crush 17:14 crying 41:18 CSR 1:17 180:18 180:23 culpability 40:20 40:22,25 117:20 153:18 157:2 customer 176:25 cut 134:24 cuts 167:18 cynical 83:8 101:18,24 D D 1:1 4:1 104:9 DA 70:1 DA's 178:4 dad 116:7 117:3 Dallas 22:6,9 121:18 164:6 damage 164:20 damages 9:5 damaging 148:18 danger 31:14 46:24 49:7 51:19 53:14 105:20 108:22 111:4,19 144:11 144:15,25 145:13,18,20 146:2 151:5,7 152:1,10 dangerous 40:12 93:25 94:1 101:2,10,11 102:16 dangerousness 144:8 152:8 daniel 3:11 68:15 68:24 69:2,15 daughters 92:22 94:1 Davis 122:18,22 122:25 133:21 134:19 135:14 day 1:11 4:11 7:6 33:16,17 106:13 180:15 days 23:18 52:15	dead 23:16 24:14 59:8 107:12 deal 7:22 48:21 58:11 157:13 dealer 157:6,20 dealing 65:21 122:25 dealings 135:22 136:10 dealt 123:17 134:19 dear 64:5 death 7:7,10,21 8:14 9:9 10:4,14 10:21 11:5,8,20 11:23 13:16,17 14:10,14 16:8 17:13,19 19:2,3 19:5 21:3,4,16 23:6 24:21 26:12,18 27:6 27:23 28:4,11 28:21 29:23 30:2,5,7,13,15 31:1,2,3,17,23 34:20 37:13,20 39:25 41:4 42:1 42:25 43:17 45:1,4,6,7,8 46:17 47:21 49:12,15,18,21 50:7 52:1,2,7,22 52:22,25 53:8 53:16,20,23,25 54:25 55:9 56:15,20 57:5 57:11,23,24,25 58:1,3,7 60:5,25 61:10 76:3 79:24 80:1 93:2 93:4,7,8,24 94:9 94:14,15,15,15 94:19,25 95:1 98:14 99:7 103:15 105:23 106:12,14 111:18 117:9 119:13 120:14 138:22,23 139:18,21,25 140:1,6,7,14,18 140:21,25 141:5 141:12,19 142:1 142:4,16,20,21 143:5,8 144:2,4 144:12 149:15 152:11 159:10 161:4 162:19,20 162:21,23 debated 147:10 149:24 deceiving 132:18 December 180:23 decent 118:20 decide 20:21 29:11 36:2,5 40:10 41:2 43:19 104:25 135:7 146:22,24 149:21 153:21 154:3,21 158:1	158:1,15 159:20 decided 44:10 63:16 70:2 157:13,23 167:18 decides 145:3 deciding 148:2 149:15 decision 12:12 53:4 54:15 60:25 156:20 173:16 decision-making 50:13 173:21 decorum 92:13 deep 9:16,17 deeper 94:13 defend 129:15 defendant 2:11 4:4,25 5:2,4 6:14 8:4,9,11,15 20:5 26:10 28:4 29:12 30:3,9 31:8,13 36:10 36:16,23 38:11 38:12 39:15,20 40:12,19,19 41:20 52:25 58:2 62:24 63:18 68:8 69:3 75:9 76:11 80:18,24,24 81:7,18,22,23 82:8 90:25 91:10 92:21 94:4 95:15 96:5 96:11 104:8 105:25 106:7,20 107:9,10 108:9 108:18 109:1,2 111:11,18 115:13 119:8,9 122:19 126:19 127:1 131:10,18 132:22,24,25 136:15 138:4,5 138:23 142:4,12 143:17,25 144:13 146:9,12 150:2,20 153:19 154:8 156:25 160:11,14 161:23 170:2 178:11,15,17 defendant's 3:12 3:12 39:6,22 40:19 68:3 88:22 108:3 117:15 148:21 153:7,16 157:1 157:1,2 163:1 defendants 17:7 81:16,25 defending 82:9 defense 3:3 6:14 18:6 24:17 32:23 34:9 43:5 62:21 63:20 67:9 68:4 71:18 72:3 73:13 82:19 89:6,21	89:23 90:16 130:14 143:14 150:25 151:23 153:10 163:11 169:19 170:7 Defense's 9:2 defensive 82:4 define 100:9 148:25 defined 147:9 definitely 60:23 163:4 definition 146:23 degree 75:4 112:5 113:3 169:4 degrees 23:19 deliberately 104:6 delight 7:12 delivery 149:2 demanding 12:25 demonstration 109:21 denial 20:10 denied 3:12 density 75:25 dentist 90:8 dentists 61:2 deny 135:18 136:1,12 department 70:16,17 107:10 depend 17:16 88:5 118:11 depended 71:2 depending 28:24 31:4 37:2 42:21 49:12 54:22 60:11 72:5 76:13 77:6 78:20 94:16 101:14 102:9 142:25 144:3,5 160:19 depends 17:22 71:21 Depot 123:4,5 124:25 deprive 120:13 deriving 44:24 describe 171:20 deserter 109:23 deserve 9:7 90:17 deserves 79:7 designed 95:2 desire 5:2 28:25 66:25 178:16 destroys 117:1 detected 72:20 determination 79:20 94:22 103:25 determine 81:7 103:24 150:12 determined 170:5 determining 21:12 deterrence 94:6 94:20 detrerent 94:17 developed 83:7	159:18 developing 177:7 dictates 50:2 52:8 die 60:10 63:10 99:13,21 106:13 145:9 died 119:5 169:11 difference 26:7 35:21 155:19 157:4,7,8,14 158:18 159:23 160:6 162:15 different 9:2 10:13 17:7 23:7 34:23 35:2,10 39:12 50:18 51:13,16,16 56:17 70:23 72:9 75:19 97:17 102:19 104:14 110:17 111:12 114:7,13 119:18 124:15 125:17 139:24 148:17 151:14 157:18 differently 14:5 17:8 56:20 65:25 difficult 13:9 58:21 70:25 difficulty 58:24 dimes 22:4 dire 1:8,11 59:18 138:21 direct 5:19 69:17 72:11 137:18 directed 92:25 direction 79:9 disagree 12:7 62:10 154:15 disaster 135:2 disbelief 107:24 Discussion 111:8 161:8 discussions 123:14 disease 20:17,18 151:2 disfavor 13:18 disfavored 27:25 dishonest 86:15 87:11 disillusionment 10:18 disorder 98:19 disprove 82:5 disqualifications 75:5 disqualified 75:9 75:15 85:9 disregard 12:8 13:12,21 14:1 42:24 dissatisfaction 133:18 disservice 66:5 dissimilated 114:10 district 1:3,17 2:7 5:24 6:4,7
--	---	--	--	---	---

137:20,24 138:1 164:3,20 172:9 172:11,21 180:5 180:19 divided 113:5 divorce 15:3,3 doctor 25:19 87:17,22 90:6 98:13,13 101:8 doctors 61:2 90:17 doctrinally 11:19 doing 6:24 7:9 13:23 25:7,22 27:7,11 32:6 35:1,1 46:6 48:23 63:9 64:16 66:5 75:23 76:3,16 77:25 91:12 92:25 100:8,16 106:10 110:13 113:21 117:17 124:4 128:17 134:21 139:3 141:11 149:20 154:18,19 172:23 dollars 23:11 176:7 domestic 110:11 don 2:13 6:21 32:1 138:7 166:11 done 10:11 24:1 25:13 30:19 32:14 35:25 41:25 46:12,13 50:25 51:1,7 65:17 76:23 88:7 89:9 92:5,6 95:6 96:14 100:8,24 101:22 105:13 114:5 125:1 151:21 158:5 163:17 164:16,20 177:3 door 99:1 113:22 double 59:7 97:15 98:6 143:7 doubt 8:10 22:22 38:4 57:19 59:4 59:11,20 62:4,5 62:12,13 77:13 81:4,19 88:22 89:5 91:17 95:17 96:6 97:6 97:7 105:19 106:9,20 108:18 110:23 111:20 120:5 142:12 143:12,24 146:8 160:14 163:1 down 9:18 12:19 12:22 13:2 22:6 22:10,17 23:15 25:8,13 38:13 45:12,18 56:16 56:17 67:7,8,13 67:17 88:9 90:9 98:21 99:4	100:25 116:13 125:2 131:12 135:6 138:17 144:19,24 155:7 159:7 161:16 163:9 169:19 177:20 downtown 71:6 downward 154:10 Dr 98:10,16,17,22 99:25 100:10 118:6 145:2,8 145:12 drank 113:6 dreamed 41:15 drink 20:7 101:7 drinking 19:20 19:21 20:9,10 drive 20:8,11 driver 152:18 driving 19:17,21 20:4,22 22:23 150:6 dropped 112:22 drug 157:6,13,20 drugs 113:21 149:2,3,3,4,5,7 149:8,16,19,20 154:6,6,9,10,11 154:16,17,19,23 154:25,25 155:4 dual 168:14,15,17 duration 6:5 during 15:3 71:8 115:19 135:20 143:13 146:5 duty 22:16 143:15,19 DWIs 19:19,22 20:4 E E 1:1,1,1 2:1,1 4:1,1 104:9 e-commerce 177:7 each 6:22 22:5 25:14 72:1 74:20 113:7 119:1 157:14 160:19 earlier 14:14 50:14 75:13 earliest 60:16 earth 79:7 112:3 easier 142:2 eastern 12:1 easy 9:4 effect 78:24 80:6 82:18 119:8 effective 175:20 effectively 151:13 eight 124:24 129:23 either 12:7,12 28:23 40:4,5 42:20 43:18 45:18 52:13,17 57:24 59:5 63:10,16 67:10	71:5 72:19 81:20 86:12 94:8 95:11 103:12 122:25 124:23 150:25 153:9 163:11 168:3 178:22 EKGs 87:20 elaborate 23:24 elderly 98:18 145:3 electrical 168:24 169:2 eligible 74:21 75:1,2 78:9,12 78:12 else's 16:11 embarrassing 161:12 emerge 113:24 114:6 emergency 16:23 encouraging 164:24 end 3:17 6:6 16:25 18:14,15 27:7 32:19 34:14 35:6 38:14 47:20 53:24 76:19,20 92:8 98:1 110:23 123:9 124:9 146:20 152:4 153:20 156:2 159:11 179:4 ended 15:9 124:5 ends 11:13,13 17:15 37:7 116:11 enforcement 72:12,19 73:9 73:13 84:24 124:22 engage 107:23 engagement 82:11 engineering 168:24 169:2 enjoying 175:25 enjoys 140:23 enlightened 113:14 enormous 41:22 enough 10:24 24:6,23 27:17 28:7 32:14 44:6 47:12 77:3 89:4 96:21 116:16,25 120:16 160:4 168:2 177:25 entered 99:9,11 enters 5:9 32:1 69:1 entertaining 8:21 entertainment 32:11 entire 15:11 103:10 entitled 43:5,14 43:18 61:24	90:12,22 entrapment 81:25 environment 113:16,20 114:6 envisioned 144:10 equal 85:24 112:7 112:8,8,9 equate 35:25 102:13 126:18 equation 35:24 equipment 177:2 177:5 escape 107:23 108:3,12 escaped 61:15 escaping 61:16 essentially 22:1 established 25:6 et 103:19 ethical 170:13 evaluate 80:6 evaluated 111:25 even 7:21 10:24 12:23 14:8 15:18 19:13,25 21:4 23:25 24:15 25:18 27:10 28:8,12 28:19 30:5,15 31:23 34:20 36:7 39:23 41:15 45:5,13 45:14 46:10,17 47:9 48:20 49:15 50:17 51:10,10 52:13 52:17,18 53:19 54:19,22 55:7 55:11,11 59:15 65:8 66:8 67:5 72:11 73:21 74:14 75:1,2 76:3 78:7,14 82:4,14 86:9 91:5 94:19 95:8 98:21 99:13 101:6,9,21 107:12 108:11 111:3 112:12,20 116:16 120:21 128:2 135:14 139:10 145:2 148:7,18 163:19 evening 12:22 event 64:12 97:16 135:4,20 173:10 ever 6:13 25:10 25:18 27:21 31:21,22 32:11 33:21 34:20 36:4,16,18 37:6 37:7 41:13,15 41:19,23 44:15 44:16 47:6,11 48:24 52:2,24 53:6 65:24 69:21 70:6,10 71:18 75:23 76:22,23 77:10	78:3 81:9 90:3,6 90:7 93:25 94:2 96:24 97:1 98:7 101:2 107:24 114:5 159:3 165:17 173:21 174:22 every 12:20,22 28:3 36:15,17 36:18,25 41:19 57:16 73:5 87:9 90:8 92:6 102:3 112:3 everybody 5:13 12:21 19:5 23:16,18 26:22 26:25 29:21 35:4 38:12 41:17 44:3 61:7 62:18 69:5 79:6 88:3 90:12,22 98:10,11 107:9 113:21,22 126:5 127:12 133:12 159:7 179:2 everybody's 45:24 everyday 150:5 everyone 52:10 127:10 everything 13:10 41:3 155:17 evicted 113:8 evidence 7:16 18:23 19:12,13 21:1,4,6 22:1,1 22:16 28:24 36:22 37:2 39:3 39:3,5,10,17 40:2,3,6,8,13,17 41:2,10,12 42:21,23 43:9 43:15,16 47:9 47:24 48:1,1,18 54:9 57:18 58:20 59:12,13 61:23 62:6,22 63:14,16,22 64:24 65:8 70:3 77:15 78:1,20 79:2,9,19 80:7 81:3,8,9 82:6,21 83:15,20 84:21 86:6,25 87:21 88:19,20 89:4 89:10,15 92:12 94:21 95:24 96:10,25 97:2 101:14 104:1,16 109:24 111:12 115:7,12,15 117:11,23 118:3 118:6 119:13,23 120:3,18 126:7 126:24 127:3 128:24 129:3,15 129:21,24 130:4 130:4,6,10,15 131:2,25 132:15 132:16,19,25 133:1,2,4,7,9	135:11 136:4,5 136:6,11 140:20 141:17,18,20 143:18 145:17 145:21,25 146:5 148:6 150:23 151:25 153:10 153:13,14,15,21 154:1,2,14 155:17 159:2,17 159:20 160:19 160:24 161:3 173:12 180:6 evil 119:3 evokes 115:5 exactly 13:20 20:24 38:3,8 57:13 76:13 118:14 120:3 125:21 140:19 159:12 176:21 examine 74:20 82:21 88:19 examined 7:2,6 68:1 examining 70:3 79:19 example 10:19 12:2 13:13 15:8 15:20 16:22 18:10 19:17 23:4 25:8 35:12 41:12 44:3 51:17 73:15 75:10 80:16 82:5,6,25 84:4 84:12 89:10 94:4 98:15 102:21 105:6 109:19 154:6 155:7 158:21 examples 107:22 except 15:24 17:2 17:4 38:16 40:9 91:9 143:15 exceptions 15:18 15:19 excited 7:10 exclude 75:24 excuse 31:9 65:19 82:16 105:16 115:18 128:1 132:12 136:23 164:23 177:17 178:9,14,15 excused 3:4,6,9 3:10,14 66:15 68:11,19 91:22 137:5 178:19 179:3 execute 25:10 156:13 executed 76:3 execution 8:18 25:9 executions 17:10 exhibits 180:10 exist 13:6 108:6 exits 131:20 177:23 expect 21:21,24
--	---	--	---	--	---

22:12 73:10 113:15 114:7 156:8,20 170:17 expecting 22:22 130:20 expensive 169:20 169:22,23 170:6 experience 9:8 83:1 164:23 expert 62:1,22 experts 152:5 Expires 180:23 explain 12:17 32:2,15 76:12 77:3 127:15,19 129:9 130:22 172:12 explained 128:15 142:14 explaining 41:7 127:21 explanation 17:25 63:23 74:19 exposing 89:9 express 80:4 93:8 97:13 expression 75:16 79:3 ext 180:21 extend 157:21 extent 12:3 151:17 extreme 32:19 34:8,10 45:7,13 45:14,22,23,25 50:17,21 54:20 54:23 76:19 78:18 extremely 23:24 92:2 109:19 extremes 11:12 extrensic 132:16 eye 167:19 eye-for-an-eye 93:10 94:12 eyes 80:18	30:15 32:5 33:13 43:20,21 47:12 53:10 55:11 71:22 72:2,4 75:16 79:14 104:11,20 141:16 162:2,5 162:10 fairly 18:23 29:11 29:25 33:14 42:19 43:6,9,22 78:13 79:3,3 80:6 82:18 88:12 111:25 160:19 fairness 35:4 130:25 faith 13:25 34:25 117:13 133:16 faiths 11:18 falco 2:4 4:5 6:3 48:9 92:16 115:18,20 131:25 132:4,6 136:24 137:1,16 137:17,19,20 138:6 161:9 162:1 163:25 165:5 166:1,5 178:25 fall 7:16 32:10 58:4 148:1,3 149:13 154:24 falls 178:1,2 familiar 163:14 163:15 familiarity 71:14 families 108:13 113:6 family 112:25 115:2 139:22 155:15 156:11 158:6,10,11,11 158:20,20 164:18,21 178:3 far 7:2 24:15 93:13 94:17 124:11 138:24 141:25 142:14 143:16 153:25 168:15 169:2 175:18 fascination 93:6 father 169:11 favor 13:17 14:2 17:19,22,23 19:2 43:12 45:1 93:1,4 140:6 141:4 162:19 favorable 84:7 fed 158:11 federal 46:7 72:19 97:18,24 fee 163:24 feel 8:25 12:9 16:9 18:3,4 22:14 29:21 34:3,4 41:20 42:25 48:22 53:3 66:13 72:9 73:24 84:5	103:3 117:5 139:23 141:12 173:14 feeling 106:2 131:5 151:14 feelings 32:6 56:17 131:7 162:6 feels 10:4 42:24 fell 11:5 fellow 20:1 117:4 164:17 felony 6:4 99:12 female 122:19,21 few 7:1 25:18 67:14,18 81:22 121:14 131:12 151:14 166:13 Fifth 143:17 fight 34:17 157:17 fighting 22:10 figure 15:5,7 20:9 32:25 104:24 133:13 figured 35:8 fill 81:9 139:16 filled 8:2 56:10 125:6 139:13 finally 66:15 68:10 94:23 137:4 161:16 178:19 179:3 find 7:8 8:7 10:24 12:7 22:1,23 30:4,9,11,16 31:14 35:5 36:23 38:3,4 43:15 44:21 63:18 67:7 76:5 82:14 95:19 98:1,2,2,3 99:25 100:5,6 106:19 106:23 108:18 118:23,24 120:6 143:24 144:13 145:15,20 152:2 160:11 161:2 163:21 164:25 165:22 166:22 find-the-body 23:17 finding 96:11 finds 143:23 fine 6:17 8:6 20:10 69:20 79:6,8 91:7,20 91:25 98:25 105:13,15 119:9 130:24 132:17 139:3 fines 20:2 fingers 135:12 finish 126:1 fire 74:3 161:15 172:4 fired 85:14 firing 23:23 first 4:14 9:3,3 10:23 17:24 19:3 29:7 31:5	39:5 40:5 41:6 44:25 47:14 48:2,5 49:2,5,6 49:8,20 50:10 51:11 57:19 58:25 60:24 63:15 65:21 66:23 74:25 78:20 96:4 97:5 100:25 111:1,1 112:22 118:19 119:15,22 122:4 128:17 137:24 139:4 142:8,17 144:2,6 146:6 146:11 160:12 160:16 167:12 fisherman 84:4,5 fishing 84:8 fit 94:25 fitness 132:17 fits 30:8 five 76:21,23 77:7 78:3,19 87:10 97:21 169:1,1 fix 24:21 90:8 flexibility 97:20 flip 58:13 151:5 floor 44:7 floors 99:5 flying 24:14 focus 63:12 156:25 focuses 61:19 folks 74:5 173:10 follow 18:8 22:17 24:7,8 29:7 32:20 33:24 44:17 58:3 74:22 75:15 77:17,20 78:13 80:21 115:7,13 119:20 141:21 160:18 following 1:12 27:18 73:9 78:2 80:10 forbidden 91:5,5 force 8:24 forced 135:4,9 forefront 110:9 foregoing 180:6 forehead 100:25 101:7 foremost 9:3 forever 107:15 forgiveness 93:21 forgiving 93:19 form 38:9 39:8 75:3 81:6 98:1 132:19 former 70:14 72:11 73:10 fornicating 113:21 forth 66:4,4 161:15 fortunate 114:22 found 30:6 32:11 36:16 40:11 43:10 46:23	59:3,11,16,20 59:24 67:8 76:11 95:15,25 96:5 100:4 107:2 111:19 120:17 159:18 foundation 123:24 fox 159:4 frail 116:5 frame 59:22 frankly 7:13 58:9 fraud 109:10 132:6 fraudulent 132:6 132:8 fred 3:13 83:5 137:9 free 30:10 47:24 freedom 19:9 freely 55:16 French 168:6,7,8 frequently 11:15 107:23 147:10 149:24 friend 64:5 158:17,18 friendly 167:20 167:21,22,23,25 friends 11:22 158:10 from 1:11 6:10,24 7:16 8:15 12:20 13:1,21 14:22 15:10,10 18:23 24:15 29:22 33:7 37:13,23 38:20 41:2 43:18,19 44:24 47:13 49:15 50:3,10,12 52:2 55:8 58:4,14 61:15,17 63:15 67:25 72:18 75:24 78:24 79:21 83:25 84:21 89:21,22 93:22,23,25 97:10 100:14,25 101:7 103:10 104:16 113:13 114:6 121:9 123:9,18 124:14 128:9 131:3,9 133:13 136:6,8 136:9,17,19 138:11 141:11 144:7,24 148:8 151:20 156:8 162:2,4,9 164:5 165:24 166:18 166:23 167:7,11 168:8,11,12 170:17 171:20 175:13 178:22 front 99:1 146:15 161:16 fuel 23:11 full 151:9 fun 32:14 115:17 116:6,8 167:19	167:19 function 21:25 72:16 funding 169:13 funny 15:17 48:20 112:19 136:20 further 8:12 94:3 94:18 103:18,25 157:21 180:9,11 furtherance 59:7 Furthermore 134:12 future 31:15 35:18 46:23 47:15 49:7,16 51:19 53:13 61:6 96:15 108:24 109:5 111:4 144:7,11 144:15 145:13 145:18,20 146:2 146:10 148:23 151:5,7 152:1,7 152:10 160:15 173:21 fuzzier 147:17 149:1
F					G
F 1:13 face 16:17 30:5 83:3 86:10 107:22 135:8 fact 8:17 10:8 15:22 16:13 42:8,13,18 43:11 77:10 90:10 104:10 105:19 118:4,11 151:18 factor 156:23 facts 96:20 97:11 97:12 141:23 143:1 145:25 146:3 160:23 162:11,12 165:2 165:3 fail 98:3 106:19 failure 129:3 fair 19:6 21:10,11 21:12 29:9,22	G 4:1 gail 2:4 6:3 131:25 132:2 137:20 gallantry 109:19 game 139:24 167:19 gary 3:4 4:19 gauge 134:14 gauging 85:10 gave 5:25 42:8 153:22 168:9 GED 61:3 gee 131:1 173:13 general 6:1 18:5 71:22 75:22 84:24 Generalizations 170:9 generally 113:16 generation 113:12 genuine 102:12 102:25 103:3 genuinely 102:11 102:18 George 61:15 German 116:7,14 Germany 26:15 27:13,22 28:12 getaway 152:18 gets 16:19 28:8,8 33:25 38:22 48:25 77:22 78:7 90:9 105:25 116:16 144:23,23 145:6 147:17 149:1 154:5 157:17 getting 54:21 76:5 113:8				

150:17 ghoul 118:8 ghoulish 93:6 give 5:14 9:5 16:10 21:15 22:24 30:12,14 32:10 33:18,21 34:8,9 39:25 54:5 55:11,20 58:13 67:10 69:5 73:15 74:11 75:16 77:12 78:3,14 78:19 79:3,5,7 79:13 80:6 82:18 84:3 85:3 85:7,17,24 86:9 86:21 87:18,24 104:6 109:11 119:7 137:12,14 149:20 153:14 153:15,17,18,19 158:21 173:15 176:21 given 17:20 31:6 46:13 123:21 132:14 139:14 141:4,15 154:1 175:21 gives 76:10 78:2 78:10 116:25 119:7 148:12,13 giving 52:12 76:16 78:24 83:20 glad 172:25 173:3 go 9:21 10:17 12:9 14:20,20 16:1 20:1,6 24:10,14,23 37:20 48:11 54:20,21 55:6 63:2,24 66:9,23 67:8 76:9,19 77:10,14 80:5 85:10 86:1,3 98:23 104:12 105:8,23 109:18 112:14 115:22 117:10 119:1,19 129:3 134:6 142:6 147:18 157:17 158:16 161:6 164:22 166:7,18 168:18 168:21 169:2,6 175:7,23 176:18 God 159:10,18,19 159:22 God's 14:4 goeller 2:12,15 4:4,7,10,18 6:16 6:18 42:5 55:24 55:25 56:3 57:2 58:15,18 66:1 66:23 67:1 68:5 68:17,19 89:6 92:19 95:19 103:13 107:17 115:24 121:5,8 122:20,21 128:7	129:25 130:23 130:25 131:5,11 131:22 132:5,8 133:6,10,25 134:9,12 136:3 136:19,25 138:9 163:14,17,22 166:12 168:4,11 168:13 169:23 178:1,8,13,24 179:1 goes 28:14 38:9 38:12,13 39:21 40:1 89:24 107:9,10 112:22 114:19 116:11 144:20,21 158:23 going 8:18,23 12:21 14:4 15:2 15:6,22 20:20 20:25 23:2,3,3,5 23:12 24:23 25:10,10 27:9 27:18 29:22 31:6,15 32:3,5 32:18,25 34:2,2 34:3,3,11,17,25 35:7,9,13,24 38:5 43:8 44:21 45:17,22 47:18 48:17 53:20,23 59:5 60:10 61:10 62:18 63:10,21,21 64:14,25 65:1 70:2 78:11 79:5 79:9,21 83:13 84:21,21 93:17 95:14,15 98:18 98:21 99:23 101:2,3 103:12 105:15,20,24 106:13,16,20 108:3 109:5 112:18 113:6,21 115:19 118:25 121:4,25 123:24 124:5 128:1 131:1 133:1 135:15 146:2,7 146:7,24 147:9 149:6,6,18 152:20,21 154:1 154:3 158:1,9 158:19 170:14 173:21,24 175:23 176:15 178:1,4 gone 94:17 112:16 124:13 161:25 176:7 177:14 good 5:21 6:18 10:3 12:20 27:17 28:7 35:12 36:4 45:6 56:4,7 59:11 64:5,16 66:13 81:14 82:15 87:10,17 88:3	109:22 110:24 112:9 114:11,11 116:16 117:16 117:18 118:6,20 122:15 133:11 133:16 138:5 150:20 151:17 153:17 157:22 159:22 163:24 168:9 172:2 176:14,18 gosh 86:2 100:20 gotten 48:22 101:19 Government 116:8 Governor 108:9 108:10 grace 102:11 grade 124:17 graduate 124:14 Grand 75:7,8 grant 135:17 granted 3:7 66:15 133:11 graphic 8:21 graphically 8:17 great 7:21 33:23 153:22 grew 74:18 112:18,19 116:2 158:8,10 groups 113:5 grow 50:11 growing 14:25 41:16,20,25 grown 114:18 151:10 grows 112:24 164:10 growth 177:14,15 GRUBBS 2:15 grumble 33:9 guarantee 20:5 35:19 43:7 103:11 142:25 163:8 guard 61:14,14 guards 61:2 108:14 guess 5:1 11:10 11:11 14:5 15:14,15 17:15 21:20 40:23 44:7,11,14 47:3 60:18 62:25 64:23 71:2 72:17,23 73:8 73:20 74:12,15 80:12 88:12 95:4 99:10 104:19 110:1 113:15 116:10 120:10 124:21 129:21,22 130:13 132:9,21 138:15 141:9 146:14 149:18 153:5 155:3 159:19 162:6,9 164:22 170:16	175:3 guilt 21:12 65:11 126:22 127:11 127:13,20,23,25 guilt-innocence 29:8 30:16,21 39:13,14 61:23 62:17 81:23 96:4 97:9 142:9 142:10 143:13 guilties 97:25 guiltiness 153:7 guilty 8:11 22:23 29:12 30:4,6,9 30:11,17 36:16 36:24 39:9,16 40:12 46:23 59:4,16,20 63:18 76:11 80:19 81:4,5,7,8 81:9,18,20,20 88:22,24 89:3 95:16,25 96:5 96:11 98:2 99:25 100:4 107:1,2 118:24 120:6 127:4 129:16,19 130:5 143:25 144:13 145:16 160:12 162:22 163:1 gun 18:4 105:8 guns 157:13 guy 16:17,24 22:12 23:4 24:21 25:22 39:25 47:18 87:3,16 88:9 99:21 100:16 101:10 105:12 116:2 122:18 131:2 135:10 173:13 176:11 guys 25:14,15 26:20 65:16 101:24 161:17 168:25 169:23 gypsies 27:24	46:24 63:21 86:18 101:21 102:3 105:1,2 107:25 108:11 happened 11:18 88:10 95:7 155:14 162:7 174:12 happening 26:19 83:22 130:2 happens 10:7 17:1 28:9 33:15 33:16,17 49:18 50:2 60:4 94:5 112:21 117:22 hard 10:8 13:1 18:19 40:21 52:23 60:8 100:1 122:15 131:5,7 170:14 174:19 harm 16:8 harm's 24:13 harsh 32:19 Hashem 165:9 having 6:21 10:3 13:6,17 15:9,20 19:1 45:4 46:22 53:3 81:8 115:4 122:11 139:16 he'll 59:15,16 62:12 108:6 152:10 head 12:24 13:2 26:6 28:2,16 29:10,13 39:18 44:10,13 46:2 60:3,6 61:9 76:18 80:22 143:2 171:6 174:24 headquarters 171:11 heads 57:9 health 145:6 155:15 hear 11:15 12:18 32:13 40:3 41:12,14 51:13 94:22 140:17 146:5 148:5 150:23 153:16 159:17 heard 1:11 39:5,9 40:2 41:3,13,14 41:19 50:15 58:20 59:14 61:23 81:8,8 118:7 127:16 136:6 150:24 159:3,20 177:25 hearing 32:11 58:14 heart 9:16,17 87:17 173:19 hearts 44:2 87:19 heat 92:2,23 heater 22:17 heaters 22:6 heath 112:7 heavily 58:12	held 1:13 61:20 63:12 108:19 help 34:8 98:23 109:13 132:2 145:8 148:21,22 148:25 149:21 156:5 158:12 helped 158:12 helping 116:10 helps 109:3 145:8 her 6:6 33:15 42:12,12 48:23 55:23 68:10 112:4 164:21 herself 109:13,14 Hi 5:22 6:15 56:5 166:11 hiding 91:4 high 2:13,15 6:21 32:1 74:5,5 89:6 102:1 121:4 124:15 135:22 138:7 163:14 166:7,8,10,11 168:14 169:24 high-pressure 92:7 high-pressured 92:3 highly 13:10 170:15 him 8:6 16:16,18 16:19,24,25 22:14,17,23,24 24:5,22 26:12 30:4,11,12 33:3 33:15 47:17,20 59:20 64:7,10 68:14 90:2,3,4 91:4 92:11 99:22 102:12 106:8 107:2 109:13,14 116:6 116:6,8,15,20 116:20,25 117:2 117:4,21 120:6 122:15,16,23 126:18 128:2,4 128:8 132:15 133:4,19 134:24 135:14 136:22 137:4,4 138:6 142:18 152:18 158:7 175:7,7 178:6,15 himself 99:21 134:16 141:7 hire 99:22 172:4 historical 17:10 history 45:25 96:16 104:1 150:16,16 hit 16:19 166:19 Hitler 27:12 54:21 115:16,22 116:1,15,24 118:4 Hitler's 119:17 hobbies 165:15 hockey 167:16,17 167:18,19,23
--	--	---	---	---	---

H

habitation 99:10
99:11
half 15:22 32:10
54:6 116:2,5
169:3
half-nuts 116:21
116:22
half-small 116:9
hammer 112:22
hand 59:5 98:19
180:15
handled 45:12
handle 95:21
handling 164:2
hands 18:13
38:16 81:6
110:11
handsomest
48:12
happen 10:1 27:9
34:2 43:8 44:2

168:2,4 hold 37:19 55:4 91:3,14 94:10 98:20 143:21 158:4 holes 159:4 Holigan 121:25 122:16 123:8 134:18 Holton 166:22,23 home 16:6 20:11 38:12 92:22 99:3 107:9 113:10 121:25 122:16 123:8,9 132:2 157:16 158:2 172:16 homeless 22:4,8 23:4 Homes 134:18 homicide 59:7 143:7 homosexuals 27:24 honest 21:7 29:21 33:5,14 34:13 53:2,5 57:7 66:11 86:13 125:7 170:14 honestly 151:9 164:14 honesty 54:18 66:8 85:25 Honor 5:4,8 33:3 68:12 131:11 134:10,12 137:17 166:1 178:11,17,25 179:1 Honorable 1:13 Hood 22:15 hooked 122:9 154:9 hope 7:12 8:22 58:9 90:20 140:20 170:15 179:3 hopes 173:15 hoping 8:20 173:5,6 horrific 154:19 horse 102:2 hospital 99:6 167:3 hot 24:14 25:16 hour 32:10 hours 16:23 23:20 house 122:2 123:17,25 124:1 Houston 69:21 huge 75:25 93:12 93:12 Huh-uh 36:12 Hum 167:25 human 7:19 9:8 9:10 15:16 20:1 23:1,6,6,25 43:1 51:16 58:11 76:15 102:4 112:3 118:20	151:18 174:4 Humans 23:19 humor 165:22,25 hundred 100:14 113:4 hunts 144:19 hurt 9:6 16:25 20:6,14 61:16 hurting 61:14 90:7 hypothetical 104:16 109:1 119:15 157:25 159:16 I ice 150:6,7 idea 10:3 13:24 25:15 43:5,10 47:20 73:8 176:21 ideal 170:16 idealistic 10:17 ignore 91:12 ill-will 89:21 90:15 illegal 149:4 illiterate 113:7 image 116:10 imaginable 50:17 imagine 7:19 34:14 75:23 129:22 130:2 177:3 impact 50:12 158:19 impacted 175:17 175:22 impair 55:10,15 58:6 65:7 impartial 141:17 162:2,5,10 implies 118:14 imply 118:15 importance 94:8 important 9:1,7 9:10 24:4,5 34:12 45:15 83:11 84:25 85:12,12,23 104:24 109:20 151:7 imposed 57:23 117:10 impossible 34:21 37:5 47:15 55:12,14 63:17 impressed 84:2 impression 178:7 improper 83:18 133:3 improprieties 132:2 133:15 impugn 173:18 inability 49:16 inaudible 26:16 177:10 incident 15:2 incidentally 111:11 incidents 148:10	172:3 include 77:5 147:11 150:4,7 159:2 included 116:18 180:7 includes 60:23 including 40:18 71:15 117:11 incompatible 13:14 incorrect 88:15 independent 171:15,17,18 INDEX 3:1 indicate 158:22 indicated 10:13 10:20 17:18 29:8 65:21 indication 85:13 indicia 134:17 indicted 75:9 indictment 8:12 59:8 75:8 indiscriminately 46:8 individual 59:18 72:2 79:22 82:24 85:10 103:24 104:2 114:16 138:21 141:7 149:15 151:21 155:4 158:22,23 160:1 individual's 150:15 inequities 112:10 112:11 inert 25:16 inflicting 54:25 influence 150:18 156:19 information 12:19 150:18 inhibit 133:2 initially 139:6 inmate 61:13 inmates 61:1 103:16 108:13 108:13 inner 63:8 innocence 21:12 65:11 125:3,15 126:3,7,13,18 126:22 127:2,7 127:8,11,13,20 127:22,25 129:11 130:8 innocent 80:25 127:18 131:2 inquiry 110:24 insanity 82:1,16 82:19 insight 62:2 74:11 109:11 148:12 148:13 149:20 installer 171:5 installing 177:9 instance 157:12 instead 15:6 49:6 52:20 80:23	84:15 86:8 140:21 instincts 83:7 instruct 79:15 instructed 81:7 instruction 83:25 instructions 58:4 insult 33:12 insurance 83:5 97:20 integrity 173:19 intellectually 51:25 intelligence 112:8 intelligent 78:23 80:9 intend 132:1 intent 20:4 intentional 105:10 interest 13:15 64:20 134:25 interesting 7:3 13:3 47:13 51:12 93:3 168:5 interests 84:3,17 interfere 20:25 29:24,24 internal 73:3 109:8 interplays 14:10 interpret 125:17 125:19,20,25 126:3,5,13 128:22,23 interpretation 130:23 131:6 interrupt 161:9 interview 73:23 intoxicated 19:18 20:5,22 22:23 Intravenous 101:6 intruder 16:8 invite 131:13 invited 169:15 invites 39:19 invoice 109:10 invoices 72:25 involve 72:18 142:3 149:10 involved 7:9 25:24 26:10,11 34:17 77:22 110:13 124:21 124:22 139:25 141:8 157:12 161:14 164:18 165:7 168:1 170:23 172:9,11 involvement 14:16 132:22 involves 141:7 involving 141:25 ironic 74:1 Irrelevant 26:14 Irving 61:18 171:12 issue 8:25 10:24 24:13 29:5	30:19 38:20 41:6 47:22 51:11 53:13 57:20,21 58:25 65:15,18,21 95:20 97:5 100:3 111:2 122:11 155:15 164:23 issues 8:13 30:6 30:23 31:1,2,3 52:4,8 53:6 58:22 59:19,23 59:25 65:16 88:11 95:11 ivan 1:5 6:14 68:6 122:15 134:17 134:20 138:4 166:12 178:13 J Jack 98:10 jackals 119:19 jail 20:2,16 56:19 71:3 113:21 175:7 jailhouse 101:25 jails 83:15,16 james 3:10 68:1 jami 2:5 6:6 138:1 Janie 68:13 Jewish 27:24 165:12,13,18 job 10:8 51:12 77:15 87:17 89:2,2,3,8,9 90:9 105:14 175:13,23 176:23 177:1,4 177:6,7 jobs 10:1 20:2 John 23:15 Johnny 83:5 joint 60:10,13 jokes 26:22 Jose 164:5 Jr 23:15 judge 1:13 4:18 12:21 19:13 31:10 33:25 38:12 39:13 42:5 45:19 55:3 55:18 57:17 58:4,16 62:11 65:6,19 68:5,19 75:12 78:2 81:6 83:25 84:10,10 84:12,15 114:23 125:5 128:1,8 129:23 131:8,22 135:16 136:22 143:20 161:16 161:17 165:1 166:8 177:17 178:14,24 judges 79:15 judgment 45:12 133:3 judicial 1:17 84:13	July 175:21 jump 44:13 jumping 44:9 46:21 47:5 51:6 54:10 junior 74:5 juries 36:15 jurisdictions 70:22 99:16 juror 4:19,20 8:23 18:22 19:4 19:6,11 21:23 28:20 32:16,18 32:21,23,24,25 33:12,18,20 41:3 42:8,9 43:18 52:20 55:22 57:8,13 57:14 58:25 67:24,25 74:16 75:14,17 77:8 77:15 78:23 83:11 84:4,12 85:9 86:24 95:10 97:21 99:19 104:10 115:1 119:12 120:22 121:2 128:2 132:23 133:18,24,25 134:2,15,25 135:2,19,25,25 136:8,9 140:13 141:21 142:7 146:24 153:13 154:14 162:10 166:6 177:24 178:9,14 juror's 132:17 177:18 jurors 4:11 7:2 8:24 9:4,11 20:12 21:21,25 22:12,21 24:2 25:8 28:10,14 30:14 33:21 36:18,22,25 37:13 38:10 43:6 74:22,24 75:22 76:21 80:9,13,23 83:12 89:20 97:13,22 98:5 111:16 131:14 137:12 140:20 141:16 152:9,11 jury 1:8,12 4:2 7:7 8:2,3,8,10 8:13 10:3 13:21 18:8 20:21 21:24 26:10,12 29:20 30:7 32:23 33:4 34:14 36:1,15 37:8,15,22 38:6 38:11,12,19 39:2 40:14 41:17 42:24 43:9 45:12,17 50:22,24 57:17 58:8 59:3,10,20
---	--	--	---	---	---

59:24 63:18	163:25 167:3	23:14 31:18	57:7 58:8,10	Larry 122:6,6,7,9	90:20 102:22
70:7 75:1,2,7,8	170:7,8 172:7	32:2,18,22	59:2,13,13,15	122:17 123:17	138:15,16
76:7,11 78:10	174:4 178:6	33:10,15 34:14	60:4,13,14,17	134:19 135:14	142:22,25 143:5
78:13,24 80:6	justice 18:5 83:14	39:24,25 41:11	60:23 61:13,14	135:15	143:9 158:23
83:13,20 84:11	89:25 107:10	43:19,24 46:17	61:16 62:5,5,6	last 27:21 35:9,14	169:22 170:15
91:22 92:11	129:4 135:1	46:20 47:20	62:15,20,23	56:22 64:23	leave 145:5
95:16,25 96:18	138:19 163:7	48:22 49:13	63:8 64:7,10,10	98:18 139:9	left 6:3,6,16 117:1
96:19,21 97:10	justify 41:21	56:9,10,12 57:2	64:17 66:2,9	149:23 176:23	137:25 169:11
101:13 110:25	juvenile 163:18	57:4,8,14,22	67:16 71:21,25	last-look 111:11	legal 8:15 17:6
111:10,25 112:1	164:1	58:4 59:22 60:9	72:1,8 80:3	latch 111:7	23:24 99:21,21
115:12 118:20	K	61:3 63:4 64:20	81:24 82:24	late 134:15	164:21,24
118:23 119:7,10	Kampf 117:16	70:20 72:25	83:5,13,14,22	later 4:11 18:23	Legislature 61:11
135:2,11 139:11	keep 6:23,25 32:6	73:8 74:24	84:13,13 87:9	30:19 116:25	76:10 77:4,6,13
141:15 143:23	80:11 104:16,16	75:21 78:2	87:19 88:9 89:7	172:12	79:14 82:18
144:13 145:15	158:14 160:16	79:12,13,22	89:13,13 90:6	laugh 144:18	120:12 144:10
145:21,24	160:17,21,22	80:5,16 82:15	90:14,14 92:5	laughing 105:7	145:14
153:12 154:3,21	162:2,4,9	82:17 83:8,22	92:20 94:17,19	119:19 157:24	lending 123:11
159:17 160:11	keeps 83:16	88:10 92:2,15	94:21 95:10	laughs 176:9	132:2 133:14
173:8 178:6,19	158:17	93:18,21 94:5	96:23 97:17	Laughter 130:1	lengthy 28:9
jury's 106:22	kelly 3:7 5:10	97:17,19 98:8	99:1,2,20 101:6	136:16 163:23	less 30:4,11 78:10
just 4:25 5:12,15	Kennedy 23:15	99:2,19 101:4	101:8,9,20	165:21 168:10	92:3 114:22
6:22 7:23 10:2	kept 26:21	101:20 102:7,10	105:20 106:12	law 7:25 8:19	146:18 158:22
11:4,6 12:8 13:8	Kevorkian 98:10	102:12 105:3	107:25 112:12	14:4,4,5 18:8	lessen 153:6,22
13:9 14:3,11	98:16,17,22	110:1,9,10,11	114:14 116:15	19:12,14 20:24	lessening 112:1
15:6,25 16:13	99:25 100:10,16	111:7,12,15	117:2,21 119:16	24:6,7,8 27:11	lesser 81:21
17:16 18:2,8	118:7 145:2,8	112:24,25 113:1	119:24,25 120:2	27:13,14,15,17	lesson 95:6
20:23 22:15	145:12	116:2,9,14,18	120:5,6,7	27:18 28:25	let 12:17 16:16,19
23:12,13,17,23	Kevorkian's	117:17 118:3,5	122:14 124:19	30:24,25 32:20	24:18,19,19
24:3,6 25:19	118:6	118:19 120:8,11	125:4 126:8	33:19,24 40:13	25:8 29:7 32:2
27:1,2,8,14,16	key 118:13	120:16 123:20	132:9,12 134:5	40:14 51:19	58:4 64:24
30:12 31:9	kick 116:15	133:19 136:20	134:16,20	58:3,5,6,8 72:12	65:20 67:17
33:13 34:1,15	kicked 117:4,21	144:15 145:21	135:12,14,15,20	72:19 73:9,12	84:3 95:13 99:2
35:24 36:4,19	kid 116:3	149:18 150:18	138:11 139:2,2	77:17,18,19,20	99:3 106:7
37:4,7 39:7,16	kids 81:14 105:17	154:2 155:1,15	139:5,13,18	78:2,9,13,23,24	116:19 126:1
45:11 46:5	113:15,16	177:14	146:22 148:16	79:4,13 80:6,10	157:21 161:6
47:14 49:10,20	114:18 116:6	kinder 113:13	151:9 154:24	80:13,23 81:1	165:2 177:20
49:25 51:6,13	16:14,16,25	kinds 17:3 18:3	155:5 158:3,6,6	82:14,18 84:24	let's 5:7 31:19,20
51:15,19,23	17:2,3,4,5 24:18	20:11 26:20	158:7,11,13,13	97:9 99:24	36:6 37:20,21
52:6 53:3,16	24:23 27:3	73:3 75:12	158:14,17,19,20	118:17 124:21	41:16 49:4,5,5,6
55:4 60:9 64:15	54:21 60:21	108:11,15	158:24 160:4,18	124:22 128:15	49:10 52:19
65:19 66:2 67:7	61:14 99:21	115:16 116:17	163:25 164:17	130:17,18	66:17 68:13
68:6 72:17 74:2	100:22,23 105:8	130:12	164:23 165:2	139:15 141:21	75:20,20 83:3
74:16 75:4 76:1	118:15 148:3	knew 9:22,23	166:16 169:21	141:23 142:20	86:10 94:21,22
77:2,18,20 78:7	156:17 158:5,17	10:1 23:16	169:25 171:13	143:16,20	95:24 97:14
78:17 80:3	159:21	26:23,24,25	172:13 173:12	146:21 152:17	98:6,15,17
82:10 84:2	killed 46:5 59:9	27:9 53:22,22	175:6 176:3	160:17,18 165:1	107:22 131:21
86:20 87:14,20	59:25,25 60:1	65:16 154:18	knowing 11:25	177:19	135:6,8 143:23
88:1,3,9,10 95:6	117:12 144:16	knock 119:13	12:2 24:22	law-abiding	152:14 155:21
97:16 100:17	145:12 157:18	know 7:3,15 9:13	33:22,22 51:3	27:11	155:24 156:2
102:7,15 103:2	159:8	9:14,14,23 10:2	53:6 65:1 73:17	laws 14:1 75:16	157:21,25 158:8
105:15 114:19	killer 25:21	11:8,18,19,21	106:4 161:4	99:20	158:25 159:16
114:23 116:3	killers 105:7,14	11:23 13:15,19	knowledge 83:18	lawyer 84:15 90:2	160:10 176:13
118:15,16	144:17	13:19,22 15:20	132:14,14,20	92:6 138:6	lethal 25:11,25
121:14 122:10	killing 15:16	15:21,23 16:7	133:12 134:4	163:19 164:15	lets 40:13,14
124:3 126:14,17	16:22 17:12	16:18 18:17	known 86:12	lawyers 17:6	letters 172:11
127:23 128:3,4	24:20 25:7 26:2	19:25 20:17	knows 20:17	38:12 90:11	level 8:7 9:8
128:5 130:10	26:10,11 82:7	23:12 24:1,3,19	25:15 35:6,6	92:5 139:15	141:6,8
131:13 132:10	118:10 158:19	25:6,18,21	59:17 60:14	161:16 165:2	lied 83:4
132:12,17 134:9	kills 99:13 144:19	26:15,19 27:1	98:10,11 132:11	lead 149:7 154:17	Lien 4:20
134:13 135:22	144:22	28:12,14 29:19	133:4 134:1	league 167:20,21	life 9:10 10:5,12
136:2,20 137:4	Kim 4:20	30:1 33:7,22,22	135:2 165:1	167:22,24,25	10:17 13:14
137:13 141:12	KIM-LIEN 3:5	34:8,11 35:6,7	L	lean 17:23 21:4	14:15 16:10
142:2 144:2,13	kind 4:22 11:9	35:11,11 36:4	lack 148:9,9	leaning 19:2,5	19:19 23:6,25
145:25 146:1	12:15 14:11,15	37:3,19,23 38:9	lady 33:5	45:2,5	27:23 31:4
147:19,20 148:8	15:4,17 16:3,16	39:22 40:10,24	laid 175:13,19,20	learn 17:23 50:12	35:12 38:7,13
149:3 150:3	16:19 18:2,9	40:25 42:10	176:3	learned 83:1,2	38:14,18 39:23
151:3 152:2,4	20:13,17,19	43:3 44:1,2,15	land 44:13	95:6	41:4,13,13,19
152:24 155:11	21:2,20,24 22:2	45:11,16,17,17	landed 44:10	least 13:18 15:10	41:22 49:18
156:16 157:22	22:15,20 23:1	45:21 49:11,13	large 76:2 151:17	15:15 17:19	50:2 52:8 53:4
157:23,25 158:1		51:8,11,22	larger 159:9	28:13 30:3 41:5	60:5,7,12,15,18
161:6 162:10,22		52:15 54:4 56:8		60:8 71:14 73:9	60:25 62:25

63:5,7,9 64:8,14 71:9 76:14 82:9 82:25 83:6 85:21 93:14 103:10,15 105:13,15 106:17 107:7,8 107:11 108:10 112:13,17,20 113:11 117:3,9 118:1 119:13 138:23 140:21 141:18 142:2 144:2,5 151:19 152:13 153:22 155:11,12,18 157:22 159:10 160:23,24 174:15 life-changing 64:12 lifestyle 114:2 light 71:23 lightly 32:18 like 4:23,23 7:23 8:5,22 9:4,18 12:9 14:11,13 14:21 15:9 16:9 16:17 17:1 18:2 18:15 19:6,14 19:17 20:13,15 20:19 21:23 22:9,9 23:2 28:3 28:12 30:20,21 31:20 32:6,13 32:17 33:18 34:4 36:20 37:4 40:11 42:25 43:24 44:3,19 45:23 46:20 47:4,16,17 48:23 50:9 51:6 58:14 62:8 64:15 67:1,10 70:12,21 71:16 72:23 74:2,3 76:9 78:18 79:22 81:5,25 82:1,2,12,16 83:19 84:5,5 86:23 87:2 88:3 88:18 89:23 91:5 97:14 100:15,16 104:7 105:6 106:8 109:8,21 115:2 116:2 117:18 123:22 128:19 130:21 133:7 135:5 136:3 140:13,16,17,24 142:1 144:1 145:12 148:7,8 149:19 151:11 152:8 153:4 155:6 162:13 164:1,21 176:12 176:13 177:12 likely 62:19 141:10 147:4,7 155:7,8 160:15	166:23 liking 32:12 limit 107:19 108:16 150:1 line 11:5,16 28:10 34:10 73:12 93:13 111:15 141:20 lines 61:1 linked 42:11 liquids 101:4 liquor 144:21,21 lisa 1:17 180:5,18 list 154:2 listen 36:22 133:8 listened 125:5 listening 17:17 84:21 little 4:9 8:16 14:12,24 27:18 28:25 36:6 37:19 38:22 51:12 56:22 57:3 58:21 69:4 69:24 92:3 93:11,11 110:19 138:14 139:2 147:17 149:1 155:21 157:21 158:25 165:24 live 23:13 51:3,4 52:11 53:4 54:17 56:16 58:11 60:13 63:6 75:11 105:15 121:21 125:7 140:17,25 145:4 150:5 157:22 166:24 171:24 175:6 lived 121:23 167:1,6 lives 9:13,15 172:1 living 22:7 114:8 121:19,20 139:21 load 27:2 loaded 26:17 loading 26:23 27:5 loan 6:5 122:5,12 123:20,20 133:17,19 loans 122:5,17 133:15 134:21 local 138:7 locked 150:3 logs 83:16 long 10:5 18:22 28:22 67:16 74:14 78:4 79:8 91:11 93:16 107:15 121:23 138:20 143:16 166:24 longer 30:8,8 look 8:4,8 10:5 17:7 18:2 19:19 26:15,16,16,16 30:2,13 39:3,4	39:21 40:16,24 47:15,16,17,20 47:23 52:4 60:19 62:8 74:24,25 80:18 82:21,23 85:19 86:25,25 87:7 89:11 90:21 92:12 94:16 95:10 100:5,14 100:15 102:9 108:4 112:13 116:13 117:17 117:18,22 122:15 135:21 141:17 145:16 145:17 147:1,3 150:14,21 154:14 155:3 162:11 163:14 163:15 170:7 176:10 looked 28:8 64:8 70:5 80:17 88:10 131:1 151:3,6,24 looking 9:14 18:14 20:14 49:25 67:6 93:19 96:13 101:25 103:15 103:17 119:1 122:4 129:22 133:19 140:5 141:16 150:11 156:21 174:16 looks 112:9 145:25 Los 123:18 lose 18:15 90:10 92:7 loser 116:3 loss 72:16,20 73:11 124:23,24 lost 23:10 119:18 lot 6:22 9:20 20:18 21:8 24:10 33:20 35:14 39:9 41:15 50:1 56:13,15,17,20 56:24 59:11 62:14 71:15,16 72:15 89:20,21 89:23 93:19 105:6 107:21 109:11 114:11 114:13,15,21 139:9,16 147:20 158:22 163:17 176:2 lots 14:19 28:5 97:22 Louis 171:11 love 81:15 105:17 155:25 156:1,3 156:5,12,17 low 38:22 77:2,10 77:14 lower 122:12 123:15,21	lowry 2:5 4:5 6:6 138:1 lucky 101:4 lucrative 84:16 Lunch 68:23 lying 83:2 87:3,3 <hr/> M M 1:17 180:5,18 ma'am 5:10,21 6:18 24:6 44:7 66:14 Machine 1:15 machines 98:24 mad 33:25,25 147:20 made 25:1 26:22 46:9 50:6 60:21 60:25 71:2 85:20,21 102:15 102:17 107:16 115:17 116:6,8 123:23 magically 88:1 Main 166:16,18 166:22 maintenance 177:5 major 72:23 majority 13:16 make 7:24 9:11 10:8 12:12 15:9 18:21,24 25:2 27:19,21 28:25 35:21 41:3,6,7 49:18 50:2,15 54:14 58:20 59:23 61:3 62:7 70:2 75:14 78:21 79:13,20 81:11 84:15 85:9 89:19,23 91:21 94:22 103:25 104:7 105:25 109:16 110:3 113:12,13 114:12 118:12 119:13 130:3,3 130:4 131:2,23 157:7,8,14 158:18 159:23 160:6 173:16 178:2 makes 26:7 41:8 64:18 108:4 making 16:25 78:23 89:10 94:3 99:20 118:17 127:8 128:3 150:15 man 33:3 63:11 79:12 80:16 82:17 92:15 101:20 116:25 118:19 120:12 120:16 137:22 137:23 138:9 144:20 man's 14:4 174:15 management	151:14 manifestation 151:2 manly 116:13 Manson 90:3 many 10:15,16 14:2,23 16:23 17:16 18:7,11 18:17,19 19:18 23:11 24:7 35:14 58:13 65:4 70:18 83:7 84:16 93:3 96:9 112:9,10 117:2 124:23 161:21 164:7 map 166:22 market 176:11 marks 88:8 married 9:24 marvelous 135:23 master 6:23 match 67:11 material 6:23 134:5 mathematical 35:24 36:1 mathematically 62:8 147:2 Matt 6:16 138:9 matter 5:25 15:22 16:13 37:16 44:22 48:8,14 48:15,18 52:23 64:24 71:4 82:4 86:11 147:25 155:16 173:19 mattered 46:11 matters 94:13 133:6 MATTHEW 2:12 may 5:25 6:20,20 7:15 9:7 12:5 13:14 22:7,13 22:13 24:14 31:4 33:3 34:4 35:8 36:3,3 40:2 45:17 50:17,18 58:1,2,5 60:20 61:1 63:24 65:1 67:6 82:25 84:12,13 86:8 87:7 88:8 89:12 96:18,19 100:3 100:7 101:18 102:9,10,18,19 104:11 107:17 108:8 109:1 112:10,11 114:23 120:2 121:14 123:19 123:21 125:17 134:9 135:11,20 143:1 145:24 147:1,3,24 148:6 149:5,10 150:23,23 152:19,19 154:14 162:22 162:23 166:1 170:5,5	maybe 9:16,17 14:23 15:5 16:18 18:4 22:8 23:9 24:23 25:19 27:16 33:4 51:14 54:23 57:10 58:13 59:15,16 60:19 61:19 62:1,22,22,23 62:24 63:1 72:3 72:9,24 73:4,9 74:19 81:20 83:8 85:13 86:1 86:2 87:9,10 90:14 91:21,21 99:10,11,19 101:6 109:4,11 117:15,16,20 122:4 123:22 127:9 131:3 134:5 135:13 138:16 144:20 145:2,2,10,13 167:5 173:16,17 177:9 McDonald 1:18 2:8 180:20 McKinney 1:13 1:18 2:8 180:21 McVeigh 90:1,6 mean 7:13 9:9,21 13:20,24 16:15 16:16 17:2 22:3 22:7 26:2,22 27:12 33:7,16 35:8,17 37:3,3 40:14 41:16 43:7,8 51:6 54:19,22 67:15 73:14,21 74:15 78:11,11,17 85:19 87:6 91:9 95:13,22 100:1 100:20 101:3 104:6 105:21 106:5 108:2,3 109:10,18 112:7 112:18,21 113:4 114:17,19 116:24 117:4 129:22 130:3,20 139:11 141:9 144:14 147:6,10 151:13,15 155:14,25 159:6 164:19,20 171:9 171:16 173:9,14 173:18,20 175:5 176:3,19 means 13:20 16:1 16:16 19:13 30:9 36:25 40:10,20 62:18 63:6 88:1 106:7 111:17 146:24 147:4 153:6 162:22 meant 28:17 108:16 124:19 127:19 130:19
--	---	---	---	--	---

measure 19:12 21:1,1,3 48:1 108:22 129:5 measured 93:10 measurement 42:23 80:7 117:6 118:14 measurements 88:7 measuring 18:23 118:17 medic 24:19 medicine 99:2 meet 93:3 100:12 Mein 117:16 member 12:10 156:11 178:3 memory 152:25 men 26:23 mentioned 170:20 mercy 93:21 merits 49:22 51:22 messed 20:2 messed-up 115:2 messianic 165:11 met 65:16 metamorphosis 101:21 methamphetamine 149:4 mid-20s 14:17 middle 11:9 might 6:11 8:1 10:13 12:17,18 13:20 17:16 25:8 27:10 30:1 32:10,20 34:8,9 35:9,10,12 39:22,24 41:12 41:18,21 43:25 62:2 65:6 70:21 72:9 74:11,17 74:20 75:16 77:7 83:15,18 84:5,7,11,12 86:3 88:5 97:24 100:10,20 101:24 102:2,12 102:14,19 104:10 105:1,3 105:10,12 107:22 108:12 108:13 109:21 109:22,22,24 110:17 112:16 114:5 117:5 118:3,4,5,8,11 118:11 119:17 130:3 133:1 144:11 145:11 147:10 148:18 148:21,22,23 149:20,21 154:7 154:7,8 155:11 156:9 159:13 161:10,13,25 163:11 177:17 miles 166:23 military 9:21	14:21 24:10 25:3 109:19 169:16,18 million 117:12 millions 23:11 mind 43:1 45:24 52:16 58:12,18 59:22 77:16 79:1,2 80:11 112:13 119:12 120:19 141:17 160:17,17,21,22 174:7,11 minded 147:2 minding 16:7,11 minds 102:25 mine 9:14 minimal 136:11 minimum 38:15 107:12 ministering 90:18 minority 87:8 minute 37:11 54:6 102:2 114:10 116:1,3 123:6 131:13 minutes 66:24 67:11,14,18 131:13 177:21 misbehavior 87:8 misery 41:25 115:4 misfortune 112:12 misinterpreting 127:9 missing 19:10 mistake 16:25 mitigating 41:2 42:23 43:6,9,11 43:15,16 112:1 112:5 115:5,7,7 115:12,15,16 117:8,19,23 118:9 119:12,23 120:18 126:8 153:10,21 154:1 154:2,4,7,13,21 155:7,13,16,17 160:24 161:3 mitigation 40:16 43:12 47:22 48:21,23 111:2 111:9 115:2 120:3,13 152:23 153:5,6,11 156:22 160:8,20 model 121:25 122:17 molestation 33:19 80:2 molester 33:21 78:19 moment 8:3,8 31:10 38:9,10 65:19 92:24 111:23 114:23 132:12 152:24 161:6 166:1 175:22 money 9:9 22:15	72:25 158:4,14 158:15,16 174:22,23 months 163:20 164:25 moral 16:9 40:20 40:25 117:20 153:7,18 157:2 morally 27:4 more 6:21 10:16 17:23,23 23:20 24:23 32:13 38:10 41:15 46:4 54:22 58:9 62:6,7,18,19,19 66:6 70:25 73:12,17 74:17 74:18 77:22 78:7,18 79:25 83:1,2,8 84:2,7 84:11,16 85:3,7 85:17,24 86:9 86:21 88:8 90:17 93:19 108:4 110:8,19 111:3 113:13 135:24 139:9 141:10 146:18 147:2,4,7 151:9 152:11 155:6,8 157:8 166:22 167:5 moring 9:25 morning 5:21 6:18 7:5,14 12:20 56:4 mortgage 122:17 132:2 133:14 136:11 Moses 15:23 most 6:12 7:17,18 11:15 13:22 16:5,9,17 23:1 41:13,18 48:12 50:17 58:24 71:5 73:10,14 73:22 75:22 77:8,23,25 80:9 82:2,4,23 88:2 99:16 100:21 101:10 110:9 115:4 116:23 140:20 158:15 mother 156:16 169:12 motion 178:2 motions 6:10 motive 104:23,25 105:1,1 move 10:2 21:20 36:6 143:25 144:25 147:8 152:15,21 163:2 moved 123:18 167:7,7,8,9,11 movies 18:16 moving 6:25 79:24 176:25 much 13:15 14:9 18:13 20:10 24:2 55:18 57:5	57:6 59:23 93:13 94:13 97:19 98:20 113:1 120:4,6 121:2 139:17 152:21 158:14 158:17 165:3 176:10 mud 15:15 murder 1:8 8:11 17:4 23:23 29:12,19 30:3,4 30:7,9,11,18 36:15,17,24 38:18 39:9 40:22 41:24 46:23 56:12,14 56:14,19 57:13 59:4,5,6,17 61:13 63:6,9,18 75:20 78:8 81:19,21 82:7 88:22 89:3 94:18 95:16 96:5,11,24 97:14,15,15,15 98:6 99:12,14 99:17,18,25 100:4,7,12,18 100:21,24 104:20,23 105:9 108:10 109:12 111:19 118:6,24 119:24 125:3,15 125:24 126:2,12 139:7,8 142:13 142:16,16,17,19 143:3,25 144:14 145:9,10,16 147:12 156:9 159:14 160:12 murdered 61:17 murderer 41:12 murderers 94:2 murders 75:24 94:18 100:12,13 100:13 140:17 Murphy 122:7,9 122:17 123:17 123:22 124:7 133:21 135:15 music 61:2 must 40:23,23 77:13 168:8 myself 24:24 26:11,17 30:15 32:11 51:4,4 72:9 87:2	nature 174:4 Navy 109:20 Nazi 26:15 27:21 28:12 Nazis 102:21 near 100:10 nearly 55:14 necessarily 106:8 156:19 necessary 156:4 necessity 7:19 82:2 neck 144:24 need 7:4,21 13:1 13:8 15:5,6 21:7 32:21 77:16,17 77:19 89:1,7,7 89:13,13 91:23 93:24,25 94:1 112:12 119:16 120:6 146:22 178:6 needed 7:20 61:11 158:12 164:20 needs 19:11 90:19 negotiated 4:22 67:23 neighborhood 158:9 neither 40:7 42:18 45:18,19 67:4 97:3 165:1 neurological 98:19 never 7:20 11:10 18:7 22:4 28:13 30:7,13 37:13 37:15 44:2 46:18,24 47:5,7 48:2,20 49:1,2 50:9,9 51:8 52:6 54:11 64:18 70:8,12 76:15 81:22 88:10 100:10 105:1,2 105:13 127:16 136:19 143:14 157:24 168:2 170:9,21 nevertheless 8:18 67:23 113:23 new 48:11 93:17 93:20 113:12 127:15 166:15 166:19 167:6 next 5:7 12:18 16:7 35:9,13 66:21 68:25 75:14 116:14 133:21 137:22 138:6 147:8 152:21 nice 33:3,5 113:15 166:12 nice, long 179:3 nine 69:25 163:8 163:20 ninth 164:25 nobody 20:17 23:14 33:25	35:5,6 37:7 40:20 61:6 83:21 90:5,7,9 128:16 134:1 140:22,22,23,23 nod 12:24 13:2,4 13:7 43:24 noddin 3:13 137:9 138:14 160:10 161:9 162:18 165:5,14 166:5,11 178:19 178:21 nods 13:4 28:2,16 29:10,13 39:18 46:2 57:9 60:3,6 61:9 76:18 80:22 143:2 171:6 non 109:2 nonchalant 110:19 nondanger 102:13 none 14:9 25:15 45:21 nonsense 22:11 nonviolent 109:3 Nope 168:7 norm 141:3 normal 40:22 71:1 151:20 normally 154:13 Nortel 177:16 north-westerly 166:23 Northern 164:7 175:15 176:3,5 177:8 note 13:4 noted 10:12 nothing 15:17,17 17:5 36:7,7 48:8 65:18 74:10 85:15,15 95:9 133:4 162:14 notice 12:17 124:16 165:5,14 noticed 13:7 notified 133:15 notion 53:13 73:10 80:1,5 86:24 94:6,24 96:13 110:1 111:22 140:15 nowhere 156:23 number 4:3,19,20 5:2,3,12 13:13 57:20 67:8,24 67:25 68:9,10 68:10,14,16,25 77:12 93:9,24 104:21 108:8 114:9,9 136:21 138:17 161:24 163:6 167:18 169:1 177:1 180:21 numbered 1:12 180:8 nun 157:4
---	--	---	--	---	---

nursing 61:2 99:3 nuts 116:22	offered 82:6 96:25 150:20 180:10	129:17 135:6 139:4 140:5,15 141:15 142:6 146:2 148:5,18 149:18 150:10 150:19 153:4,25 155:10,20 156:21 157:11 157:12,15,19 158:25 159:25 161:12 166:14 166:20 167:4 169:4,14 170:4 170:4,13 171:5 171:15,19 172:2 172:25 173:5,7 174:2,14 175:6 175:13 176:1,15 177:2,13 178:10	28:18 34:13,14 37:6 42:19 48:21 60:4 72:8 79:5 81:9 88:23 101:3 108:16 111:1 123:23,25 123:25 129:4 132:23 136:6 138:20 141:13 154:8,19 163:19 163:21 164:1,3 Ontario 167:9 169:10,12 onto 44:5 open 4:2 42:20 43:10 77:16 79:2,8 80:11 141:17 160:17 160:17,21,22 180:8 open-minded 77:25,25 79:12 79:17,18 opened 79:2 opening 6:1 operation 177:5 operative 177:12 opinion 10:25 34:23 36:2 58:23 90:23 104:2 125:7 140:8 148:20 151:25 opinions 10:14 19:7 opportunities 108:12,15 opportunity 52:12 119:7 140:2 159:8 opposed 10:20 11:15,20 29:19 30:2 41:4 58:3 152:18 opposite 14:3 57:10 152:2 opposition 162:20 162:21 option 142:17,20 142:22,23,25 143:5,6,9 options 76:10 order 30:4 115:11 orderly 91:11 ordinarily 6:7 14:8 organization 15:13 originally 123:12 other 6:22,24 7:23 11:18,24 13:5 16:15 17:9 22:5,20 24:25 25:22,22 27:7 28:20 29:22 32:24 34:6,9 36:15 40:2 45:5 51:14,14,14,20 59:17 60:22 61:1,25,25 62:22 64:8 70:3	72:23 75:11 76:19,20 79:9 81:19 83:8,12 83:19 85:11,23 86:1,3 88:2,17 90:9 92:3,24 93:16,21 97:22 98:9 102:19 103:1,23 107:15 108:25 109:18 113:7,9 114:1 116:6 118:4 119:1 120:11 130:12 131:14 132:21 135:25 137:5 138:3 140:23 144:12 145:4 147:3,24 156:22 157:14 163:20 164:18 164:21 170:24 172:10 176:2 180:7 others 84:3 123:22 141:8 otherwise 6:25 16:4 59:23 86:13 ought 9:20 76:3 77:19 99:20,24 135:1 140:21 ourselves 12:7 76:5 118:17 out 6:24 8:3,19 10:7,16 15:5,7 20:6 23:13,16 23:17 18 35:25 38:11 39:8 45:24,25 47:18 54:21 56:10 60:17 62:23 63:2,10,11 67:11 70:1 92:11 94:13 98:23 103:14 104:24 105:7 106:2,3,8 108:7 113:20 114:2 116:15 117:5,21 119:1,13,19 125:1,6 127:6 139:13,16 144:17,22 147:23 156:6 157:13 158:1,12 160:20 163:8,21 164:15 165:1 171:11,12 174:10,16 175:7 175:7,23 177:3 outcome 80:1 172:12 outfit 176:20 outlook 103:10 outside 1:12 147:18 150:7 177:18,24 over 9:6 18:14 22:11 32:18 41:17 46:12 61:18 65:17	69:4 72:3 75:13 80:17 91:4,8 93:13 124:24 140:10 152:13 152:24 159:13 Overall 113:18 overboard 23:10 overlook 92:17 overlooked 110:10 overlooking 93:19 overnight 102:7 overrule 42:14 Overruled 133:5 overwhelming 47:9 overworked 163:5 owe 8:23 9:3 164:22 own 8:7 15:5,7 16:7,11 27:18 49:22 51:22 90:23 110:1 115:4 149:11 171:25 172:1 176:5,12 owns 177:9
O O 1:1,1 4:1 Oak 109:20 oath 5:13,15 34:13 64:23 69:5,5,9 77:18 99:23 125:4 137:12,12 141:20 obeying 27:14 object 42:6,6 83:21 128:2 132:15 objection 42:10 42:14 49:15 54:24 136:3 objections 54:25 91:21 objectives 90:23 objectors 16:2 obligation 129:21 130:10,15,18 obliges 38:19 80:23 observations 7:1 70:13 obvious 138:22 obviously 58:2 94:24 108:17 136:21 138:15 139:5,6,11,23 142:8 144:10 146:4,17 149:6 149:25 156:16 159:1 162:25 165:23 173:3 176:10 occur 6:11 24:8 135:20 140:19 141:1 occurred 14:13 72:20 76:4 82:7 82:8 119:3 180:8 occurs 38:10 84:20 115:1 October 180:16 odd 62:3 105:19 odds 20:9 25:20 off 14:20 26:18 28:21 44:9,13 46:21 47:5 51:6 54:10 60:10 68:22 70:19 82:16 102:1 110:11 111:8 123:21 133:20 144:17 158:23 161:8 175:13,19 175:20 176:3 offend 34:16 offenders 95:2 offense 117:12 142:12 154:12 156:23 offer 40:6 93:21 97:2 132:16 133:2 173:25	offering 132:24 133:4 office 123:4,5 124:25 171:12 172:21 178:4 officer 61:17 70:14,23 71:7,8 72:11 73:11,16 73:19 83:3 84:22 85:4,8,12 86:22,23 87:1 87:25 88:6,13 88:15 110:13 124:23 132:10 132:13 officers 72:19 74:2 83:6 84:22 86:10,12 88:1 100:21 official 1:17 11:22 12:3 13:13 180:5,15 180:19 officially 12:2 often 33:17 43:8 92:1 oftentimes 76:5 76:24 112:20 oh 127:5 135:21 167:2,17 172:18 175:20 okay 4:18 5:16 7:12 11:10 14:11 16:5 17:5 18:21 20:9 21:9 21:14,17 23:1 26:9,13,15 27:10,12 28:18 28:19,22 32:8 36:6,13 38:20 38:25 44:21 45:10,15 47:12 48:20 49:9,25 50:4,8,8,14,14 51:2 52:13 53:9 54:1,4,13,16 57:8 58:1,23,23 60:2 61:5,20 62:4 64:2,2,13 65:14 66:1,3 69:7 70:13 72:8 72:17,17 74:13 75:18 78:6 79:10 80:8,15 82:12,23 83:9 83:17 84:1 86:4 86:7 88:21 90:24 91:6,23 92:14 93:1,16 94:7 95:23 96:1 96:12,22 98:4 99:4,7,8 101:24 104:18 109:7 111:21 113:4 114:17 121:6,14 122:24 123:1,14 124:5,11,16 125:2,11 126:23	Oklahoma 46:1 50:18 old 17:11 22:4 60:12,17 63:11 67:7 160:4 161:18 171:22 omissions 56:1 once 78:22 79:5 80:5 118:16 149:14 one 4:15,23,23 5:7,23 6:21,22 7:15 8:11 9:25 10:25 11:14 13:16 25:16,21 28:20 29:1,22 31:7 34:5 36:17 36:18,25 37:6 45:4,24 47:22 47:23 48:13 49:6,8,25 50:10 50:10,10 53:12 54:17 57:20 58:20 64:23 65:17 67:4,8 71:5 74:20 75:4 77:12 87:10 89:19 92:3 93:24 97:21,22 98:1 99:5 104:5 113:12,20 119:15 120:21 124:22 127:15 127:15,16 134:22 136:21 137:5 138:17 139:20 142:17 144:18 145:3,7 147:25 151:21 155:10 163:6 164:23 165:14 166:1 177:1 one-in-three 25:17 one-on-one 133:17 ones 87:11,11 92:18,20 145:11 168:1 only 6:8 14:9 16:14 25:9,17 25:21 27:23	P P 1:1 2:1,1 4:1 p.m 1:11 PAGE 3:3,15 pages 131:24 paid 175:21 180:12 Pan 46:4 panel 68:1 168:25 paperwork 73:4 paragraphs 97:23 paralyze 100:25 paralyzed 101:7 144:24 paraphrased 132:1 pardon 103:10 pardoned 108:9 108:10 Pardons 38:16 107:13 parent 105:6 119:18 144:16 156:3,3,11,20 parental 62:9 parents 113:11 144:18,18 parking 147:20 parole 60:8,12,18 63:3 107:14 Paroles 38:16 107:13 part 14:13 17:6 26:1,1,2 39:6 40:5,6,9 49:24 51:12 53:10 71:8 73:1 74:21 82:23 95:12 113:11 117:6,7 133:18 particular 6:8		

15:11 29:1 65:15 104:2 108:2 114:16 176:25 177:1 partied 113:6 parties 152:17 180:7,10 parts 89:21 pass 120:11 121:2 166:5 passed 133:20 passion 20:24 passionate 23:2 passivists 16:3 past 35:12,25 84:23 140:2,10 150:16 patch 24:22 patrol 71:8 110:13 124:23 pattern 151:4,4,6 patterns 61:25 Paul 47:17 pause 31:11 55:5 114:24 166:4 pay 13:15 20:2 93:14 113:8 141:8 170:10 paying 20:7 72:25 payroll 171:24 172:1 peacefully 63:6 Pelagian 27:15,16 pen 98:16 113:7 penalty 7:7,21 9:9 10:4,14,21 11:5,9,20,23 13:16,17 14:10 14:14 17:19 19:2,3,5 21:3,4 21:16 28:21 29:23 30:2,6,15 31:18,24 34:20 37:20 45:2,4,6,7 45:9 46:17 47:21 49:21 50:7 52:7,22,22 53:16 55:1 57:5 57:11,23,24,25 58:1,3,7 61:10 79:24 93:2,4,8 93:24 94:9,19 94:25 95:1 103:15 105:23 138:22 139:18 139:21 140:6,14 140:18 141:1,5 141:6,10 142:16 142:20,22 143:5 143:8 144:12 162:19,20,21 pending 178:3 penitentiary 30:12 60:21,22 60:23 61:15,20 63:2,7,12 Penn 168:21 Pennsylvania 167:8 168:19,20 Pentecostal 165:6 people 6:23 7:17	7:18 9:14,21,24 10:1,7,18 11:8,9 11:11,12,15 13:17 15:18,23 15:25 16:3,15 17:7,9,16 18:7 18:10,18 19:8 19:18,20,22 21:23,24 23:25 24:7,12,21,24 24:25 25:1,18 25:20 26:18,21 26:22 27:2,5,5 27:15,22 28:6 29:18 33:23,23 37:4,6 42:20 43:14,23 44:6 46:4,6,7 47:14 51:14,15 54:22 57:24 58:2,9,13 59:8,8,25 60:10 60:22 61:3 62:22 71:15 72:10,24 73:10 73:14,22,23 74:1,2,11,18 75:25 77:3,23 78:3,19 79:25 80:4,10 81:15 82:16 83:8 84:2 84:17 86:20,20 88:2 89:2 90:10 90:19 92:24 93:1,3,8,16,25 100:14 101:18 101:21 102:4,19 102:24 103:1,5 103:6,8 105:9 107:23 109:11 110:9 113:1,4 113:19,23 114:1 114:6,11,11,13 114:18,21 115:3 116:13,18 117:12 118:10 141:11,13 147:1 147:3,21,24 148:4 149:4 150:17 158:3,13 158:19,23 163:8 172:10 173:9 176:2,4 people's 14:5 34:24 per 11:20 72:12 percent 45:4 62:6 62:11,19 percentage 122:12 147:2,3 perception 72:1 peremptory 3:12 33:1 57:3 135:5 135:9 136:21 perfect 8:5 112:19 114:2 154:6 perfectly 12:24 17:24 74:21 perhaps 7:18 8:18 9:1 31:13 33:4 45:23	74:17 92:4 96:14 109:11 137:11 permit 84:10 person 10:11 12:15,18 21:2 21:10,11 22:4,8 25:9,11,18 29:9 33:13,14 34:25 36:3 45:12 50:1 52:12 57:16 60:15,16 64:15 64:16 73:11 74:17,25 75:1 78:12 80:25 82:15 84:6,7 85:18 86:1,25 87:25 88:8 93:18 96:13,14 100:7 101:10 102:10,11,13,15 102:16,17,18 103:16 104:20 104:25 109:4,13 109:22,23,25,25 112:18,19,24 118:24 119:4 132:11,23 133:17,20 144:11 145:15 147:12 148:24 149:3,11 150:5 150:6 151:5,7 151:20 154:7 155:1 156:9 160:3 162:22,23 person's 108:22 personal 15:9 48:9 54:25 65:7 99:23 117:19 132:13,20 133:12 134:4 153:18 161:12 personality 31:13 109:24 154:11 personally 51:3 52:11 54:25 64:10 92:25 139:24 perspective 92:7 Petco 121:10 123:6 petty 116:7 phase 29:8 31:6 39:14 40:3 41:11 57:20 61:23 62:17 63:15,19 81:23 96:4,25 97:2,9 107:4 142:9,9 142:10 143:13 144:1 146:5 150:19 163:2 philosophically 73:12 phone 98:18,20 phonetic 168:13 phony 72:24 phrase 42:10 147:9 156:22 159:3,6,13	phrased 108:17 physical 151:2 physically 144:24 144:25 pick 158:1,9,15 picked 142:7 pin 74:4 ping-pong 66:4 place 2:15 7:22 121:20 129:2 151:15 158:4 placed 137:11 places 10:2 plaintiff 22:5 plane 23:15 46:4 planet 82:25 Plano 2:16 6:19 164:15 172:18 172:19 174:21 planted 46:3 play 116:4 135:15 167:17 168:2 played 14:13 167:18 168:4 player 167:16 playmate 161:14 plays 160:20 please 5:17 12:25 55:6 69:11 137:14 156:12 156:17 166:2 pleasing 159:9 pleasure 7:13 10:6 plethora 159:3 plunges 25:11 plus 99:17 105:1 pocket 22:5 point 15:4 19:10 42:6 54:14 58:19 66:5 81:13 92:7 103:15,17 133:23 134:7 139:6 145:6 150:21 151:21 152:13 169:7,12 175:22 176:17 177:18 points 123:21 polarity 67:5 police 61:17 70:14,17 71:7 72:11 73:10,16 73:18 74:2 83:3 83:6 84:22,22 85:4,8,12 86:10 86:12,22,23 87:1,2,25 88:1,6 88:13 100:21 125:1 144:22,23 148:9 174:21 policemen 100:24 political 46:9 130:12 pool 43:20 74:21 poor 22:4,13 pop 67:6 population 76:2 portion 30:16 76:2	portions 180:6 posed 36:19 position 8:9 11:17 11:21,22 12:11 13:5,22 34:13 79:18 85:1 131:22 134:13 139:20 147:24 positions 13:13 possibility 61:7 62:20 95:12 135:19 146:13 146:18 176:15 possible 12:6,10 77:5 80:1 92:1 103:23 146:14 146:16,17 possibly 7:9 94:2 133:25 post 175:4 posted 174:25 175:1,2 potential 135:2 173:7 Potter 70:24 71:6 practically 130:9 practice 89:12 practicing 6:19 90:11 practitioner 138:7,10 praying 157:4 preachers 61:2 preconceive 21:11 predict 35:18 47:15,18 61:6 64:14 151:13,19 predicting 49:16 prediction 35:19 35:20 predictor 96:14 prefer 73:18 preliminary 133:6 preparation 180:12 prepared 102:3 112:21 presence 1:12 177:18 present 4:2,4 108:22 128:24 129:15 presentation 6:1 presented 28:24 37:2 79:3 81:3 83:15 101:14 presenting 126:7 127:2 presents 88:20 Presiding 1:13 presume 80:25 95:24 presumption 130:8 pretend 31:19 prettiest 48:13 pretty 11:20 17:15 34:4 47:19 66:7	72:14,15 97:19 102:20 103:5 115:25 139:17 140:15 164:17 165:3 prevent 18:23 55:1,8,10 prevention 72:16 73:11 124:23,24 previous 103:13 previously 75:3 price 93:14 priest 85:18,19 86:2 87:6,6 priests 87:8 90:18 primary 177:6 principle 12:13 prison 18:17 20:13,20,22 38:13 60:24 61:4 62:25 64:6 64:11 76:16,23 100:16 103:15 103:16 107:18 107:19 108:16 108:19 117:9 150:1,2,3 prisons 7:21 private 138:7,10 pro 57:24 probabilities 35:20 probability 31:7 35:23 38:1 52:17 62:17,18 64:16 96:7 108:23 146:9,19 146:23 147:3,5 148:14 150:12 152:10,12,22 160:13 probably 6:12 10:15 12:1 14:17 19:20,22 20:5 25:18,22 26:22 31:2,14 31:15 32:13 37:9,12 38:5 39:6,7 40:12 43:1 44:3 46:24 57:7 61:12 62:7 63:7,10 64:23 65:9 71:14 72:12,24 73:3 73:12,18,21 83:6 84:1 85:25 86:16 89:22 92:6 96:2,9,15 102:22 104:15 107:7 110:16,19 116:2 118:25 120:9 134:1,20 137:21 138:8,17 139:5 140:15,20 141:3 152:15 155:10,12,13 156:1 157:24 169:1 probation 33:18 33:19,22 60:9 63:3,3 78:9,14
--	--	---	---	---	--

78:20 79:5,8 80:2 probing 173:13 problem 7:23 19:20,21 28:7 51:11,15,21,24 52:21,22 53:12 53:19 65:12,13 86:4 90:24 91:7 97:21 134:2,17 135:16,16 138:18 163:7 problems 53:12 73:1 procedural 81:13 procedure 66:23 proceed 32:3 79:21 proceedings 1:11 1:12,14 6:2 18:14 31:11 55:5 114:24 166:4 180:7,10 process 8:15 17:6 23:25 25:6,25 26:1 32:2,16 53:11 71:15 74:25 80:5 104:12 138:15 138:19,24 139:3 140:1 141:16,25 142:3 152:11 163:21 164:24 produce 129:3 131:2 135:11 produced 1:15 95:24 129:5 producing 89:4 products 176:25 professed 66:22 profession 73:17 79:18 88:19,20 90:11 91:22 professional 21:22 90:9 92:16 professionals 90:18 professions 73:18 74:11 program 169:3 projected 177:13 projection 104:1 proof 42:19,22 62:8,17 81:22 81:23,25 82:1,2 91:16 97:4,4 120:4,6 126:6,7 126:10,22 128:20 142:10 146:7 152:8 153:9 proper 57:22 88:22 104:17 140:8 properly 89:3 property 147:18 147:25 148:4,19 propose 8:12 prosecute 173:17 173:18	prosecuted 160:5 170:21 173:1,20 prosecuting 173:10 prosecution 6:5 165:2 172:23 173:8 prosecutor 6:4 48:12 73:15 164:2 prosecutors 6:8 18:6 48:11 163:5 prospect 7:8 prospective 58:24 133:18,23 prospects 57:12 protect 23:25 93:24 94:3 protected 112:23 prove 8:10,13 62:3,12,13,16 81:18 82:9 88:21 91:16 95:17 97:5,6 99:25 100:2 115:11 125:3,15 126:3,6,7,13,18 126:22 127:2,7 127:7,11,12,18 127:20,22,23,25 129:10,11,19 130:20,21 132:1 142:11 143:12 146:8 153:9,11 163:1 proved 104:8 143:24 146:25 160:14 proves 22:22 81:4 100:1 143:11 provided 131:24 providence 166:21 provides 97:20,20 proving 39:8 psychiatrist 62:2 150:25 151:24 152:2 psychiatrists 151:12,16 psychological 116:19 psychologist 62:2 public 89:22,23 publicly 86:11 pumping 92:8 punish 92:12 punishable 94:14 94:15 punishment 7:18 20:21 22:24 30:10 31:3,6 32:19 36:8 40:3 40:6 56:12 63:19 76:7,10 76:20 77:4,14 93:11,12 94:24 95:21 131:24 135:8 144:1 146:5 150:19	163:2 punishments 60:5 purpose 39:12 88:14 99:6 purposefully 50:5 purposes 65:20 99:11 110:1 142:15 pursue 79:21 90:23 pursuit 92:24 push 26:13 pushes 25:25 put 5:13 18:8 20:12 22:6,17 37:15 69:5 77:19 86:17 98:22 99:23 100:15 101:1 113:5,9 124:16 126:14 129:21 129:23 130:4,10 130:14 138:17 143:18 149:15 162:23 163:8 169:19 175:9,11 puts 25:20 putting 20:16 99:6 130:18 Q Quakers 11:22 qualified 19:4 32:21,24 33:24 43:20 74:16,21 78:4 85:16 134:25 qualify 42:12 qualifying 76:6 quarrel 28:19 quasi 73:9 Quebec 168:11 168:12 Quebecwan 168:13 quest 120:14 question 7:2,5 18:7,9 21:5 28:24 31:6,12 31:12,18,20,22 34:11,20 35:3,3 35:4,18,22 36:9 36:11,19,23 37:1,5,9,15,22 37:23,24 38:6 38:17,19 39:2 39:10,19,21 40:16 42:2,7,10 42:11,13,16,19 42:24 43:16 44:12 46:25 47:7,13,14,25 48:3,6,17,21,24 49:2,4,5,7,11,13 49:14,14,16,20 49:21 50:1 51:18,20,20,21 51:22,23 52:14 52:18,19,21 53:17,24 60:19 60:20,24 61:1	61:11,19,22,22 62:3 63:12,24 63:25 64:21,21 79:24 85:2,15 86:9 87:13,15 88:5,12 96:2,4,9 96:19 97:7,8 101:9,13 104:21 105:4,12 106:19 107:3,19 108:16 108:21,25 110:22 111:1,3 111:9,17 114:14 115:11 117:7,10 119:11,14,17,23 120:10 125:17 126:1,4,15 127:21 128:3,6 128:14,22,23 136:17 144:6,8 145:17,19,20 146:3,6,11 148:11,16,20,22 149:14,16,25 150:10 151:11 151:20 152:7,14 152:16,19,21,22 152:23,23 153:2 153:5,8,12,25 156:21,25 159:1 159:1 160:7,8 160:13,13,16,19 160:20 161:3 162:18 questioning 65:4 65:10 questionnaire 8:3 10:13 17:19 45:1 56:10 67:9 70:6 121:9 124:16 125:6 128:16,17 138:18 140:5 161:7 165:6 questionnaires 4:8 73:24 139:13,14,16 questions 5:14,19 7:3 13:11 28:15 29:25 43:23 49:17 50:6 52:5 52:25 57:6 58:19,21 59:3 59:10 64:9,20 64:23,24 65:1,2 65:8 66:6 69:6 69:17 71:22 72:4 76:9 87:18 95:8,13,22 96:3 105:24 119:2 120:24 121:5,15 127:19 128:12 137:13,18 144:3 144:4,5 166:13 174:19 quick 89:20 Quickly 104:5 quid-pro-quo 173:25 quit 15:7 155:1 quite 7:13 12:14	20:17 57:7 58:8 107:23 R R 1:1,1,1,1,1 2:1 4:1 rage 147:22 raised 11:4 82:5,5 82:10 165:6 range 14:19 76:10,12,20 77:4,14 raping 61:13 rare 63:17 77:9 79:1 97:1 102:2 rarely 78:3 rarity 33:16 rate 122:12 123:15 136:12 rather 35:20 49:18 72:17 78:24 117:9 157:9 159:11 re-examined 15:5 reaction 78:21 read 15:14,14,25 17:11 38:23 61:17 73:23 94:14 111:13 117:16 125:21 126:15 150:24 152:24 reading 17:17 93:18 ready 54:21 69:13 76:5 120:11 real 23:7 24:5,11 28:21,22 58:10 58:11 88:12 90:5 96:23 116:13 120:10 159:20 171:1 realize 8:9 79:1 80:9 92:18 110:10 realized 7:5 139:7 139:8 realizes 120:12 really 8:24 9:11 11:10 21:7,10 25:7 30:25 31:21 40:4 42:23 52:14 54:2,2 60:11,12 61:16 63:6,8 64:6,8 66:9 70:24 72:15 73:24 76:22 87:13 102:1 111:3,17 114:18 115:2 118:10 123:16 130:9 139:16 147:25 149:10 151:21 156:23 165:1 173:13 reason 34:15 36:9 52:11 75:5 77:5 82:8 97:21 110:8 114:6	133:11,16 136:12 154:16 161:13 reasonable 8:10 17:24 22:22 38:4 57:19 59:3 59:11,20 62:4,5 62:13 81:4,19 88:21 89:4 90:20 91:16 95:17 96:6 97:6 97:7 105:19 106:9,20 108:4 108:18 110:23 111:20 120:5 142:11 143:12 143:24 146:8 160:14 163:1 reasons 9:1 20:3 43:2 47:10 49:1 64:3 93:2 104:5 104:21 107:21 114:13 138:22 rebuild 123:24 recall 5:25 6:20 8:1 70:6,10,12 121:25 122:3,4 122:5,11,13,22 123:14,16,20,25 124:1,3,4 137:11 144:7 163:10 recalls 135:14 recent 45:25 110:9 recess 12:21 66:17,20 67:20 68:23 137:8 177:18 recognition 33:13 recognize 15:19 62:14 87:11 88:14 98:9 104:19 120:22 122:15,23 168:17 recognized 96:18 136:4 recognizes 118:19 recollection 136:10 record 1:7,15 4:3 13:4 65:20,20 68:22 111:8 126:14,17 161:8 180:8,9,12 recourse 141:14 REDIRECT 128:12 reduce 153:6,6 referencing 124:20 reflect 65:20 reflection 139:17 reflects 180:10 refresh 152:25 regard 32:14 129:4 135:25 136:10 141:24 142:10 143:3 144:6 146:6,19
--	--	---	--	---	---

148:5,9,20	renfro 1:17 180:5	141:12,25	129:20,21	106:17 113:19	66:22 67:3,15
150:10 152:7	180:18	160:25 161:4	130:14 131:9,19	121:20 126:5,7	67:21,22 68:6
153:8,25 154:5	rent 113:8	resulted 142:2,4	131:21 133:19	126:9 127:1,2	69:13,14,18,20
154:23,23 158:2	reparation 164:4	resulting 140:7	134:11,13,18,24	129:2,10 143:3	111:9 114:23,25
158:22 163:10	reparations	results 22:1 28:15	135:12 137:2,22	143:7 145:5	115:23,24,25
regarding 133:17	164:20	37:23 38:18	140:19 141:2	154:14 156:8	121:1,3 128:1
140:11 152:7,16	repeat 56:22	43:17 49:15	147:18 152:1	158:24 170:23	128:10,13 130:2
153:16 156:21	repeats 96:16	81:20 139:25	159:12 162:15	173:10	131:8 132:12
regardless 21:13	replace 52:20	140:1 144:4	164:10 165:3	San 164:5	136:2,8,14
49:22 53:24	replaced 51:20	149:8 154:18	167:11 169:6,16	Sandoval 1:13	137:23 142:14
156:2 174:11	reported 1:14	retained 170:15	169:19 177:22	sat 36:20 160:11	144:15 152:16
regards 56:11	180:8	retarded 27:25	177:24 178:18	satisfied 120:19	157:3 177:17,25
149:14 160:7,8	reporter 1:17	return 47:25	178:21 179:2	Saul 47:16	178:2,5,10
regrettable 7:19	13:2,8 45:20	64:22 140:7,13	rights 18:7,11,19	savage 100:23	Schultz's 42:6
regrettably 17:1	180:5,19	141:18,19,22	62:9	saving 67:5	65:4
regular 20:13	reporter's 1:7,15	returned 75:7	rise 66:19 67:19	102:11	scope 24:16,16
77:3 78:8	3:16 180:1,7,9	returning 55:8	68:21 137:7	saw 78:5 149:19	screened 85:14
regulated 13:10	180:12	revealed 15:21	risk 134:14	saying 22:18 32:4	screw 111:6
rehab 101:17	reporters 13:5	17:11	Rivas 61:15	36:7 37:14	Scripture 14:3
rehabilitable	reports 86:16,17	review 28:5 94:21	river 41:16	42:24,25 43:3	94:14
104:4	represent 90:1,2	reviewed 28:8	road 9:18 45:18	44:17 46:17	scrutiny 19:19
rehabilitate 95:2	90:4 166:12	reviewing 4:7	56:16,17 121:22	55:12 57:14	28:5 39:12
rehabilitated	representing 5:24	RICO 69:21 70:2	rob 144:21	65:3,11 66:9	se 11:20 72:12
52:10 62:24,25	164:13	ridicule 89:10	157:23	74:22 75:25	searching 23:12
rehabilitates 95:4	requested 107:14	rifle 16:1 24:15	robbery 59:7	77:20,24 80:21	23:16 56:21,24
rehabilitation	180:7	right 4:14 5:5	60:1 97:15	87:1 90:16 92:8	117:17
63:1,5,8 94:25	require 20:4	6:16 10:11	143:4	98:22 101:25	seat 43:19
95:7,10,12	35:19	11:16 12:18	Robin 22:15	102:15 104:11	seated 5:17 69:11
101:17,18 103:1	required 33:15	14:25 18:20	robs 144:21	115:8,13 119:1	83:13 134:15
103:2	75:16 84:14	19:8 20:20,24	Rockwall 75:11	119:20 129:8	137:15 138:3,6
reject 53:13	89:15 115:10	21:20 22:14	role 21:25 72:10	132:18,21	second 38:19,22
relate 35:9	requires 33:19	29:16 35:17	113:11	142:24 148:11	40:9 41:11
related 6:24	35:20 80:13	36:13 37:4,14	rolled 9:6	154:2 156:17	47:22,23 49:6
132:16	143:16	41:4 42:8 43:12	Roman 11:19	174:1	49:13,14 53:19
relates 19:13	rescue 23:17,18	44:1,9,10,12,16	13:12,18,20	says 15:25 16:13	55:4 58:13 68:1
relating 132:14	resettlings 71:16	44:20,22 45:3	roof 44:4,8 46:21	16:14,19 17:3,5	75:21 79:7
relationship	resident 75:10	46:22 47:1,2,4,6	47:5 54:11	19:13 27:12	96:25 97:2
159:19 177:8	residing 166:21	48:3,4,9,10,14	room 16:23	30:24 32:16	107:4 134:9
relationships	resist 79:12 83:12	50:3,12,15,22	139:22 161:19	47:23 58:7	138:16 160:16
116:17	resistant 79:25	51:7,8 53:15	ROTC 169:17	63:19,20 68:4	169:9
reliability 87:15	resolve 18:15	54:9,11 55:24	rough 168:1	81:6 85:17	secondary 177:7
88:5	112:10 172:8	57:16,22 60:5	roughly 14:15	90:11 93:13	secondly 77:15
reliable 88:8	resolved 172:7	61:8 64:2 65:17	routree 3:10	98:17,25 99:4	120:2
reliance 74:18	respect 19:8,9	65:23 67:2,21	68:2	99:19 117:7	seconds 31:10
religion 11:3 14:2	24:25 84:24	68:4,9 69:15	rub 22:4	129:23 130:18	55:19
14:10,13 27:16	85:1	70:1 71:3 72:6	rudeness 13:9	134:16 136:13	secrets 26:21
86:3	respectfully	73:6,21,25	rule 15:19 82:15	136:15 150:3	secure 123:11
religions 11:24	55:22 133:3	74:14,15 75:6	rules 18:1 82:10	156:12 159:17	security 72:13,16
12:1	136:2	76:8 77:1,16	82:11 133:7	160:17 161:17	see 7:6 11:18 21:2
religious 11:14	respecting 10:8	78:1,25 79:11	run 134:14	164:22	21:5 22:10
13:23 93:17	respective 180:10	80:17 81:2,10	running 148:8	SBOT 2:3,4,5,12	24:15 26:9,11
111:4	respond 84:17	83:24,25 86:13	Rusty 122:18,19	2:13	30:6,15,23 34:3
relook 40:1,9,10	response 84:7	91:1,14,19,24	122:21	scales 129:4	38:20 47:21
145:21,24	93:10	93:15,23 96:17		scams 132:2,4,5	50:3 51:5 57:14
remains 130:8	responses 86:5	97:2 99:15		scapegoats 89:24	60:20,25 63:11
remember 23:15	responsible 27:4	101:5,15 102:7		scene 88:7	65:3,24 67:6,11
26:17 31:5 86:4	27:6,8 176:24	102:8 106:10		school 74:5,6	68:18 74:11,12
86:17 110:16	responsiveness	107:2,8 108:6		116:11,15 117:5	76:15 79:4,11
122:16,25	76:7	108:20 110:2		117:21 124:11	85:23 87:1
134:17 135:22	rest 53:4 63:7	111:7 112:2,6		124:13,15 150:6	90:20 100:16
135:23 142:18	83:14,20 92:10	112:16 115:14		161:15,25 164:3	101:13 107:22
144:8 152:15,18	95:14 105:15	115:21 116:5		164:19 167:8	108:22 120:7
153:2 157:3	117:1,10	117:14,25		169:11	129:20 131:3,4
161:10 163:19	result 7:9,15 8:15	118:18 119:6		schools 124:15	131:21 148:1
164:14	20:22 24:8	120:1,3,21		schultz 2:3 4:5,14	152:4 159:12
remind 5:13,15	28:23 31:3,4	124:18 125:9		4:21 5:18,20,23	167:23 173:20
69:4,8 137:14	37:13 38:6 43:1	126:5 127:2,4,9		31:9,12 42:15	176:13
remorse 46:10	49:12 52:25	127:10,12,17,20		54:5,7,8 55:2,6	seeing 6:20 72:10
remorseful 103:7	53:20 55:9 58:1	127:22,23,24		55:7,18,20 57:2	135:14
remote 108:8	101:1 106:9,14	128:11,24 129:9		57:16 58:5 60:7	seek 140:25
renew 136:3	106:21 112:11	129:10,12,15,19		64:2,19 65:19	seeking 138:21

seem 10:11 13:14 13:17 15:18 31:18 45:20 58:23 78:18 79:22 82:12 84:17 seemed 84:5 116:17 128:19 164:16 seems 13:18 19:3 39:2,10 89:23 108:21 116:2 seen 41:3 86:15 86:16 92:22 114:9 151:11 165:18 sees 105:7 selected 70:12 140:12 selection 141:15 self-absorbed 115:3 self-defense 16:6 16:15 82:6 93:23 self-employed 123:1 self-respect 10:6 106:3,10,14 120:17 selfish 54:14 sell 177:2,4 selling 149:19 150:6 send 27:5 52:7 53:7,23,25 sense 10:9 11:25 12:1 14:22,23 18:24 25:2 27:19 28:25 32:22 35:19,20 41:6,8 59:23 64:18 78:21 81:11 89:22 95:4 109:16 110:3 118:12 124:22 134:3 sent 27:22 56:15 64:11 sentence 8:14 28:4,11 30:8,13 37:13 38:13,18 39:23,25 41:4,5 41:22 42:1 43:1 43:17 49:12,15 52:2 53:21 55:9 56:19,20 60:7 62:25 63:5,9 78:10 80:1 106:12,17 107:7 107:8,11 108:10 111:18 117:9 118:1 119:13,14 120:14 127:10 140:21,21 141:18,19 142:1 144:4,5 147:8 149:23 150:2 152:11,13 153:22 155:18 160:23,24 161:4	sentenced 26:12 60:15 separate 30:23 61:11 separation 13:24 September 1:11 series 134:23 144:3 serious 101:19 110:20 112:16 139:9 serve 7:7 70:22 served 70:9 serves 57:17 service 6:9 13:21 66:8,10 70:7 128:17 137:4 169:6,16,18 173:8 178:20 services 177:2,4 serving 38:13 56:19 57:13 107:11 set 161:14 162:10 162:16 174:10 setting 73:11 settle 164:19 settled 139:10 seven 124:24 136:24,25 several 8:25 131:24 132:1 sexual 76:1,6,11 78:15 80:2 147:13 Shakes 26:6 174:24 shaking 98:20 shalt 15:24,25 17:1,3,4 share 83:19 92:23 176:8 shared 150:16 shed 62:2 sheltered 158:12 Shhhh 122:20 shifts 143:14 ship 23:11 shipped 26:18 shock 63:3 shock-value 8:21 shoot 100:24 157:14 shoot-out 100:22 144:23,24 shooter 152:18 shop 171:13 short 63:2 show 95:13 101:25 140:20 143:1,15,16 showed 139:4 shows 129:15 141:19,20 151:10 shred 58:20 shuffles 73:4 sic 77:12 95:6 161:13 176:20 sick 20:14 44:4 116:5	sickness 20:15 side 6:22 29:22 32:19 34:5,6,9 40:5 42:18 43:18 63:16 64:8 92:3 97:3 103:23 111:7 120:11 151:5 153:9 164:23 178:22 sides 5:14 8:23 28:23 33:2 36:20,21 52:19 94:20,22 97:2 141:16 sight 90:10 significant 87:7 139:12 silly 89:11 136:17 136:19 simple 33:1 117:23 160:2 165:3 simply 17:3 39:16 since 18:18 20:19 56:10 70:5 82:18 121:24 125:1 139:19 152:20 159:17 sincerely 121:1 single 28:3 36:18 sir 54:7 58:17 68:17,20 69:10 69:14 71:10,13 71:20 74:23 77:21 79:22 81:6,12 82:13 84:9 85:3 87:5 87:23 110:4 111:14 115:23 118:2 119:21 120:24 121:11 125:23 128:10 131:14 137:9,10 166:8 sissy 116:9,11,12 sit 8:23 20:20 45:11 79:11 90:3 120:2 135:6 156:15,18 161:16 sitting 41:17 58:11 70:1 72:3 78:13 80:17 84:11 85:6 126:11 135:11 137:22 139:21 situation 12:14 40:23 42:8,13 52:2 65:24 72:6 80:20 104:10 105:19 112:10 112:25 118:4,11 119:8 142:3,21 143:4 144:1,12 144:20 145:2,10 155:4 159:7 162:1 170:24 171:21 172:4,12 172:13 situations 50:11	78:18 98:9 134:22 142:15 144:11,16 145:15 six 117:12 124:24 161:21 169:1 176:7 sixth 44:7 skate 168:2 skid 88:8 skill 89:8 slap 16:18 slaps 16:17 slaughtered 46:8 slavery 100:15 sleeping 157:16 slock 176:20 slow 71:15 138:19 slowness 163:7 small 87:8 smashing 147:19 148:7 149:19 smoke 74:3 snaps 135:12 sneak 99:4 snow 146:15 so-called 98:13 111:2 soccer 116:4 social 73:16 74:9 74:10,16 79:6 86:24 society 7:19,23 11:21 12:5 18:12,19 20:20 23:7,14,23 28:1 31:15,17 36:3 37:25 38:2,5 52:17 60:23,24 61:4 65:22 84:1 90:11 93:13,24 94:1,3,3 96:9 98:7 102:18 103:14,16,18 104:3 106:21 107:18,19,25 108:4,17 109:22 109:25 111:19 113:13,24 118:25 149:17 149:25 150:1,4 150:4,5 151:15 154:16 society's 93:10,23 solely 96:19 97:11 97:12 146:3 solicit 145:8 some 4:7,8,11 7:3 10:3,12 11:25 13:3 15:25 16:15,24 18:10 19:20 20:12,17 22:3 24:2,11,11 24:12,15,23 28:6 29:18 30:14 35:8 36:9 40:2,23 47:14 51:20 54:21 55:20 60:10 61:11 62:2 70:3 70:3 71:14	72:20 74:3,11 75:3,5 77:6 80:4 81:19,21 84:6 86:12 87:7,8,16 88:7,9 89:21 92:6 93:6,9 94:12,14 97:13 97:21 98:5,24 102:20,21,24 106:13 109:8,24 111:7,7 112:5 112:15 113:23 114:1 115:7,25 116:7,13,18,19 116:23 117:17 118:3,14 122:3 123:21 130:3,17 132:16 133:17 134:5 135:10,20 139:6,19 140:3 140:7 141:6,11 144:15 147:1,3 147:21 148:12 148:13 149:4,20 150:15,23 151:2 151:16 155:15 164:17 168:4,5 172:10,11 174:18,19 175:22 176:12 176:17 somebody 9:5 10:3 16:10 17:12 20:13,16 20:22 23:10 25:10 33:6 36:9 37:10 39:23 41:16 44:19 46:8,23 47:16 47:17 57:5 59:2 59:4 67:12 76:22 79:4 83:2 83:3 85:4,7,8,17 86:22 87:14 90:1 92:17 94:17 97:13 99:22 100:8 102:1 109:12 112:15 116:25 118:24 119:11 119:22 122:6 129:14 132:14 148:3,8 149:10 149:19 154:6,8 154:24 157:17 158:24 159:9,13 159:17 somebody's 7:10 139:25 140:1 157:16 somehow 7:8 8:21 13:25 27:25 30:4 49:4 55:7 67:6 75:10 89:8 132:16 172:7 someone 21:15 50:6 52:7 53:7 53:23,25 56:14 56:15,18 74:19 76:16 98:15,17	125:2,14,22 126:2,12 150:12 152:17 someone's 52:8 93:6 something 7:14 8:5,6,22 9:16,17 9:19 12:6,17 14:21 16:9 30:11 34:12,21 40:24 44:20 47:8 50:18 59:16 64:16 82:14 92:15,16 98:3 100:8 105:2 109:21 112:16,16,22 115:5 118:11 123:21 129:14 130:20,21 132:22 135:5 139:11,22 146:17,18 151:19 155:13 155:15 168:16 172:8 sometime 84:11 sometimes 9:15 10:2 12:23 14:20,24 17:1 17:17 18:13 20:8 23:9 27:14 66:3 78:7 90:10 92:1,9 170:8 somewhat 72:12 110:17 somewhere 175:2 son 161:14 162:2 162:7,13 163:10 170:20,23 173:10,17,18,20 174:12 son's 162:11 soon 34:4 sorry 22:14 42:5 67:24 115:20 122:21 136:25 sort 14:19 15:8 16:3 17:7 20:3 74:6,24 80:7 111:7 112:19 113:23 151:13 164:17 171:16 sorts 61:21 soul 56:21,24 117:17 sound 30:20,20 112:19 sounds 14:13 15:9 19:6 21:23 Southwestern 171:13 speak 72:8 168:6 168:8 speaking 67:4 95:14 130:9 137:22 special 8:13 29:4 41:6 47:21 51:11 52:4 53:6 53:13 57:20,21
--	--	---	---	---	--

58:22,25 59:19 59:23,25 65:18 65:21 95:11 97:5 100:3,12 111:2 123:20 124:2 specific 42:8,13 47:10 49:1 51:21 64:3 specifics 104:7 spectators 45:20 46:6 spectrum 103:5 103:22 speculate 72:9 108:2 spence 3:4 4:20 spend 18:13 23:11 24:2 152:20 spent 167:14 168:5 175:15 spin 178:4 spine 101:1 spiral 154:10 spiritual 103:2 113:10 split 15:10 123:24 spoke 137:23 138:9 spoken 13:6 178:12 squad 23:24 St 171:11 stack 67:7 staff 61:2 staff 105:10 stance 93:22 stand 9:19 27:19 34:16 129:13 134:4 151:24 standard 94:11 94:12 stands 45:24 start 4:6 10:16 60:9 68:15 76:21 78:18 87:18 93:18 147:17,19 149:1 started 4:10 147:20 starting 81:13 starts 81:1 92:8 state 1:3 2:2 3:3 5:24 6:1 13:24 14:1 22:22 24:5 33:6 37:12 40:7 43:17 51:18,25 57:8 61:24 62:10,11,13 63:19 72:19 81:4 91:16 92:21 97:4 100:1 120:13,17 126:6,21,21 127:23 128:9,20 129:5,20 131:23 133:10,14 134:1 134:19 135:3,18 136:13 138:21 142:11 143:11	143:14,24 146:7 146:25 148:3 149:15 150:25 152:1,9 153:9 160:13 162:3,6 162:25 180:2,5 State's 3:7 6:9 43:14 59:12 stated 64:19 125:21 statement 46:9 89:20 126:12 129:18 163:4 States 168:16 station 27:2 stations 26:20 statistically 67:4 statue 100:13 statute 95:9 statutorily 75:9 statutory 75:4,13 111:24 stay 176:19 stays 128:20 stealing 73:4 steals 148:8 Stenotype 1:14 step 7:15 67:13 67:17 131:12 142:6,6 177:20 stern 117:4 sticker 165:24 stickers 165:18 sticks 167:19 still 5:15 6:25 7:4 9:9 12:7,11 14:6 15:1 19:14 22:12,21 23:10 28:10 43:5 53:19 54:10 57:25 58:7 69:9 69:25 70:1 74:20 78:4 82:17 85:16 87:11 95:17 97:3,22 99:13 102:20 106:10 126:20 127:8 129:2 140:8 149:1 152:10 158:25 160:1 164:8,9 171:24 172:13 175:2,2 stock 176:5,10 177:10,14 stone 3:7 5:10 17:13 56:4 66:3 stop 15:2 76:22 77:23 78:25 98:16 116:1,3 141:11 stopped 65:17 stops 95:5 store 144:21,21 150:7 storerooms 70:4 stories 83:12 story 41:19 straightforward 52:24 stranger 158:18	strangers 46:6 strategy 57:3 straw 101:4,7 street 1:18 88:9 121:22 157:6 180:20 strength 23:8,10 stricken 134:7 strike 3:12 4:19 5:2 33:2 135:5,7 135:9 strikes 57:3 striking 178:21 strong 11:21 28:21,22 29:23 34:16 44:6 strongly 30:1,14 struck 135:1 structure 112:25 struggle 57:12,12 struggled 54:2 studied 47:16 151:18 study 151:22 168:23 stuff 9:4,9 17:11 17:14 25:16,16 28:8 30:18 83:13,19 88:8 92:7 93:22 97:19,19 110:12 115:16,25 116:9 118:4 129:23 164:17 177:12 sty 113:17 subject 11:21 89:19 submit 115:15 subpoenaed 134:1 substance 25:11 25:25 substantial 64:20 substantially 29:24 55:10,15 58:6 65:7 substantive 132:25 sudden 134:16 159:8 sufficient 41:2,21 42:1,22 43:2,3 43:11,16 95:24 117:8,24 118:3 118:9,12,13,16 119:12,23,25 120:3,13,17,19 153:21 155:18 160:24 161:2 suicide 98:13 suing 22:5 Suite 2:8,15 sum 80:12 summarized 164:25 summoned 75:11 supply 121:13 support 15:4 18:20 24:20,20 44:6 93:8 94:9 94:10,20 115:3	127:3 156:1,4,5 156:12 177:5 suppose 61:11 68:24 135:19 165:4 173:11 supposed 8:6 14:1 15:16 16:18 111:16 sure 7:3 9:11 33:8 49:18 50:6,15 52:9 54:11 67:13 79:25 92:5 104:14 105:25 125:5 131:15 144:6 156:3 171:1,15 175:24 176:1 177:20 surgeon 16:22 surprised 67:9 surprises 10:18 surrounding 82:22 surrounds 79:19 survey 18:2 survive 23:20 suspect 11:24 suspension 107:24 suspicion 89:10 Sustain 128:5 SUV 9:6 swear 141:22 swore 125:4 sworn 141:21 sympathetic 155:14 sympathy 39:15 39:20 74:18 115:6 symptoms 20:18 syphilis 116:25 syringe 25:11,15 26:13 system 18:5 83:14 97:18,24 138:19 139:25 142:8 163:7,8 177:11 177:12	148:10 149:5,7 151:24 152:24 158:4,16 159:1 161:6 163:20 164:25 172:25 taken 12:22 66:20 67:20 85:19 94:13 99:22 110:11 111:12 137:8 takes 11:20 67:16 138:20 taking 12:19 16:10 103:17 117:10 147:23 148:19 149:3 talk 21:19,19 23:6 26:21 29:4 32:13 36:21 37:21 42:22 59:19,22 62:23 73:23 75:20,21 75:22 86:11 95:21 138:14 139:21,23 155:21 158:25 166:12 174:4 talked 8:16,16 31:5 57:2 118:5 128:16 139:15 152:16 170:24 172:9 talking 15:8 17:12 29:1 31:17 32:11 41:24 46:20 48:23 63:1 86:11 92:4 104:12 107:21 122:3,5,5,16,17 128:19 132:23 138:8 142:18 147:17 149:1,2 149:3 151:3 152:19 157:3 talks 95:9 tank 176:7 177:14 task 34:21 taxpayers 170:10 teach 15:2 teacher 168:7 teachers 61:3,3 teaches 91:23 teaching 15:6 17:16 24:12 102:14 teachings 13:12 15:1,10 team 176:23,24 177:8 tearing 147:20 tears 41:17 46:12 teased 116:6 technical 177:11 technicality 105:8 Tel 180:21 telecom 164:7 171:5,8,10 175:15 176:5 177:8	Telephone 2:9,16 television 151:10 tell 6:8 7:13 10:23 21:7 28:14 31:21 34:2 39:2 39:14 40:20 44:19 46:21 47:24 56:9 57:17 62:12 67:17 68:10,13 68:14 69:24 70:16 80:19 83:2 95:19 100:10 120:5 125:5,11 127:6 132:3,10 133:9 133:9 137:2,4 140:22 141:4 150:11 161:20 166:15 175:17 175:17 176:21 178:13,18 telling 19:4 29:7 33:7 34:19 47:5 48:1 49:19 50:24 53:22 65:6 83:9,12 87:14 111:15 126:11 133:8 tells 32:22 39:6 40:1,17 148:11 151:4,6 temptation 79:13 ten 15:21 17:10 35:7,13,14 64:11 78:10 152:11 163:8 167:9 ten-minute 66:17 137:6 tend 30:2 35:23 85:19 147:7 155:7 tended 71:23 term 21:22 30:12 31:2 71:25 115:2 termination 62:9 terms 6:12 45:3 47:19 102:5 109:12 171:17 173:24 terrible 40:11 82:17 98:19 101:22 test 58:14,18 Testament 17:11 93:17,20 testified 71:12 testify 87:16 91:3 134:4 143:17,18 143:21 151:1 156:4 testifying 85:4,5 85:18 88:6,6 90:25 151:1 testimony 151:8 Texarkana 70:21 texas 1:3,5,13,17 1:18 2:2,8,16 5:24 6:19 18:1
--	--	---	--	---	--

T

T 1:1 2:4 68:1
table 6:3,6,14
72:4 90:3 138:3
140:23,23
take 4:6,22,23
7:12 8:3,8,20
10:1 11:22 13:2
13:5,22 22:14
27:18 34:16
35:24 38:22
39:2 40:17 41:1
47:23 61:14
66:17 75:24
77:3,18 92:11
94:11 97:14
101:3 114:1
121:4 122:14,15
137:6 138:11
141:20,21 142:6
146:4 147:24

28:4 36:16	112:20 113:23	111:6 112:14,23	109:23 118:25	toward 7:15	104:10,24
38:14 51:19	116:14,14	114:7,11,14	150:4	47:20 162:6	125:17,19,25
60:8,13 78:9	118:20 119:2,3	115:1,4,6 116:1	threatening	towards 17:23	129:9 130:22
96:24 97:4,25	120:8 129:4	116:3 120:21	149:12	90:15	133:2 173:18,19
99:14 107:10,11	134:23 139:20	121:9 123:12	three 25:14,14,15	trade 67:24	174:3,4
142:8 145:9	156:8	125:16 126:9	25:21 92:22	trading 67:25	tuberculosis
164:10 180:2,5	things 6:24 7:23	133:6,12 134:1	94:1 109:20	tragic 41:13	20:16
180:18,19,21	9:13,15,21	134:6,6,17,25	142:15	117:19	tumor 151:2
thank 55:20,25	13:14 14:3,4	134:25 135:4,16	thrilled 7:8 93:5	train 26:20 27:2	turn 16:15 47:18
57:1 66:7,8,16	15:5 17:3 18:3	135:24 137:3	through 10:17	training 84:14	93:20 114:2,11
69:12,20 79:23	20:11 21:11	138:24,25 139:2	30:19 64:10	88:11	114:11 140:16
121:2,3 137:4	33:14,17,20	139:18,19	80:5 89:8 101:4	trainmen 28:12	145:16 152:1
137:17 166:5	34:5,6,15 39:14	140:12,13,16,19	101:7 104:12	trains 26:18,23	turned 118:7
177:22 179:1	46:3 51:13,14	140:20 141:2,2	113:22 142:7	26:24 27:3,5	TV 18:16 22:10
theft 36:8 75:3	55:15 56:10,12	141:6 143:4,7	146:15 161:6	trait 155:9	139:22 140:16
148:8	60:22 61:24	145:18 146:1	176:25	tran 3:5 4:20	Twelve 10:7
thefts 109:8,8	63:4 71:16 73:4	147:5,11 148:3	Throw 130:11	transactions	two 14:3 22:4
their 9:6 19:19	73:5 75:12,13	148:6,10,21	throws 98:19	132:7,8	30:23 48:11
20:8 21:25	79:14 81:25	149:20 150:14	thumb 25:22	transcription	53:12 56:16
27:23 44:2 52:8	82:1,2,2,4 85:24	151:8,23,25	thumbs 25:14,14	1:15 180:6	59:7,8,25 60:4
53:7,23,25	86:15,17 92:8	152:1,9,12,20	time 4:9 6:24,24	transforming	64:20 69:5
56:15 59:13	92:24 102:20,21	154:15,21,21	14:18,19 15:23	74:10	70:21,23 95:11
60:11 73:17,23	102:22 103:22	155:12 156:19	18:13 20:8	treat 90:6 92:11	96:3 102:19
74:19 76:7 77:7	108:11 109:18	157:8 158:21	22:11 24:2,4	92:17	105:14 113:5
78:20 89:2,8,12	112:4,9,14	160:9 162:4,13	28:1 33:16	treated 32:17	119:18 124:13
90:9,23,23	114:3 115:2	167:1 168:4	55:18 59:2 63:2	treating 92:9	137:23 138:11
91:14,22 93:8	116:24 117:22	175:20 178:1,2	66:6,6 68:18	treatment 112:15	139:19 140:2,10
95:5 98:9 102:5	119:15 141:11	thinking 9:25	72:18,18 75:13	tremendous 22:8	144:7 145:9
102:25 103:7,7	146:10 148:7	10:12,24 11:6	77:3 83:4 95:14	177:13,15	172:12
103:9,10 113:8	149:7 150:11,14	20:6 21:8 24:3	104:17 107:13	trial 1:2,8 12:20	two-step 74:25
113:11 114:6	150:20,20,21	30:21 42:9 45:5	107:15 108:22	13:10 18:14	type 6:13 46:16
115:3 117:13	151:11 159:3,22	45:23 56:11	110:12 112:22	27:23 28:4	62:23 72:20
118:10 127:11	think 4:7,8,10,18	67:4 74:12	113:7,19 114:12	29:22 31:7	84:6 118:14
127:11,13	7:17,17 8:23,25	76:21 77:8	114:16 115:4	33:17 39:6 40:5	140:11,18 141:1
131:24 134:5	9:3,8,10 10:16	85:13,14 86:23	116:5,6 120:4	40:6,9 41:11	141:2 142:1
143:11,24 145:6	11:3,14,16,16	93:23 96:17,17	120:25 123:8,23	57:20 59:14	143:8 148:10
145:13 146:3	12:25 16:5,17	114:5 140:3	127:1 134:21	61:23 63:15	150:11,21,24
148:12,12,25	18:5,6,11,12,12	141:24 159:13	137:6 138:16,16	66:10 76:6	151:8
149:11,16	18:13,18,18	173:13 178:24	138:20,25 139:6	81:24 82:11	typing 12:19
151:18 157:13	20:19,23 21:7	thinks 33:6	139:9,17,19	91:10 92:10,18	
160:5 171:12	21:10,11 23:8	third 57:21	145:5 152:21	92:19,20,21	
177:14	24:2,3,11,11	138:16	157:9 167:12	96:24,25 97:3,9	
themselves 27:16	25:13 26:7,17	thirsty 118:7	168:5 169:9,12	135:20 142:7,9	
36:20 145:7	27:6,8 31:25	thou 15:24,25	175:22 176:3,10	152:13 155:10	
149:11,16,17	32:3,5,17 34:19	17:1,3,4	176:17	156:2,9 159:13	
theoretically 55:7	34:21,23 35:23	though 12:23	times 10:16 19:18	trials 17:6 28:6	
theory 45:2,3	36:2,10 37:11	15:18 66:8 76:3	24:10 45:8 65:4	tries 116:11	
54:19	37:17,17,18,20	86:24 95:8	70:8 71:11 79:5	trouble 23:4	
therefor 149:8	44:16 45:17,17	99:13 101:9	96:9 164:7	72:24 116:17	
they'd 114:2	46:11,13 47:5,7	148:18	172:10 174:19	true 3:8 5:14	
175:21	47:10 50:5,16	thought 11:10	tired 16:20	10:15 34:7,11	
thing 12:11 14:19	50:22 52:4,6	40:4 41:14	today 151:15	57:10 66:21	
16:3,7,19 17:7	53:3,5,5,10,24	44:12,20 46:8	166:13	67:25 100:5	
19:1 20:3 22:15	55:9,12 56:20	46:22 47:2,4	told 28:17 44:25	102:1,6 169:24	
22:20 34:14	62:18 63:23,24	54:2,9 56:13,15	46:24 48:24	170:5 180:6	
35:1 41:4 43:25	64:6 65:5,18	64:6,18 72:4	50:14,16,21	truly 180:10	
44:1,9,11,13,16	66:4,7 71:23	91:5 114:8	57:4 60:7 64:2	truth 25:24 83:9	
44:20,22 46:5	73:10,14,22	126:14 131:3	84:23 125:8,10	87:15 116:23	
46:22 47:2,4,6	74:14 75:21,25	134:23 135:22	125:12,13	125:5,8,10,11	
50:22 51:7,8	76:22,24 77:9	159:9 161:24	134:18 143:20	125:12,13	
54:9,11 57:4	77:19,23 78:25	168:8 173:23,24	144:1 152:8	truthful 69:6	
60:9 62:23 63:8	80:12 82:15,16	174:6 176:20	154:15,16 178:2	87:18,20 88:1	
69:21 74:7,9	82:20 83:1	thoughts 56:9	Tomorrow 98:20	137:12,14	
75:14 76:23	84:24 85:9,11	139:1,8 140:10	tonight 16:6 20:6	truthfully 119:2	
77:25 78:1,17	85:18 88:1	140:12 141:2	146:15	try 23:25 25:5	
80:7,13 81:9,14	89:20 90:5,10	threat 31:17 36:3	tooth 90:8	34:6 52:13,23	
83:22 85:12	90:22 92:16	37:24 38:2,5	top 44:4	67:7 73:23	
87:6 89:7 101:3	93:4 94:10	52:17 65:22	total 180:11	107:22 156:5	
101:4,22 102:7	95:19 99:24	96:8 98:7	touch 8:24 116:20	trying 7:24 8:20	
105:3 106:17	102:2,21 103:13	103:14,18,19	touched 116:20	13:9 34:5 61:14	
110:13,20,24,25	103:22 104:15	104:3 106:21	touchy 174:18	100:22,23	

U

uh-huh 10:10,22
11:2 12:16
15:12 18:25
19:16,24 22:19
23:21 38:21
39:1 77:11
85:22 106:25
107:5 127:5
172:20,22 174:5
175:14 176:6
ultimate 58:18
93:14 141:10
ultimately 36:21
55:17 57:17,21
159:19
unable 30:14
undefined 146:20
149:24
under 5:13,15
11:6 22:6,24
34:13 69:5,9
72:4 78:9 133:7
137:12 161:18
undermine 89:9
underpass 22:7
understand 9:11
10:18 13:3
25:13 40:21
42:2,7,12,15
49:3 54:16

64:11 66:23	utter 22:11	100:11,13	122:11 123:15	59:15,18 66:3	122:3 124:20,21
72:10 76:9,12		102:18 103:7,18	164:19	68:15 111:23	125:16 127:4
83:17,25 86:18	V	106:23 108:24	wanting 29:20	131:13 154:5	135:10 137:2
87:19,20 90:16	V 1:4 3:3	109:6,10,10	30:16 123:20	177:21	145:11 146:5
90:25 92:23	vacation 175:21	110:5,6,12	wanton 105:9	we're 4:7 9:15,16	147:1,4,21,24
94:23 95:18	175:25	146:10,13	wants 58:2 79:15	9:17,17 10:19	148:11 149:5
104:13,15 105:2	vague 104:6	147:11,12,13,15	99:21 132:16	12:21 13:23	150:7,10 151:3
105:17,18 118:8	vagueness 104:5	147:22,23 148:3	133:3 140:22	15:15 16:11,18	151:24 152:19
126:20 128:14	varied 75:19	148:4,6,15,20	war 15:22 83:12	23:13,16,22	154:8 155:3,5
130:16,25	varieties 8:11	148:24 149:6,9	warden 25:19	32:15 34:17	159:17,21
131:18 138:20	77:5	149:17,17	warrant 117:9	41:24 51:13,15	161:21 164:17
139:20 142:19	variety 80:10	150:13,16	118:1 153:21	51:16 54:10	166:13 167:25
143:13 145:19	93:2 100:12	160:15	155:18 160:23	61:10 63:1	168:2 169:21
145:22 148:21	venireperson 5:9	violent 148:1,8	warranted 45:9	69:25 76:6	170:4 171:11,17
150:8 153:23	5:11,16 56:24	149:7 150:17	77:7	91:12 92:18,20	172:9 175:18
155:19 162:15	66:16 69:1,7,10	virtually 12:19,22	warrants 69:25	93:17 95:21	176:12,13,23
162:25 163:3	69:12 131:20	visit 103:14	was 15:20	97:16 102:3	177:14
165:23 170:2,6	137:10 164:14	voir 1:8,11 59:18	wartime 15:24	107:4 112:17	went 23:15 32:12
170:11 173:9	164:18 165:16	138:21	wasn't 9:22 17:25	118:16,17	44:8 65:17 71:3
174:1,15	165:20,23	volume 1:1,8 3:17	34:20 45:18	134:13 138:25	71:6,11 74:6
understanding	168:12 176:9	179:4 180:7,12	51:24 118:9	146:7 152:20,21	75:12 122:4,16
84:6 109:4	177:22,23	volumes 39:6	127:3 128:2	154:15,16	123:12 124:13
126:21 127:22	VENIREPERSO...	voluntary 8:18	145:12 163:21	158:25 170:4,6	135:13 167:17
129:10 138:17	3:2	volunteer 9:22	164:24 167:19	174:15 178:21	169:8,12,15
142:1 145:18	verdict 30:17	vote 43:12 46:18	168:18	we've 4:17,18 7:2	were 1:12 7:10
understood 8:22	38:9 55:8 80:20	46:23 47:3,4	wasted 24:4	8:12 23:17	10:20,20 11:16
64:7 125:16	81:5,6,20 88:23	49:17 52:1,3	wasting 66:5	36:18 44:4	12:24 14:24
128:20 136:4	88:23 96:3 98:1	54:10 57:6,18	watch 18:16	48:21 68:1	15:20,21 17:11
undisputed	106:4 130:5	57:22,25 78:5	watched 151:10	69:25 82:5,9	18:11 26:10,23
133:14	140:7 141:22	89:2,15 104:9	watching 8:6	87:15 107:6	27:22 29:7 36:7
unfair 18:21 37:9	173:15	106:12,13,16	water 23:19	110:11 137:5	36:8 39:12 44:7
37:12 71:23,25	Verizon 171:14	120:17 174:11	way 8:4,14 9:2,24	168:25 172:3,3	44:8 45:19,21
72:2 90:5 92:17	versus 103:15	voted 28:11 54:22	10:25 20:20,24	174:18,18 177:3	46:4 47:9 51:18
112:15 119:23	157:6 158:19	vows 85:19	23:5 24:13 25:1	177:3,25	51:20,23,24
unfamiliar 165:7	very 6:17 8:16		25:6 27:18,22	weak 89:11 116:8	52:14 57:19
Unfortunately	13:1,25 21:10	W	28:11,20 30:3	weakness 23:9	58:19 59:8 64:3
58:12 169:25	21:11,12 23:1,8	wait 123:6	30:17,21 32:6	wealth 112:9	64:4 65:16
unit 115:3	25:18 28:8 33:1	waiting 69:25	32:18,25 35:18	week 105:10	69:22 70:10,14
United 168:16	43:8 56:18 57:5	wake 7:14 9:25	38:14 41:7,8	weekend 179:3	71:8,22 72:4
units 23:17,18,18	57:6,24 72:4	157:17	42:2,11,19,20	weeks 5:25 8:2	74:2,2,5,5 75:7
unless 44:21 81:3	79:17 81:22	walk 44:5 72:5	42:24 43:1	31:5 32:12	75:8,10,22 84:4
130:10 132:13	87:8 97:1	106:2,3,8 158:3	44:15,21 45:5	56:17 69:5	84:10 85:6
132:19 168:16	103:20 110:13	walked 122:10	48:2,16,24 49:5	129:23 137:24	86:10,16 88:6
Unlike 97:24	113:24,24	walking 88:9	49:17 50:12,19	138:9,11 139:4	99:20 102:4,4
176:2	117:18 121:2,14	113:22 119:1	52:1,2,5,24 53:2	139:19 140:2,10	102:21 110:13
unstable 94:18	125:5 133:11,20	144:17	53:5,7 54:10	144:7	110:18 112:13
until 16:19 38:14	134:14 135:10	walks 30:10	57:18,23,25	weigh 41:10	112:23 113:6
68:19 81:3	139:11 151:16	want 4:9,13,16	64:1,18 66:9	77:15 153:12,20	119:11 121:15
104:16 105:11	151:16,17 165:7	5:12,15 8:5 9:10	76:14 77:2 81:1	weighed 111:25	121:19 123:1,3
107:11,13	177:18	10:2,3 19:9 20:1	82:11 83:6 85:2	weighing 155:17	123:8,24 124:24
untruthful 64:22	victim 156:23,24	21:22 28:18	85:15 86:2,3,17	weights 58:12	128:19 134:14
88:14,14	157:9	29:4 32:15,23	90:20 95:6,8	weight 153:14,15	134:16 136:11
untruthfully 65:2	victim's 156:24	33:3 34:12,16	104:14,15	153:17,18,19,23	139:5,7,14,15
unusual 13:25	157:7	42:9 49:21	106:13,16 108:5	155:1	139:19 142:7
23:1 77:10,24	view 4:22 7:18	50:15 52:20	108:17 112:14	well 12:25 16:1	144:1 147:18
94:24 104:25	28:18,20 35:2	55:2 57:8,14	112:17 114:20	17:9 19:3 20:3	148:5 151:13
upper 99:5	37:7,7,8 67:23	67:11,13 69:4,8	117:5 134:14	20:19,23 21:19	154:18,19 155:4
upset 116:20	71:24 83:10	89:19 92:12	136:20 142:2	23:19 24:6,23	155:10,24
156:16	86:5 94:9 97:13	98:22,23,23,24	144:22 147:25	25:6,20 27:11	157:12 165:6
usage 153:5	100:7 110:5,6	99:13 100:8	148:17 154:12	32:4,5 33:5 35:3	166:24 167:11
use 18:10 19:17	111:12 149:16	118:15 128:25	155:3,14 158:2	44:12 47:3 54:8	172:10 175:13
21:22 44:3	151:21 173:12	129:22 130:10	164:21 171:20	54:20,23 64:24	175:19 176:20
71:25 105:6	173:12	133:9 137:5,14	173:22	67:15 68:10	180:8
115:1 135:5,7,9	viewed 14:23	138:14 142:6	ways 14:24 35:14	76:20 77:9 79:1	weren't 26:24
136:21 140:18	viewing 155:8	143:18,19 145:3	39:21 40:1	82:15 85:3,7	27:7 28:7 31:17
149:16 154:6	views 14:14 29:23	145:4,4 148:16	61:21 83:7	86:11 93:16	55:11 84:8
used 35:2 56:18	65:7,7 99:23	152:24 153:14	84:16 85:6 93:9	98:5 102:10	106:9 116:24
64:20 65:5 87:1	135:8	153:15,17,19	97:17 108:8	104:8 113:24	what-do-you-think
96:10 167:17	violate 64:22 65:2	157:22,22 158:5	109:19 114:6	114:19 115:5	18:9
usual 73:3	violence 31:16	168:1 173:15,20	we'll 21:19,19	117:15,20 118:8	whatsoever 62:12
Utopia 7:20	61:12 100:6,7,9	wanted 64:3	23:11 37:19	119:16,24 120:4	while 4:16 9:6

19:17 20:4,22	94:19 95:8	Y			
22:23 56:8 70:5	109:9 113:9	y'all 128:16			
72:11 77:19	121:10 125:1	yeah 18:12,18			
83:17 101:18,24	157:23 158:13	20:23 24:8,17			
105:16 116:12	170:14 171:7	43:23,25 44:12			
130:14 138:8	176:16,18,18,22	47:3 57:15			
158:25	worked 70:17	76:22 78:17			
White 164:12,16	124:10 133:13	79:1 87:6 108:8			
whole 14:10	134:20 163:12	115:9 121:17			
19:10 26:16	worker 73:16	122:2,8 123:10			
32:16 39:9	74:9,10,16 79:6	126:25 130:12			
41:13,15 143:23	86:24	134:18,19			
wicked 119:3	workers 108:14	157:14 166:17			
wide 103:20	working 16:23,24	167:13,15			
123:13 124:5,7	27:1 69:22	169:23 172:24			
124:9,10	105:14 123:3	175:8			
wife 110:5,6	158:2,3,14	year 56:16 168:9			
124:10 147:14	177:11	169:3 177:15			
willing 24:12,13	works 22:25 32:2	year's 161:15			
24:16,18,18	32:16 41:7 42:2	175:21			
88:13 107:24	42:7,16,19 43:2	years 30:12 35:7			
109:13,25	44:4	35:9,12,13,14			
willingness 19:11	world 9:24 61:7	60:8,10,12,17			
43:22 98:8	74:12 96:23	64:11,12 70:18			
window 99:5	140:17,25 145:5	76:15,16,21,23			
windshields	150:5,7 170:16	77:7 78:3,10,20			
147:19	175:6	100:14 107:12			
wink 43:24	world's 48:12,12	110:9,23 116:25			
wired 98:23	100:20 101:10	124:13,20,24			
wish 7:24 92:4	Worldcom	135:21 161:18			
104:14 130:3	176:23 177:1,4	167:7,9 171:22			
169:24	177:9,9,13,15	172:12 175:15			
wishing 7:20	worry 13:7 23:3	176:19 177:4			
withdraw 116:21	30:7,10,18	yesterday 176:13			
witness 62:1,22	92:10	you-all 68:18			
66:21 85:11,25	worse 16:13 46:3	137:5 179:3			
88:17 92:9,17	98:21	young 160:3			
104:8 121:4	worst 41:22	younger 10:14,20			
131:23 133:23	worth 46:9 87:21	11:1,16			
134:3,3,4,20	161:15	youngest 60:15			
135:10,10 136:7	worthy 78:11	youth 160:3,6			
137:5 180:15	wouldn't 26:9				
witnesses 59:14	27:4 36:1 48:13				
82:24 89:9	48:15 55:1,8				
158:5	57:7 85:20 86:9				
woke 7:5	87:21 102:16,17				
women 26:23	104:24 108:11				
46:5 116:18	108:17 118:23				
wonder 9:18,21	130:17 140:13				
wondered 70:20	169:18 170:18				
164:7	wounds 24:22				
wonderful 93:5	wrap 54:6				
word 12:20,22	wringing 18:13				
41:20 103:17	write 86:16				
118:13 146:19	172:11				
146:19 147:1,5	writing 180:7				
149:23,25 150:1	wrong 14:22				
153:6	20:12 31:2 37:4				
worded 42:25	50:3,12 59:21				
wording 111:24	85:15,15 89:24				
words 32:24 65:5	104:11 105:13				
85:11 132:21	112:22 119:2,3				
144:12	132:1 154:18				
wore 48:13	wrongfully				
work 6:13 7:9	162:23				
12:14 13:23	wrote 125:2				
18:19 22:25					
33:1,17 52:20	X				
72:12,12,13,16	x-rays 87:20				
73:1,8 77:20					
83:16 86:12					