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R E P O R T E R ' S R E C O R D

VOLUME 26 OF 53 VOLUMES

TRIAL COURT CAUSE NO. 380-80047-01

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

---

JURY VOIR DIRE

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COPY

On the 21st day of September, 2001, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Charles F. Sandoval, Judge Presiding, held in McKinney, Collin County, Texas;

Proceedings reported by Computerized Machine Shorthand.

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 [Signature]

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 6 VS. ) COLLIN COUNTY, TEXAS  
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 8 IVAN ABNER CANTU ) 380TH JUDICIAL DISTRICT

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1 VOLUME 26

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3 SEPTEMBER 21, 2001  
4 INDIVIDUAL VOIR DIRE

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1 PROCEEDINGS: 4

2 (Open court, defendant present.)

3 THE COURT: Cause No. 380-80047. State of  
 4 Texas versus Ivan Abner Cantu.

5 MR. SCHULTZ: Ready.

6 THE COURT: State's ready. Defense is  
 7 ready.

8 MR. GOELLER: Defense is ready.

9 THE COURT: All right. The defendant is  
 10 here with both of his attorneys. So the first witness  
 11 -- or excuse me, if you call them witnesses. The first  
 12 juror, I believe, is Martin Stratton.

13 (Venireperson Stratton present.)

14 THE COURT: Are you Martin Stratton?

15 VENIREPERSON: Yes, sir.

16 THE COURT: Perhaps you remember about a  
 17 month ago when all 200 of the jurors were assembled. I  
 18 administered an oath, and the oath was to tell the truth  
 19 with regard to any questions that are asked by the Court  
 20 and by the attorneys on both sides. Do you recall that?

21 VENIREPERSON: Yes.

22 THE COURT: All right, sir. I just want  
 23 to advise you you are still under oath. Please have a  
 24 seat right here.

25 VENIREPERSON: Thank you

08:54 1 THE COURT: Mr. Schultz.  
08:55 2 MR. SCHULTZ: Thank you, Judge.

08:55 3 VOIR DIRE EXAMINATION

08:55 4 BY MR. SCHULTZ:

08:55 5 Q. Good morning to you, Mr. Stratton.

08:55 6 A. Good morning.

08:55 7 Q. My name is Bill Schultz, and I'm one of the  
08:55 8 assistant district attorneys representing the State of  
08:55 9 Texas in its capital prosecution of Ivan Cantu. Next to  
08:55 10 me is Ms. Gail Falco. She's a chief felony prosecutor  
08:55 11 assigned to this trial from another district court. And  
08:55 12 at the far end of the table is Ms. Jami Lowry, who is an  
08:55 13 assistant district attorney, felony prosecutor.

08:55 14 At the defense table, you may remember is,  
08:55 15 first of all, the accused, Ivan Cantu. Further to your  
08:55 16 right is Mr. Don High, and then Mr. Matt Goeller. Both  
08:55 17 Mr. High and Mr. Goeller are fine attorneys engaged in  
08:55 18 private practice in Plano, Texas.

08:55 19 My recollection, Mr. Stratton, is that you  
08:55 20 don't personally know any of us. And if you've even had  
08:55 21 any contact with any of us, it would be so casual that  
08:55 22 probably neither of us would remember; is that correct?

08:55 23 A. That's correct.

08:55 24 Q. Can you think of any place on this earth you'd  
08:55 25 rather be than up here this morning?

6

08:55 1 A. A few. Hawaii comes to mind.

08:56 2 Q. Even downtown Dallas maybe?

08:56 3 A. Sure.

08:56 4 Q. I'm sure that's true for any of us. This is  
08:56 5 going to be light in some respects. It will be casual.  
08:56 6 It will be long, and maybe it's sometimes even seeming a  
08:56 7 little bit too tedious. I hope a couple things out of  
08:56 8 it. I hope, number one, most importantly both sides get  
08:56 9 a reasonable understanding of how you think and how you  
08:56 10 approach analytical situations to enable both sides to  
08:56 11 answer the questions that we have.

08:56 12 Is this person someone who can look at the  
08:56 13 evidence as we think it's going to be and look at it in  
08:56 14 a way that's fair to our side? And it's just about that  
08:56 15 simple. I mean, there are no right or wrong answers to  
08:56 16 it. Nobody expects a juror to be right down the middle  
08:56 17 on a lot of issues.

08:56 18 We have people already seated on this jury  
08:57 19 that are probably less enthusiastic about the death  
08:57 20 penalty than the middle. We've got some people who are  
08:57 21 probably more enthusiastic about the death penalty than  
08:57 22 the middle. And they all have one thing in common, and  
08:57 23 that is that they've assured both sides that they could  
08:57 24 answer all questions presented to them, either way,  
08:57 25 depending upon what the evidence showed them that the

08:57 1 answers should be.

08:57 2 And then both sides have to make these  
08:57 3 critical decisions of how much is this person's position  
08:57 4 on some of these issues going to statistically affect  
08:57 5 how they are going to answer these kinds of things. Do  
08:57 6 you follow what I'm saying?

08:57 7 A. Yes.

08:57 8 Q. You know, a year ago, if the United States had  
08:57 9 invaded Afghanistan, let's say, public opinion would  
08:57 10 have been much lower than it would be right now, agreed?

08:58 11 A. Yes.

08:58 12 Q. We're the same people. I mean, our parents are  
08:58 13 the same. Our 16th birthday was exactly the same,  
08:58 14 whether we're talking about today or whether we are  
08:58 15 talking about a year ago; but people's attitudes do  
08:58 16 affect how they see us, how they see reality. And so  
08:58 17 there's no magic to it and no curve balls. And the only  
08:58 18 wrong answer you could ever give us is an untruthful  
08:58 19 answer because we need you to just be honest about it.

08:58 20 I suspect that when you first heard that  
08:58 21 you were being considered as a possible juror in a death  
08:58 22 penalty case, I suspect that it wasn't a thrill that lit  
08:58 23 up inside of you when you heard that. Is that a fair  
08:58 24 statement?

08:58 25 A. Absolutely.

8

08:58 1 Q. A lot of things might have come to mind. I

08:58 2 mean, I think everybody, in general, understands that  
08:58 3 they take longer. A death penalty case takes longer  
08:58 4 than a two-day, car-theft case, for example. But I  
08:59 5 imagine, as you thought about it some more and actually  
08:59 6 kind of waited until the time you came up here today, I  
08:59 7 imagine you've done some thinking. Maybe not in-depth.  
08:59 8 Maybe not meditated on it for hours, but you've done  
08:59 9 some thinking off and on about your views on the death  
08:59 10 penalty, haven't you?

08:59 11 A. Sure.

08:59 12 Q. Tell me a little bit about that. And just tell  
08:59 13 me what kinds of things you have been thinking and how  
08:59 14 you have been just kind of passing over it and looking  
08:59 15 at it from time to time.

08:59 16 A. I would say overall my views haven't changed  
08:59 17 drastically. I have been a death penalty proponent.  
08:59 18 And -- and, you know, being part of this hasn't --  
08:59 19 hasn't -- hasn't really changed that view. I would say,  
08:59 20 you know, earlier, earlier in my life before, before  
08:59 21 world experience and, you know, knowing, knowing a lot  
08:59 22 of different types of people and that kind of thing, I  
08:59 23 swayed a little bit more just probably because I was  
09:00 24 younger as well. But really, you know, over the last  
09:00 25 four or five weeks, it hasn't changed much. I mean

09:00 1 I'm -- I'm for the death penalty. I think it's -- it's  
09:00 2 a right way to handle certain situations, and that --  
09:00 3 that really hasn't changed.

09:00 4 Q. Good. When I ask that question of a lot of  
09:00 5 jurors, some things emerge. There are some people who  
09:00 6 say it makes no difference. I thought about it before.  
09:00 7 And whether I'm directly doing it or just being in favor  
09:00 8 of it is to me no difference.

09:00 9 Other jurors say, you know, it's easy,  
09:00 10 when you are not directly affected, to have positions on  
09:00 11 all sorts of things. It's very easy for us to say, for  
09:00 12 example, we need to -- we need to dispatch a couple of  
09:00 13 carriers to the Mediterranean and just -- and just  
09:00 14 unload unbelievable ordnance on countries that have  
09:01 15 sponsored what's happened to us. And that's real easy  
09:01 16 to do in our living rooms, perhaps.

09:01 17 But it might be a little bit different if  
09:01 18 we had a brother or a son that's, you know, some Navy  
09:01 19 pilot reservist getting ready to get called up. And we  
09:01 20 realize that our academic pursuit of what we believe in  
09:01 21 could really be tested by affecting us personally. That  
09:01 22 doesn't mean that we'd change. That doesn't mean that  
09:01 23 -- because I don't know. I've never had a relative in  
09:01 24 the military. That doesn't mean that it would change  
09:01 25 our view of what it is. And jurors say the same thing

09:01 1 about the death penalties.

09:01 2 It is fine for me to sit in the living  
09:01 3 room and look at those escaped prisoners that killed the  
09:01 4 police officer and went on that rampage and got captured  
09:01 5 in Colorado. You know the ones I'm talking about?

09:01 6 A. Yes, absolutely.

09:01 7 Q. They are being tried right now in Dallas,  
09:01 8 probably one at a time. It is easy to be for the death  
09:02 9 penalty and say, we need to do more about that. Why  
09:02 10 don't they start executing these people? And yet,  
09:02 11 somehow, for many of us, when we get into it, it feels  
09:02 12 different when they suddenly becomes us. Does that make  
09:02 13 any sense to you at all?

09:02 14 A. Yeah, sure. Actually, interesting analogy.  
09:02 15 The family in the military, I mean, as we do -- as  
09:02 16 things do change with our military become heightened --  
09:02 17 I have a brother who is an Air Force pilot. So, very  
09:02 18 real and, you know, I think much like this situation.  
09:02 19 You do think about it a lot more.

09:02 20 Since being called for this -- for this  
09:02 21 service, you know, I've certainly thought about the  
09:02 22 death penalty a lot more. Just like over the last week,  
09:02 23 I've thought about my brother, you know, being in a war  
09:02 24 a lot more. You know, before it's like, oh, cool. He's  
09:02 25 in the Air Force. He's a fighter pilot, that kind of

09:02 1 thing, but it becomes much more real.

09:02 2 And in both those cases I don't think --  
09:03 3 again, you think about it a lot more, but I don't  
09:03 4 necessarily think my position or view has changed on --  
09:03 5 on either of those types of things. I think it -- you  
09:03 6 become -- I think you probably either do become more  
09:03 7 relaxed about it and kind of standoffish about it, or  
09:03 8 you actually become more determined in your -- in your  
09:03 9 thoughts about it. And I actually, with both -- with  
09:03 10 both instances, I would say I've become -- become even a  
09:03 11 little bit more supportive of that type of thing.

09:03 12 Q. Okay. And we certainly hear that. It's funny,  
09:03 13 not everybody takes it the same way. We have other  
09:03 14 people who come up and say, you know, when I finally  
09:03 15 start thinking about it, the concept of life becomes  
09:03 16 more important to me, and I'm still for it, but I'm  
09:03 17 maybe not quite as much for it as I used to be. We are  
09:03 18 all different, and we all react. We're all the same in  
09:03 19 a lot of ways, and we are all different in a lot of  
09:04 20 ways.

09:04 21 Another thing that's frequently said by  
09:04 22 jurors is that, although they could do it, they wished  
09:04 23 we lived in a world where we never had to have a death  
09:04 24 penalty. It's like most of us wished we lived in a  
09:04 25 world where your brother wouldn't have a job like he

09:04 1 does, but we do. And they just -- it's certainly not a  
09:04 2 thrilling thing for them, for most people to do that.

09:04 3 Not only your brother, I've always  
09:04 4 wondered about that. I've got to believe it's got to be  
09:04 5 an absolute thrill to be able to fly something as  
09:04 6 powerful as one of those fighter jets. I can't even  
09:04 7 imagine. I bet he's talked to about that, what it's  
09:04 8 like. I've talked with pilots, just kind of about the  
09:04 9 whole flying experience. And they say you get physical  
09:04 10 rushes from some of those turns that are indescribable  
09:04 11 in any other human context really.

09:04 12 And so I'm sure on one hand that  
09:05 13 experience and that chance to be put into practice what  
09:05 14 he's been training for and believes in may be important.  
09:05 15 I'll bet deep down inside of him, he probably, if he  
09:05 16 looked at it in a certain way, would not just be  
09:05 17 delighted at letting those missiles go flying because no  
09:05 18 matter how careful he is or how -- how following of  
09:05 19 instructions he might be, somebody's dad is going to get  
09:05 20 killed if he let's one of those go. Do you know what  
09:05 21 I'm saying?

09:05 22 A. Yeah.

09:05 23 Q. He believes in what he does. He can enjoy it.  
09:05 24 He can enjoy the camaraderie, and he can enjoy the  
09:05 25 service. But at the same time, the ultimate result is

09:05 1 not something that would be delightful to many human  
09:05 2 beings.

09:05 3 A. Absolutely.

09:05 4 Q. Same thing here. You know, I didn't wake up  
09:05 5 this morning and say, what a great opportunity I have to  
09:05 6 be one of those -- to be in a situation most people  
09:05 7 never have, and that is to be able to provide some  
09:05 8 leadership to get somebody killed down at the  
09:05 9 penitentiary at some point. I mean, I don't get -- it's  
09:06 10 a necessary thing. It's a lawful thing, and I don't  
09:06 11 apologize for what I'm doing. But at the same time it's  
09:06 12 serious stuff, and I can tell you feel the same way.

09:06 13 A. Sure.

09:06 14 Q. Tell me why it is that you favor the death  
09:06 15 penalty and believe, as an option of punishment, it  
09:06 16 should exist.

09:06 17 A. Couple -- couple reasons.

09:06 18 Q. Okay.

09:06 19 A. Although you -- you know, the eye-for-eye,  
09:06 20 tooth-for-tooth type argument is often made, I don't  
09:06 21 know if I -- I don't believe that to, you know, to quite  
09:06 22 the degree that some might. But I think for -- for  
09:06 23 certain crimes, it's -- it's a just penalty. I think  
09:06 24 there are -- there are situations where and crimes where  
09:06 25 a person who commits those crimes should lose their

09:07 1 right to life based on what they've done.

09:07 2 I think it's -- it's -- it's probably,  
09:07 3 although from a statistic standpoint, I don't have any  
09:07 4 data. But I would say it's probably to some degree a  
09:07 5 deterrent, and I would hope it is a deterrent to others.  
09:07 6 Those would probably be the two biggest reasons.

09:07 7 Q. It's interesting because probably people have  
09:07 8 identified in this business, for a legitimate answer of  
09:07 9 punishment, only three of which are served by a death  
09:07 10 sentence. Those four aims are: retribution, eye for an  
09:07 11 eye as a concept, the notion that it is important for  
09:07 12 society to speak in actions to kind of model behavior.

09:07 13 The idea is that if you make a little  
09:07 14 infraction against society's rules -- if you park too  
09:08 15 long, you speed, you run a stop sign, you get a little  
09:08 16 punishment. Yeah, we can probably use that 75 bucks for  
09:08 17 something different. But we pay the fine, and it  
09:08 18 irritates us, and we go on about our business.

09:08 19 If you steal something, you do a bigger  
09:08 20 punishment. If you do a felony, you might end up in the  
09:08 21 penitentiary for a while for it. You do -- you do a  
09:08 22 murder, a quote regular murder, not a capital murder,  
09:08 23 you might get -- you might get as much as life in prison  
09:08 24 for it. Kind of a progressive set of sanctions. The  
09:08 25 bigger your sin, the bigger the hammer that's going to

09:08 1 hit you as a result. Until finally, society takes a  
09:08 2 position you've gone too far and because of what you've  
09:08 3 done, you are going to get the same. You'll be killed  
09:08 4 because -- because you have killed in a particularly  
09:08 5 awful way. Not necessarily the facts of the killing  
09:08 6 itself or themselves, but rather the inner play of the  
09:09 7 killing when some other crime or some special --  
09:09 8 special -- special circumstance that society says is  
09:09 9 across the line, and that's a death penalty thing.

09:09 10 The concept of eye for an eye doesn't have  
09:09 11 any direct connection with the special issues that we  
09:09 12 have. It probably is indirectly connected to the second  
09:09 13 special issue. I'm going to talk with you about it in a  
09:09 14 minute. Probably eye for an eye fits very nicely into  
09:09 15 the mitigation question because that asks you in a sense  
09:09 16 to compare the enormity of the crime and the defendant's  
09:09 17 character and his background with any other sympathetic  
09:09 18 type factors that come along.

09:09 19 And that comparison invites the concept of  
09:09 20 saying, well, he did this awful thing, and he should be  
09:09 21 punished the same way for what he did. And I can say  
09:10 22 that because anything that's being shown to me that's  
09:10 23 mitigating or sympathetic or explanatory isn't near  
09:10 24 enough to overcome the fact he needs to be hammered. He  
09:10 25 is the nail, and society is the hammer kind of idea.

09:10 1 But the thing -- the other thing that  
09:10 2 never finds its way into a death penalty directly but  
09:10 3 perhaps does play into that question, the idea of  
09:10 4 rehabilitation. Because that's another identified  
09:10 5 legitimate aim of punishment in the criminal justice  
09:10 6 system. And that is the idea that if we use punishment  
09:10 7 wisely, some people can be redeemed. Some people can be  
09:10 8 rehabilitated. And if not, made constructive. At least  
09:10 9 maybe made harmless. I think it's asking a lot to ever  
09:10 10 think you could ever rehabilitate a murderer into being  
09:10 11 something inspirational and wonderful, but maybe it can  
09:11 12 happen.

09:11 13 And at the very least, the notion is that  
09:11 14 some murderers you can make innocuous at some point, and  
09:11 15 that's about all our society wants from people anyway.  
09:11 16 Nowadays, if you don't do any harm, we're happy with  
09:11 17 you. We'll feed you and give you medical care and take  
09:11 18 care of your kids and give you handouts and all. Just  
09:11 19 don't do anything, and that's pretty good for our  
09:11 20 society now.

09:11 21 A third thing about punishment that's been  
09:11 22 identified, and actually these two go together. One is  
09:11 23 this notion of protecting society from dangerous people  
09:11 24 because, quite obviously, a legitimate purpose in having  
09:11 25 prisons is to separate us from people who will do us

09:11 1 harm. We either got to put them there or we got to  
09:11 2 build prisons around ourselves. Somebody has to have  
09:11 3 bars between us and criminals.  
09:11 4 And our thinking is: We didn't do  
09:11 5 anything wrong. We ought to be able to walk around and  
09:11 6 get ice cream, and they did do something wrong. So they  
09:11 7 need to be kept away from us while we're doing that.  
09:12 8 But your idea of deterrence, also if you get right down  
09:12 9 to it, has a direct relationship to protecting society.  
09:12 10 I mean, the reason we're trying to deter other capital  
09:12 11 murderers with the death penalty is to protect other  
09:12 12 capital murder victims. And do you happen to agree with  
09:12 13 me on that?

09:12 14 A. Uh-huh.

09:12 15 Q. So I could never get up to you and argue --  
09:12 16 argue that we need a death penalty in a particular case  
09:12 17 in order to rehabilitate the defendant. I guess you'd  
09:12 18 have to get real metaphysical about that. Maybe like  
09:12 19 with reincarnation or -- or that would be silly.

09:12 20 But I certainly could argue to you from  
09:12 21 the evidence in connection with these questions a death  
09:12 22 penalty in a particular case because -- because he's got  
09:12 23 it coming. Basically -- basically among other things,  
09:12 24 let's kill him because -- because he's got it coming.  
09:12 25 Does that make sense to you as an argument?

09:12 1 A. Yeah, absolutely.

09:12 2 Q. All right. And I could certainly argue to you:  
09:13 3 Let's kill him because he's dangerous to our society  
09:13 4 and -- and there's no reason we need -- we, not just you  
09:13 5 or me, or any other member of our society in any of its  
09:13 6 locations. There's no reason we need to even have to  
09:13 7 worry about what happens when this character trait kicks  
09:13 8 in again. What happens the next time a defendant wants  
09:13 9 something and thinks that taking a human life is a fair  
09:13 10 measure or fair price to pay for what he wants?

09:13 11 Or beating somebody up. What happens the  
09:13 12 next time a defendant gets mad and decides to be violent  
09:13 13 because that makes sense to him? His anger justifies  
09:13 14 his violence in his value system. So I could talk about  
09:13 15 protection of society.

09:13 16 I could also argue, let's use the death  
09:13 17 penalty as a deterrent. Let's send a message that, if  
09:13 18 you do these kinds of things, it could happen to you,  
09:13 19 too. And let's do it in -- and how effective that is, I  
09:14 20 don't know. I'll be honest with you, I always wonder,  
09:14 21 first of all, how many of these crimes are thinking  
09:14 22 crimes anyway.

09:14 23 You and I would look at that, and we would  
09:14 24 say, boy, we better think about that. But that  
09:14 25 reasoning process that we have keeps us from doing those

09:14 1 kinds of things anyway.

09:14 2 A. Uh-huh.

09:14 3 Q. If we didn't have a death penalty, you and I  
09:14 4 wouldn't still go out killing just because of how we  
09:14 5 are.

09:14 6 A. Sure.

09:14 7 Q. At the same time, when we get to these death  
09:14 8 penalty issues, the jury is not just turned loose and  
09:14 9 asked: What do you want to do? It's a very regulated  
09:14 10 type of analysis that the jury has to do. It has to be  
09:14 11 orderly, and it has to -- it presupposes a willingness,  
09:14 12 number one, and an ability, number two, for juries to  
09:14 13 follow the law and to consider -- answer the questions  
09:14 14 either way depending on what evidence is presented. And  
09:14 15 are you the kind of person that could do that?

09:14 16 A. Uh-huh.

09:14 17 Q. All right. About the only time I'm going to  
09:14 18 talk about guilt-innocence is real quickly. And it's  
09:14 19 not that I trivialize the fact that he's presumed  
09:15 20 innocent. That we have to prove his guilt beyond a  
09:15 21 reasonable doubt and that the defendant doesn't have to  
09:15 22 do a single thing in that trial other than be here and  
09:15 23 be orderly in the courtroom.

09:15 24 But I believe, knowing my evidence as I  
09:15 25 do, it is my belief that I will produce sufficient

09:15 1 evidence for you that will demonstrate beyond a  
09:15 2 reasonable doubt the defendant is guilty of actually all  
09:15 3 varieties of capital murder alleged in our indictment,  
09:15 4 but certainly one or more which would justify --  
09:15 5 which would justify a guilty verdict.

09:15 6 And I propose to do that, number one, by  
09:15 7 not ever making reference to the failure of the  
09:15 8 defendant to testify, if he chooses not to. Because I  
09:15 9 know that's not evidence, and the Judge will tell you  
09:15 10 that's not evidence. Even more than not evidence,  
09:15 11 that's actually an exercise of an important  
09:15 12 Constitutional right that you and I and everyone else  
09:15 13 has if we find ourselves accused of a crime.

09:15 14 And I'll further do it by not somehow  
09:15 15 hurling implications against the defense table by  
09:16 16 saying: Why didn't you produce any evidence? Because  
09:16 17 they don't have to. This is -- this is our -- we have  
09:16 18 convened this trial. They didn't. You might say, well,  
09:16 19 the actions of an accused may be in a trial, but  
09:16 20 actually not.

09:16 21 The formal proceedings, if at all, are  
09:16 22 done by the State of Texas. We have done the  
09:16 23 investigating. We have done the presentation to the  
09:16 24 Grand Jury. We sought the indictment. We've set this  
09:16 25 case for trial. We've indicated we're seeking a death

09:16 1 sentence, and that's why -- that's why we're all here.  
 09:16 2 And the defendant has no obligations to do anything  
 09:16 3 including put on evidence.

09:16 4 Now, I know -- I know -- I know that these  
 09:16 5 are good lawyers, and I know that they will. I know  
 09:16 6 that they will cross-examine our witnesses in a vigorous  
 09:16 7 way; which witnesses they think is important to  
 09:16 8 cross-examine is their business. I don't know whether  
 09:16 9 they'll put on any witnesses, but I know this: If they  
 09:16 10 want to put on witnesses, they will. And that's  
 09:16 11 certainly their right, but it's their right not to do  
 09:17 12 that. Are you okay with that?

09:17 13 A. Yep.

09:17 14 Q. They also have the right to seek all  
 09:17 15 legitimate -- to pursue all legitimate or pursue any  
 09:17 16 defenses they choose to do in good faith. It doesn't  
 09:17 17 mean they have to be true, and it only means that it has  
 09:17 18 to be done in good faith. And that means -- especially  
 09:17 19 for something like a burden of proof, beyond a  
 09:17 20 reasonable doubt.

09:17 21 It doesn't seem to me that there's  
 09:17 22 anything wrong with approaching different parts of the  
 09:17 23 trial and suggesting that -- that this or that flaw or  
 09:17 24 this or that piece of evidence somehow is tantamount to  
 09:17 25 reasonable doubt. And I don't get on a soapbox about

09:17 1 defense attorneys very often, but the truth is, they  
 09:17 2 take a lot of unfair criticism in our society.  
 09:17 3 Something to the nature of, how could you defend a  
 09:17 4 guilty person? How could you defend a person charged  
 09:17 5 with an awful crime?

09:17 6 Nobody ever asked a priest, how come a  
 09:17 7 priest comes in and prays with that person? I never  
 09:17 8 heard anybody ever ask a doctor: Doctor, how could you  
 09:18 9 stitch up a killer when he's been shot by the police in  
 09:18 10 a gun fight? It always falls on the lawyers, and we  
 09:18 11 deal with it. But they do an important job, and that's  
 09:18 12 kind of a freedom to be able to have, what they do, that  
 09:18 13 I hope you appreciate because I do.

09:18 14 A. Yes. Absolutely.

09:18 15 Q. For example, they have the right, if they  
 09:18 16 choose, to attack all of the evidence or attack part of  
 09:18 17 it. They have the right, for example, in argument or  
 09:18 18 through witnesses or cross-examination or otherwise to  
 09:18 19 suggest -- they don't have to prove. But they certainly  
 09:18 20 have the right to suggest that one or more elements in  
 09:18 21 the State's case is deficient.

09:18 22 And it's funny how that works because,  
 09:18 23 let's assume that you got robbed one day. You are  
 09:19 24 walking down the street. A man comes out of the bushes,  
 09:19 25 puts a gun on you and says, "Give me your wallet or I'll

09:19 1 kill you."

09:19 2 It's kind of one of those things like you  
 09:19 3 see on TV. He's got the gun in his pocket. You know,  
 09:19 4 it's like you see something sticking out, and you figure  
 09:19 5 it's a gun because he's claiming it is, but you don't  
 09:19 6 actually see the handgun.

09:19 7 So you give him money, and then, you know,  
 09:19 8 15 minutes later the police catch him. You get to the  
 09:19 9 police and you say, "There's a fellow who is wearing an  
 09:19 10 overcoat, and he pointed something at me. I think it's  
 09:19 11 a gun. He said it was a gun."

09:19 12 They catch him. 15 minutes later they  
 09:19 13 bring him back to you. "Is this the guy?" "Yeah,  
 09:19 14 that's him." And they don't find a gun on him. But you  
 09:19 15 say you thought it was a gun. He said it was a gun. So  
 09:19 16 he gets indicted for the offense of aggravated or armed  
 09:19 17 robbery.

09:19 18 The case goes to trial. Through his  
 09:19 19 lawyers or through himself if he chooses to, he offers  
 09:19 20 evidence: I never had a gun. It was just my hand in  
 09:19 21 there. I claimed it was a gun. I wanted the victim to  
 09:19 22 believe it was a gun.

09:19 23 It's screwy, but under Texas law, if the  
 09:19 24 jury doesn't believe there was a handgun, the fear of  
 09:20 25 the victim will substitute for what actually didn't

09:20 1 occur. And so what might happen in that case, if there  
 09:20 2 is no issue about whether or not you know he was the  
 09:20 3 robber -- you identified him, and you offered the police  
 09:20 4 evidence on how his clothing was. He's found with your  
 09:20 5 wallet in his pocket. There's no question about those  
 09:20 6 things, but the gun isn't found. I suppose the State's  
 09:20 7 theory might be, well, he had 15 minutes to ditch the  
 09:20 8 gun and he did. We never found it.

09:20 9 But in a case like that, the jury would be  
 09:20 10 entitled -- the defendant would be entitled to have the  
 09:20 11 jury consider the lesser offense of regular robbery.  
 09:20 12 That's unarmed robbery. That's where he used threats of  
 09:20 13 deadly force, but you actually don't use a deadly  
 09:20 14 instrument like a handgun or a butcher knife or a  
 09:20 15 blowtorch or something like that that could be deadly in  
 09:20 16 a manner of its use or intended use. And then the jury  
 09:20 17 considers whether or not there's a reasonable doubt  
 09:20 18 about one part of the State's case. Does it make sense  
 09:20 19 to you?

09:20 20 A. Uh-huh.

09:20 21 Q. And they may -- they may say, well, I believe  
 09:21 22 he had a gun. I believe his words, and the way he was  
 09:21 23 holding it and the reaction of -- of the juror is enough  
 09:21 24 to -- I'm sorry, of the witness, of the victim is enough  
 09:21 25 to make me believe there was a handgun. Or they may

09:21 1 not. And they may say, yeah, he probably did, but we  
09:21 2 don't know. I'll bet he didn't have time to really  
09:21 3 ditch it, so we'll find him guilty of the lesser  
09:21 4 offense.

09:21 5 As it might make sense to you this lesser  
09:21 6 offense would carry a lesser punishment range. Because  
09:21 7 remember, I told you that the more serious your  
09:21 8 infraction against society, the higher the punishment,  
09:21 9 and then you finally cross the line into the death  
09:21 10 penalty. Does that seem like a concept you could work  
09:21 11 with when considering a lesser-included offense?

09:21 12 A. Yeah.

09:21 13 Q. And you might accept them, and you might reject  
09:21 14 them, but it happens all the time. And the fact that  
09:21 15 the Judge gives you an instruction on a lesser-included  
09:21 16 offense, that doesn't mean that's a comment by the Judge  
09:21 17 that's what ought to be found, but it's merely an option  
09:21 18 that's given by the jury to decide.

09:21 19 And that has an application in a death  
09:22 20 penalty case because in a death penalty case, it is  
09:22 21 possible that one of the things that makes it capital  
09:22 22 murder, one of the aggravating elements that makes it  
09:22 23 cross the line couldn't be proved. Just like the  
09:22 24 handgun couldn't be proved.

09:22 25 I'm trying to think of an example. But

09:22 1 let's say your next-door neighbor is a police officer.  
09:22 2 And he's home, and he's watching the football game  
09:22 3 because he's not working that day, and you get into some  
09:22 4 kind of argument or something with a third neighbor. He  
09:22 5 comes out and says, "What's going on? You know, stop it  
09:22 6 you can't be doing this. You know, this is disturbing  
09:22 7 my football game. You are disturbing the neighborhood.  
09:22 8 Stop it."

09:22 9 And you pull out a gun and shoot him.  
09:22 10 Well, he's a police officer, and I don't know if you  
09:22 11 recall when Ms. Falco might have explained, one of our  
09:22 12 kinds of capital murder is murdering a police officer in  
09:22 13 the discharge of his official duties.

09:22 14 And so, I mean, the likelihood is he gets  
09:22 15 indicted as a capital murder, but the jury has got a  
09:23 16 real serious issue there. Is he in his duty as a  
09:23 17 neighbor saying, "Shut up. I'm trying to watch a  
09:23 18 football game"? Is he out there being a police officer?

09:23 19 You know -- you know he's a police  
09:23 20 officer, and he's telling you to stop. And so that's  
09:23 21 different than if it were a stranger dressed in civilian  
09:23 22 clothes, and you thought he was just a regular person.  
09:23 23 And the jury looks at all that evidence. They may find  
09:23 24 him guilty of capital murder. They say, any fool knew  
09:23 25 that when he comes out of his house telling people to

09:23 1 stop, he's doing it as a police officer. And that's a  
09:23 2 capital murder. And otherwise they may say, no. That's  
09:23 3 not proof to me beyond a reasonable doubt, and then you  
09:23 4 have a claimer. Are you with me?

09:23 5 A. Uh-huh, yes.

09:23 6 Q. And once again, the punishment range is quite  
09:23 7 different because if it's plain murder, there is no  
09:23 8 death sentence available.

09:23 9 Now, first of all, and I know you are the  
09:23 10 kind of man that wouldn't have a problem with this, but  
09:23 11 I have to ask you. There could be some ideal laws who  
09:23 12 would say, I'm going to answer that lesser-included  
09:23 13 question in a way to achieve my death penalty agenda,  
09:23 14 whichever that might be.

09:23 15 There could be ideal laws to say, no way  
09:24 16 am I going to deprive the State of its chance for a  
09:24 17 perfectly good execution on somebody that's got it  
09:24 18 coming by something so unimportant as whether they  
09:24 19 proved everything they have to prove or not. Because  
09:24 20 just because they haven't proved to you he's a police  
09:24 21 officer, in my value system, what he did deserves the  
09:24 22 death penalty. Do you follow what I'm saying? There  
09:24 23 are some people that would be that way.

09:24 24 The flip side of that is, there might be  
09:24 25 some people that say, well, they proved a capital

09:24 1 murder, but I'm hopping off of this ship because I'm  
09:24 2 against capital punishment. I don't like it. I'm  
09:24 3 opposed to it. And the simplest thing for me to do is  
09:24 4 put an end to that possibility right here and now, and  
09:24 5 I'm just going to answer that question on the lesser-  
09:24 6 included offense in a way that would cause nothing but a  
09:24 7 life sentence to be the maximum because it fixes it so  
09:24 8 it can't be a capital murder. Are you with me on that?

09:24 9 A. I follow you. I don't agree with it.

09:25 10 Q. I know you are not that kind of person. I can  
09:25 11 tell that from your questionnaire, but I need to talk  
09:25 12 about that. The way this system works is to have jurors  
09:25 13 come in and essentially say, the reason that we have  
09:25 14 courtrooms in the kind of society we have is because  
09:25 15 most of us follow the law.

09:25 16 Some of us may agree with all of the law,  
09:25 17 and some of us may not. But we all, almost always, do  
09:25 18 follow the law because we believe collectively that's  
09:25 19 the best way for society to be. And that means, if our  
09:25 20 law provides for a death penalty, I'll follow the law.  
09:25 21 And if the evidence leads me that way, I'll answer it,  
09:25 22 even though I don't feel great about a death penalty  
09:25 23 right now. I'm still following the law and doing the  
09:25 24 right thing.

09:25 25 If you are a strong advocate of death



09:25 1 penalty law, you'd say the same thing. Boy, I -- I  
 09:25 2 think we are too -- I think -- I think we make it too  
 09:26 3 hard on the State to get death penalties a lot of times,  
 09:26 4 but I'm going to follow the law. And I'm not going to  
 09:26 5 make law from the jury box. I'll make law through some  
 09:26 6 candidate that I can get elected down in Austin, Texas,  
 09:26 7 to change the law. Do you see yourself as that kind of  
 09:26 8 person?

09:26 9 A. Yeah.

09:26 10 Q. And another thing that -- a lot of times we ask  
 09:26 11 you these questions almost -- we have to ask them  
 09:26 12 hypothetically. It's forbidden for the lawyers to tell  
 09:26 13 you what the evidence is going to be. I have a notion  
 09:26 14 what the evidence is going to be. Mr. Goeller has a  
 09:26 15 notion. But if we got up there and said, you know, fact  
 09:26 16 A, B, C, D, and E. How do you vote? That's forbidden  
 09:26 17 because we're pinning y'all down in ways that isn't  
 09:26 18 fair, number one. And our representation of the facts  
 09:26 19 are affected by the fact that we're advocates, number  
 09:26 20 two. Are you with me?

09:26 21 A. Uh-huh.

09:26 22 Q. What's really required of jurors to be fair is,  
 09:26 23 whatever portion of the law would apply to their trial  
 09:26 24 or their service, they have to be able to say, well,  
 09:27 25 I've never exactly thought about that before. Perhaps,

09:27 1 maybe they never thought about any of these issues ever.

09:27 2 But if the legislature tells me that  
 09:27 3 that's the law that our democracy has created, and they  
 09:27 4 tell me that these are the areas that I've got to work  
 09:27 5 within, and this is -- this is the window I've got to be  
 09:27 6 thinking in, I can do that fine because I'm a person who  
 09:27 7 follows instructions and can follow the law. Do you  
 09:27 8 think -- do you see yourself as that kind of person?

09:27 9 A. Yes.

09:27 10 Q. And for example, let's talk about punishment  
 09:27 11 range on lesser offenses. Let's say -- let's say in a  
 09:27 12 situation we were able to prove a defendant was guilty  
 09:27 13 of murder, but for some reason there was a defect, some  
 09:27 14 elemental defect in proving a burglary or robbery, some  
 09:27 15 technical reason, not unlike killing a police officer  
 09:27 16 when he's in his shorts watching the football game.

09:27 17 Let's say that the jury legitimately had a  
 09:27 18 reasonable doubt about one portion of the State's case,  
 09:28 19 not about the fact that the defendant was a killer, but  
 09:28 20 about the aggravating element that made it capital  
 09:28 21 murder.

09:28 22 The jury's duty, if they have a reasonable  
 09:28 23 doubt or if they believe that there's a defect that  
 09:28 24 matters that's part of the element itself, not we forgot  
 09:28 25 to tell you where the -- where the officer was. But

09:28 1 he's got the wrong time on what time he reported.  
 09:28 2 Unless that matters, reasonable doubt is not the same as  
 09:28 3 human mistake. It may be, but it doesn't have to be.

09:28 4 A. Uh-huh.

09:28 5 Q. Then the jury has to consider the punishment on  
 09:28 6 murder. And the punishment range on simple murder is  
 09:28 7 anywhere from as little as 5 years to as much as 99  
 09:28 8 years or life. And I know there's a huge difference on  
 09:28 9 those two. But if you stop and think about it, there  
 09:29 10 are all sorts of situations which many of us say are  
 09:29 11 very different.

09:29 12 I don't know how you feel, for example,  
 09:29 13 about the concept of mercy killing when someone is very  
 09:29 14 very old or very seriously injured or in very agonizing  
 09:29 15 last days of life.

09:29 16 I don't know how you feel about the  
 09:29 17 concept of getting some type of medical assistance to  
 09:29 18 shorten that process because you want to, but many  
 09:29 19 people in our society think that should be legal. In  
 09:29 20 our society suicide is legal. I mean, if you decide you  
 09:29 21 don't like it here anymore, you have a perfect legal  
 09:29 22 right to end your life in our society.

09:29 23 Now, the likelihood is, if anybody finds  
 09:29 24 out about it, they will send the police out. They will  
 09:29 25 get you taken off to an institution or something because

09:29 1 we tend to think that most people, certainly in your  
 09:29 2 apparent health and age, we tend to think there's  
 09:29 3 something wrong with your brain if you are wanting to  
 09:29 4 end your life that way, and we try to get you some help.  
 09:29 5 But the fact of the matter is, you got the right to do  
 09:29 6 it.

09:29 7 I guess if you had enough hearings and get  
 09:30 8 doctors to come in and say, yeah, he ain't crazy. He  
 09:30 9 just wants to die. I think they will probably let you  
 09:30 10 go, and you could go and kill yourself. It's different  
 09:30 11 though -- even though you can kill yourself, you can't  
 09:30 12 hire somebody or get a loved one to do it because if  
 09:30 13 they do, it's murder. It's just how our laws are  
 09:30 14 written.

09:30 15 A. Right.

09:30 16 Q. And yet most people, when you think about that,  
 09:30 17 if it's old Uncle Ned, and he's just got some awful  
 09:30 18 disease that's just breaking everybody's heart. And  
 09:30 19 Uncle Ned has talked to me about it for 20 years, and  
 09:30 20 says, you know, you'll be like this one day maybe if you  
 09:30 21 are real unlucky. And you'll understand that I won't  
 09:30 22 live through all of this. It is not any good. It's  
 09:30 23 hurting my wife. It's hurting my kids. It's hurting  
 09:30 24 me, and there's no point in it.

09:30 25 Most people think that's different than

09:30 1 going out and, you know, when you send for Dr. Kevorkian  
09:30 2 and his magic machine. Most people think that's kind of  
09:30 3 different than somebody shooting someone for the fun of  
09:30 4 watching them die. How do you feel about that?

09:31 5 A. Mercy killing is a tough question. I think  
09:31 6 obviously when somebody -- somebody wants to die,  
09:31 7 whether they want to commit suicide or they want  
09:31 8 somebody to kill them, probably have -- have at least --  
09:31 9 not issues mentally, but have something mentally that  
09:31 10 they are struggling with.

09:31 11 So, and I think that probably goes both  
09:31 12 ways. And I would say even an old person or a  
09:31 13 terminally ill person, again, could probably benefit  
09:31 14 from -- from counseling or that type of thing before  
09:31 15 that decision is rational and completely sane. That  
09:31 16 said, I would say, kind of where I fall on the -- on the  
09:31 17 mercy killing issue is probably that -- that it -- it --  
09:31 18 it should be -- it should be legal to an extent.

09:32 19 I say to an extent. I don't know exactly  
09:32 20 how that -- how -- how that would -- would come about  
09:32 21 because, you know, I mean, if you hire somebody to  
09:32 22 basically put a gun to your head and shoot you, that's a  
09:32 23 little different than calling up Kevorkian and working  
09:32 24 out a contract for your death and peacefully doing it  
09:32 25 and that kind of thing. So it's a different question.

09:32 1 I'm not sure if I have a complete answer on it.

09:32 2 Q. But doing -- helping somebody that out of  
09:32 3 compassion with a mercy killing, at least, has a  
09:32 4 different feel than just going and killing somebody  
09:32 5 because you are mad at them or --

09:32 6 A. Certainly.

09:32 7 Q. -- a business rival or something like that.  
09:32 8 You decide the best way to get a promotion is to take my  
09:32 9 rifle out and doing it, or killing your daughter's  
09:32 10 cheerleader competition, or those kinds of situations.

09:32 11 A. Completely different.

09:32 12 Q. Are you with me on that?

09:32 13 A. Yes.

09:32 14 Q. That's probably why the legislature has given  
09:32 15 that wide range of punishment. Furthermore, even though  
09:32 16 nobody is justified to do a murder, you've got to  
09:33 17 consider people's background in deciding how much  
09:33 18 punishment to give.

09:33 19 I mean, you got to consider the nature of  
09:33 20 the crime. You got to consider, if you can figure out  
09:33 21 what the motive for the murder was, most juries, you've  
09:33 22 got to consider that because the idea is to make the  
09:33 23 punishment fit the specific crime and fit the offender,  
09:33 24 and I always use that example.

09:33 25 And you might remember, I believe

09:33 1 Ms. Falco used the example of the father whose child  
09:33 2 gets murdered. And through some technicality, the  
09:33 3 killers are caught, and they are taken to court. And  
09:33 4 some legal ruling fixes it so they can't be convicted.  
09:33 5 And they walk out of the courtroom just laughing and  
09:33 6 proud of themselves.

09:33 7 And I think every one of us can understand  
09:33 8 how a grieving father, not insanely, but just simply  
09:33 9 grieving, decides: I can't allow this to happen. I  
09:33 10 can't let people of that personality be loosed on  
09:33 11 somebody else to cause what happened to my little child.  
09:33 12 And I can't -- I can't stand it. And I'm going to --  
09:34 13 I'm going to do what the law should have done, in my  
09:34 14 mind, and failed. So he gets a gun and finds him and  
09:34 15 kills him, and it's still murder.

09:34 16 There's nothing in our law that says --  
09:34 17 says it's okay to murder somebody if they need killing,  
09:34 18 even though probably everybody on the jury says, if they  
09:34 19 need killing, it's that guy or those people. We can't  
09:34 20 let our citizens make that choice. We have to do it up  
09:34 21 here. That's how it has to be.

09:34 22 But that's different, once again, many  
09:34 23 people say it's -- it's a different -- it feels real  
09:34 24 different than just somebody that kills for the fun of  
09:34 25 killing or because they -- they want something somebody

09:34 1 else has got. Do you agree with that, that different  
09:34 2 feel?

09:34 3 A. Yeah. I mean, the hypothetical is a loose one.  
09:34 4 So, there would obviously be a lot of circumstances that  
09:34 5 would change -- change your feeling based on what kind  
09:34 6 of technicality and that kind of thing. Somebody taking  
09:34 7 the law into their own hands. Or people taking the law  
09:35 8 into their own hands is a scary prospect.

09:35 9 Certainly, as a father, myself, I can -- I  
09:35 10 can, you know, be sympathetic to -- to the hypothetical  
09:35 11 and understand what you are saying and understand those  
09:35 12 feelings. But as far as, you know, agreeing one way or  
09:35 13 the other as far as how exactly that person should be  
09:35 14 punished, you know, the circumstances would determine  
09:35 15 that.

09:35 16 Q. I mean, if he's been violent all his life,  
09:35 17 maybe he doesn't get the benefit of that sympathy  
09:35 18 because you say, well, anything else might have set him  
09:35 19 off, too. If he's always been a really good -- you  
09:35 20 know, there's just a lot of things you would want to  
09:35 21 consider.

09:35 22 A. Yes.

09:35 23 Q. How remorseful he was afterward. Did he turn  
09:35 24 himself into the police because he realized he had  
09:35 25 broken the law and knew it at the time and wasn't trying

09:35 1 to be a problem for anybody? Did he do that? Did he  
09:35 2 escape? Did he make up lies? Did he come up with  
09:35 3 stories that evidenced he had a responsibility for? All  
09:35 4 of those things would probably claim to be analysis.

09:35 5 But our legislature really has decided  
09:36 6 that for the crime of murder, anywhere from five years'  
09:36 7 probation, if the jury believes that's a proper  
09:36 8 punishment under all the circumstances to as much as  
09:36 9 life, is a proper punishment.

09:36 10 And in order to serve on a jury, the jury  
09:36 11 would have to say, well, maybe I can't think of a life  
09:36 12 case for murder, or maybe I can't think of a five-year  
09:36 13 probated sentence for murder, but my mind's not blocked  
09:36 14 against it. I follow the law, and I can fairly consider  
09:36 15 it. It's not like a taboo. It's not like -- it's not  
09:36 16 like some weird human practice that I wouldn't even dare  
09:36 17 let my mind go visit and consider what that would feel  
09:36 18 like. It's not like that.

09:36 19 I don't know right now, but I'll fairly  
09:36 20 consider anywhere within that range if called upon to do  
09:36 21 that. And that's the -- and that's the -- and that's  
09:36 22 really the question for jurors. Can they follow the  
09:36 23 law, or do they have -- do they have a -- do they have  
09:36 24 such an aversion to some part of the law that they would  
09:37 25 say, "I revolt"? I will not follow that part of the law

09:37 1 because I decided it shouldn't be.

09:37 2 Just like the death penalty. If somebody  
09:37 3 says, I'm so against the death penalty, I'll not answer  
09:37 4 these questions so that death will result. They are  
09:37 5 revolting. They are not bad people, but they are  
09:37 6 revolting against -- against lawful authority if they  
09:37 7 say that. And if someone says, I will not consider five  
09:37 8 years' probation for murder, they are revolting. It may  
09:37 9 not be the same thing as throwing a Molotov cocktail,  
09:37 10 but in a way they are revolting against the law.

09:37 11 Are you the kind of juror that would  
09:37 12 consider all part of the punishment range if called upon  
09:37 13 in a murder case, for example?

09:37 14 A. I believe so.

09:37 15 Q. That doesn't mean that you would be more likely  
09:37 16 to give lots of time in a murder case than probation.  
09:37 17 It merely means that you could consider, in a proper  
09:37 18 case fairly as you saw it, fairly assess as little as  
09:37 19 five years' probation. You could do that?

09:38 20 A. Yeah.

09:38 21 Q. And, you know, and then as you said, I mean, I  
09:38 22 could suggest things to you, and I would never ask you,  
09:38 23 what would you do in that case? The defense could  
09:38 24 suggest situations to you. But we're only talking  
09:38 25 hypothetically. And we're not even talking about this

09:38 1 case when I ask you that question because we're not  
09:38 2 talking about murder in the course of a robbery.

09:38 3 And we don't -- and we are not able to  
09:38 4 find robbery, so it becomes a regular murder. We're  
09:38 5 talking about murder as a concept, whether you can get  
09:38 6 probation in a hypothetical murder case, whatever that  
09:38 7 might be. And you could do that?

09:38 8 A. Yes.

09:38 9 Q. Okay. Let's assume you have found the  
09:38 10 defendant guilty of capital murder because that's what  
09:38 11 these questions assume. It doesn't mean that we don't  
09:38 12 know we have a big burden of proof. And we ought to  
09:38 13 because we ought to.

09:38 14 First question that you are going to be  
09:38 15 asked is what we generally call the future dangerousness  
09:38 16 question. Have you read that?

09:38 17 A. Uh-huh.

09:38 18 Q. Okay. First of all, some people observe that  
09:39 19 it requires us to do some predictions about the future,  
09:39 20 and of course it does. But we do that all the time. In  
09:39 21 many ways we -- there aren't any certainties. We  
09:39 22 think -- we think something may be a way, and we act  
09:39 23 upon it, but we don't know that for sure, agreed?

09:39 24 A. Yeah.

09:39 25 Q. You take a job. You do the interviews. You

09:39 1 learn what you can about the company. You consider the  
09:39 2 money that they are offering you. You consider the  
09:39 3 future that you are going to have, and then you make the  
09:39 4 determination about whether it's something that you need  
09:39 5 to do or not, right?

09:39 6 A. Yeah.

09:39 7 Q. And -- and sometimes we're right. Sometimes  
09:39 8 we're wrong, but we make the best decision we can make  
09:39 9 at the time and -- and we hope we're right. But  
09:39 10 sometimes we may not be. That applies to things like  
09:39 11 marriage. I mean, nobody knows. Nobody knows how  
09:39 12 that's going to be 5 years, 10 years, 15 years down the  
09:39 13 road.

09:39 14 You are relatively newly married. You  
09:39 15 know, maybe -- maybe you'll be fortunate enough or some  
09:40 16 say unfortunate enough to stay married for forever, and  
09:40 17 I kid you about that. But I truly think that would be  
09:40 18 good; maybe not.

09:40 19 You certainly made some predictions when  
09:40 20 you did that. And you -- and you -- you bet on the  
09:40 21 probabilities. Common interests, common, you know,  
09:40 22 feelings about each other, romantic things. We use  
09:40 23 religion, kids and all those kinds of things when you  
09:40 24 made those decisions.

09:40 25 Same thing here. We're asking you to

09:40 1 examine someone's personality. But really, a part of  
09:40 2 that personality has to do with the personality for  
09:40 3 criminal acts of violence and make a probability  
09:40 4 decision on what that person will be like in the future.  
09:40 5 Personalitywise, not necessarily behaviorwise.

09:40 6 Because it doesn't say to you, for  
09:40 7 example, will this person commit criminal acts of  
09:40 8 violence that would constitute a continuing threat to  
09:41 9 society? But rather, would that person? And that's  
09:41 10 almost, that word itself almost is hypothetical in the  
09:41 11 sense of -- of would that person? And it doesn't say,  
09:41 12 for example, would that person commit criminal acts of  
09:41 13 violence if not restrained, if not locked up.

09:41 14 The question is not worded that way. And  
09:41 15 the question is not worded: Can we safely handle this  
09:41 16 person in prison without killing him? Instead, it's  
09:41 17 asking you: Is there a probability that would he commit  
09:41 18 criminal acts of violence that would constitute a  
09:41 19 continuing threat to society?

09:41 20 It doesn't have to -- the question is not  
09:41 21 would -- will he kill again? Or even would he kill  
09:41 22 again? The question is: Would he commit criminal acts  
09:41 23 of violence again? Which could be, depending on the  
09:41 24 circumstances, less than killing. It could be killing.

09:41 25 It could be, you know, sexual assaults.

09:42 1 It could be -- it could be anything that we would all  
09:42 2 agree are truly clearly crimes of -- or more acts of  
09:42 3 violence. But it's not a -- it's not a will-he-  
09:42 4 kill-again question. Do you see how that's worded?

09:42 5 A. Yes.

09:42 6 Q. Now, we all know some criminal acts of  
09:42 7 violence. We all know that murder is a criminal act of  
09:42 8 violence by its definition. Rape, robbery, aggravated  
09:42 9 assault, attempted murder, kidnapping, all those things  
09:42 10 are clearly crimes of violence.

09:42 11 There are other areas that aren't quite so  
09:42 12 clear. For example, violence to property. If what we  
09:42 13 mean by violence is directly inflicting physical pain or  
09:42 14 threats of physical pain on another human being, then  
09:42 15 probably taking a baseball bat and destroying your  
09:42 16 vehicle would not be an act of violence.

09:43 17 On the other hand, if what we mean by an  
09:43 18 act of violence is one person taking up arms or taking  
09:43 19 up force in order to do -- do harm to someone else, not  
09:43 20 necessarily physical harm, but harm to someone else,  
09:43 21 then that might be a criminal act of violence also.

09:43 22 And I'm thinking to myself, if I'm mad at  
09:43 23 Middle Easterners, so I take some dynamite and go find  
09:43 24 me a mosque down in Dallas. I blow it up at night,  
09:43 25 knowing there isn't going to be anybody there. And I do

09:43 1 it on purpose. I don't want to kill anybody. I want to  
09:43 2 blow up their house of worship. Is that an act of  
09:43 3 violence?

09:43 4 A. Yes.

09:43 5 Q. There's nobody in there, and I know it. I'm  
09:43 6 not trying to hurt anybody's body. I may be trying to  
09:43 7 hurt their spirit. I may be trying to frighten them or  
09:43 8 I'm not trying to terrorize them, but do you think  
09:43 9 that's a criminal act of violence?

09:43 10 A. Yes.

09:43 11 Q. How about beating up your wives and  
09:43 12 girlfriends? Is that a criminal act of violence?

09:43 13 A. Yes.

09:43 14 Q. What if the answer is: Well, they said a lot  
09:44 15 of stuff or they, you know, you don't know what it was  
09:44 16 like living with them or something. Does that make it  
09:44 17 not a criminal act of violence?

09:44 18 A. No.

09:44 19 Q. And then there's some -- everybody would agree,  
09:44 20 are not acts of violence. Some crimes that are not an  
09:44 21 act of violence, like shoplifting. That, by itself, you  
09:44 22 couldn't make that an act of violence, could you?

09:44 23 A. No.

09:44 24 Q. Then there are some things in the middle that  
09:44 25 at first you would say probably aren't, and then you got

09:44 1 to look at them and ask this question. Let's talk about  
09:44 2 drug dealing. Let's talk about me selling you drugs in  
09:44 3 exchange for money. Let's say I've got some heroin, and  
09:44 4 I say, you know, I got \$10,000 worth of heroin here.  
09:44 5 And you say, I got \$10,000 worth of cash, and I want the  
09:44 6 heroin. So we shake hands and make the deal and go  
09:44 7 leave. Is that an act of violence, in your opinion?

09:44 8 A. No.

09:44 9 Q. If you look at it in that context, for sure  
09:44 10 it's not. I mean, you know, if you try to rip me off or  
09:45 11 I -- if I got my people with machine guns there, and you  
09:45 12 got your people with machine guns. That's getting  
09:45 13 closer maybe because we're both ready for violence, and  
09:45 14 it may start and it may not.

09:45 15 But other people say, well, you know,  
09:45 16 heroin is to dangerous to human bodies. And he's not  
09:45 17 buying that heroin for his own use. He's buying it to  
09:45 18 go turn that \$10,000 into \$50,000 by selling it to  
09:45 19 Johnny and Fred and peddle it on the street.

09:45 20 And if my definition of a criminal act of  
09:45 21 violence is to do an act calculated to harm human  
09:45 22 beings, either physically or even spiritually perhaps,  
09:45 23 if that's my act, maybe that transaction is so close to  
09:45 24 violence it's so interlaced that maybe that is an act of  
09:45 25 violence. I'm not saying that's right. Do you see how

09:45 1 that could be a reasonable argument?

09:45 2 A. Yeah, sure.

09:45 3 Q. Furthermore, what it's going to do to those  
09:46 4 people when they take it? Heroin is a very unstable  
09:46 5 drug. Everyone knows it makes you aggressive and mean.  
09:46 6 And when you get into the frenzy of wanting some more  
09:46 7 heroin for your fiendish ideations, then you get to  
09:46 8 doing things that are very violent as a result of that.  
09:46 9 Would you agree with that? If you want heroin --

09:46 10 A. I can see the argument.

09:46 11 Q. Maybe it makes me violent in order to pursue  
09:46 12 my -- maybe it makes me violent simply because I've  
09:46 13 taken something that I know is going to make me  
09:46 14 aggressive from the past because it's done it before.  
09:46 15 People say, you know, you are not yourself when you are  
09:46 16 on that heroin. You are mean or extra mean, maybe.

09:46 17 Some people say, well, all of that taken  
09:46 18 together, the fact that there's so much violence, that's  
09:46 19 the result of this drug transaction, the fact that when  
09:46 20 people take these drugs, they get in automobiles and  
09:46 21 drive and they kill innocent people with their cars  
09:46 22 while intoxicated. Some people say that's a criminal  
09:46 23 act of violence or not. But certainly you would agree  
09:47 24 that a person's drug dealing would be something you  
09:47 25 would consider in identifying his personality so that

09:47 1 you could answer the probability question. Don't you  
09:47 2 think? Even if it's not?

09:47 3 A. I don't quite understand the question.

09:47 4 Q. What do you think?

09:47 5 A. I don't quite understand the question.

09:47 6 Q. Well, even if you say, okay, I understand  
09:47 7 everything you said, but I still say drug dealing is not  
09:47 8 a crime of violence unless violence somehow goes with  
09:47 9 the act itself.

09:47 10 A. Right.

09:47 11 Q. Do you still see how the fact that somebody  
09:47 12 deals drugs is important in looking -- in figuring out  
09:47 13 what his personality is so you can decide: Is he  
09:47 14 probably going to be a threat of violence in the future?

09:47 15 A. Considering that is a tough question.  
09:47 16 Considering drug dealing is a relatively violent -- or  
09:47 17 acts of violence quite often surround drug dealing. It  
09:47 18 is not very often a type of transaction that doesn't  
09:48 19 involve some threat of violence in some way or -- or  
09:48 20 with generally violent people. I can see that argument.  
09:48 21 Whether or not, in a vacuum, the transaction between  
09:48 22 a -- the cash transaction is an act of violence, you  
09:48 23 know, I still wouldn't agree with that.

09:48 24 Q. Okay. Because there can be some acts that you  
09:48 25 do that may be criminal in nature, but everybody would

09:48 1 agree are nonviolent.

09:48 2 A. Sure.

09:48 3 Q. And yet you've got to say, you know, it does  
09:48 4 have one thing connected with violence. And that is  
09:48 5 it's a willingness to do what this person wants to,  
09:48 6 legal or not. And that tells me something about the  
09:48 7 person's personality if he's willing to violate the law  
09:48 8 in a nonviolent way. In some way that helps me figure  
09:48 9 out is his personality one that will enable him to  
09:48 10 violate the law in a violent sort of way? Does that  
09:48 11 make sense to you? Or maybe it doesn't.

09:48 12 A. Yeah, I mean to an extent.

09:48 13 Q. I mean, for example, let's say you are a  
09:49 14 deserter. You are in the military. You don't like  
09:49 15 marching or you don't like the food or somebody sassed  
09:49 16 you or something like that. Or like your brother, he  
09:49 17 decides this isn't what I thought. So he just leaves.  
09:49 18 He goes over the wall and flies away. He doesn't hurt  
09:49 19 anybody. He doesn't hurt the sentry. He just leaves.  
09:49 20 He stays gone. It's pretty hard to make that an act of  
09:49 21 violence, don't you think?

09:49 22 A. Yes.

09:49 23 Q. You have to make it extreme. You almost got to  
09:49 24 have a guy leaving his sentry duty in a war, and then  
09:49 25 some guys get killed because he's not there to stop

09:49 1 them. But that might help you answer that question; it  
09:49 2 might not.

09:49 3 There might be some evidence in that  
09:49 4 question about whether or not he's got a personality  
09:49 5 that's going to do what he wants when it suits him, do  
09:49 6 you think?

09:49 7 A. Uh-huh.

09:49 8 Q. Okay. Society is undefined. There was some  
09:49 9 discussion about that in the general -- in the general  
09:49 10 discussions with the jury. Mr. Goeller made some points  
09:49 11 that are true. I may disagree with the breadth of his  
09:50 12 points, but prison is certainly a part of society. That  
09:50 13 that's a fact. Do you agree with that?

09:50 14 A. Yes.

09:50 15 Q. Not our society, but it sort of is. We pay for  
09:50 16 it, just like libraries or schools. We, as a working  
09:50 17 society, taxpaying society provide prisons. And those  
09:50 18 prisons have connections with the outside society, that  
09:50 19 free-world society. Visitors come to visit the inmates  
09:50 20 that are there.

09:50 21 Doctors are typically not inmates. They  
09:50 22 are people that live outside the walls, and they go in  
09:50 23 everyday to treat sick -- sick inmates. Ministers come.  
09:50 24 We got guards. Guards aren't prisoners. They are  
09:50 25 people that, when they are not working there, they live

09:50 1 off -- if not off base, they live -- they live in an  
 09:50 2 area where they can go to the store when they want to  
 09:50 3 and things like that. Prisons have newspapers. Prisons  
 09:51 4 have religious services. Prisons have, you know,  
 09:51 5 rodeos. They got all kinds of things like that.

09:51 6 And so, when we talk about continuing  
 09:51 7 threat to society, you may consider prison society as  
 09:51 8 one -- one venue for testing the personality of the  
 09:51 9 defendant, but that's not the only venue that you  
 09:51 10 consider.

09:51 11 For example, you could say to yourself:  
 09:51 12 How is this person going to be in prison? What's going  
 09:51 13 to happen when another inmate says something to him?  
 09:51 14 Not threatens his life and comes at him or something,  
 09:51 15 but how is that going to happen?

09:51 16 How is this person going to react to -- to  
 09:51 17 how the guards are going to treat him? And how is this  
 09:51 18 person going to react when given an opportunity to buy  
 09:51 19 drugs in the prison? And I'd love to tell you that  
 09:51 20 prisons are perfect, but they are not. I'd love to tell  
 09:51 21 you that all the guards are perfect. But you live in  
 09:51 22 the society, you know what I'm talking about. You can  
 09:51 23 consider -- you can consider that society.

09:52 24 You can also say that question doesn't  
 09:52 25 limit me to prison society. I want to know how that

09:52 1 person would be if he's in a barroom. Is that person  
 09:52 2 going to be a threat when something goes wrong with him  
 09:52 3 in the bar or the poolroom, for example? Where you or I  
 09:52 4 might walk away or call the police, is that person going  
 09:52 5 to arm himself? Is he going to go to the barroom with a  
 09:52 6 handgun, for example, for purposes of hurting somebody  
 09:52 7 in the event of trouble?

09:52 8 Like the dope dealer thing. You know,  
 09:52 9 yeah, maybe you are not looking for trouble, but you are  
 09:52 10 ready for it because that is part of the culture. How  
 09:52 11 would I feel if that person were my next-door neighbor?  
 09:52 12 Would I be concerned about it? Would I have the guts to  
 09:52 13 go tell him to mow his lawn because the grass is too  
 09:52 14 high, knowing his personality? Is that a risk I'd want  
 09:52 15 to take? Is he the kind of person that would think  
 09:52 16 that's enough provocation to hurt me because I said his  
 09:52 17 grass is too high? All of those kinds of things you may  
 09:52 18 consider. Does that make sense?

09:53 19 A. Yes.

09:53 20 Q. Okay. You can argue, well, he's only -- what  
 09:53 21 you are really talking about automatically and  
 09:53 22 practically is prison society. Because you know if you  
 09:53 23 answer that question no, he's going to get a life  
 09:53 24 sentence. That's an automatic thing, if the question is  
 09:53 25 answered no. And you know that the life sentence means

09:53 1 he goes to prison under our law for 40 years minimum.  
 09:53 2 So at first you could -- you could -- you could rewrite  
 09:53 3 that question to almost say: Is he going to be a  
 09:53 4 continuing threat to prison society?

09:53 5 And I mean, I don't know how anybody could  
 09:53 6 tell you not to do that except it doesn't -- it doesn't  
 09:53 7 say that. It's actually trying to measure his  
 09:53 8 personality at the time -- at the time that you are  
 09:53 9 looking at it. And it just says society, which means  
 09:53 10 here, there and everywhere. Hospitals, schools, and  
 09:53 11 wherever we may end up being. Does that make sense to  
 09:53 12 you?

09:54 13 A. Yes.

09:54 14 Q. Does that sound like a question you feel you  
 09:54 15 could answer just from your ordinary experience in  
 09:54 16 living in this society? Are you capable of answering  
 09:54 17 that question yes, depending on the evidence.

09:54 18 A. Sure.

09:54 19 Q. Why I ask you this, some people say I can't  
 09:54 20 because that's asking me to predict the future, and  
 09:54 21 nobody can do that. But other people say, we do that  
 09:54 22 all the time in our everyday life. We buy a car  
 09:54 23 predicting how long it's going to last. We get extended  
 09:54 24 warranties based on predicting. Is this thing going to  
 09:54 25 break down or not? It's a measurement kind of question.

09:54 1 And you could do that?

09:54 2 A. Yes.

09:54 3 Q. Some people say you need a psychiatrist to help  
 09:54 4 you answer that question. As you look at it, what do  
 09:54 5 you think about that? Do you think you need a  
 09:54 6 psychiatrist to come and testify?

09:54 7 A. It would depend on -- it would probably depend  
 09:54 8 on the -- on the probability. But as an absolute, no.

09:54 9 Q. Very possibly you will. You will hear  
 09:54 10 psychiatrists testify. The State may call a  
 09:54 11 psychiatrist to come in, and common sense will tell you  
 09:54 12 we're not going to -- we wouldn't bring in a  
 09:54 13 psychiatrist to come tell you that he's a peaceful  
 09:55 14 fellow, and I wish he could come to dinner at my house.  
 09:55 15 We are not going to call somebody like that. Nor would  
 09:55 16 the defense call a psychiatrist to say, "Watch out for  
 09:55 17 this guy. He's going to kill again."

09:55 18 If we call a psychiatrist, our  
 09:55 19 psychiatrist is going to say something favorable on that  
 09:55 20 question. He's going to say this guy has demonstrated  
 09:55 21 this and that. In my opinion, he's going to be  
 09:55 22 dangerous.

09:55 23 If the defense chooses to call a  
 09:55 24 psychiatrist, they are going to have just the opposite.  
 09:55 25 They may be equally qualified, and they may be both

09:55 1 persuasive, and you listen to that evidence. And then  
09:55 2 you come down to the question of: Do you need a  
09:55 3 psychiatrist to tell you something that's essentially  
09:55 4 what we do everyday in our society?

09:55 5 If you take your family to the circus, and  
09:55 6 you are watching the tiger show. And one of the tigers  
09:55 7 gets out of the cage and starts running -- running loose  
09:55 8 down at the -- at the arena, you probably don't need a  
09:55 9 veterinarian to tell you "get out of here" because  
09:55 10 there's a loose tiger that -- that is going to be  
09:56 11 dangerous, based upon his personality. Do you follow  
09:56 12 what I'm saying? You don't need expertise for some  
09:56 13 things.

09:56 14 A. Sure.

09:56 15 Q. You don't need a doctor to tell you, you know,  
09:56 16 don't stay out in the sun all day long with your shorts.  
09:56 17 We just know that by living -- by living in our society.

09:56 18 If the answer to that question is yes, and  
09:56 19 it's proven beyond a reasonable doubt that there is a  
09:56 20 probability, then there's another question for you. If  
09:56 21 the answer is no, then we're done. The defendant has a  
09:56 22 life sentence, and our work is through.

09:56 23 You could answer that question either way  
09:56 24 according to the evidence even if the result wasn't  
09:56 25 something that felt exactly what you wanted it to be.

09:56 1 You could still do that, couldn't you?

09:56 2 A. Yeah.

09:56 3 Q. Good. And nobody says juries have to like the  
09:56 4 results of their verdict. We would hope that they would  
09:56 5 at least be comfortable in the results, but there might  
09:56 6 be times when they wouldn't. There may be times when  
09:56 7 you've got a pitiful plaintiff that's been injured real  
09:56 8 badly, and you just don't have liability. And you are  
09:57 9 just stealing from a company if you give the poor guy --  
09:57 10 if you are just being Robin Hood. And they wish they  
09:57 11 could, but they can't. Do you know what I mean?

09:57 12 A. Yes.

09:57 13 Q. And you are the kind of man that could do that?  
09:57 14 Answer that question without regard to the result, but  
09:57 15 rather with regard to how much evidence has been  
09:57 16 presented and what you think that evidence means?

09:57 17 A. Sure.

09:57 18 Q. All right. If you answer that question -- oh,  
09:57 19 one other thing I need to talk to you about real quickly  
09:57 20 is the concept of probability. We can't define that for  
09:57 21 you. I think most people using that in the  
09:57 22 nontechnical, nonmathematical sense would say  
09:57 23 probability means -- well, you don't. What do you think  
09:57 24 it means in the everyday parlance?

09:57 25 A. Probably better -- better than average. I'm

09:57 1 not sure if I would define a mathematical value for it.

09:57 2 Q. More likely than not maybe?

09:57 3 A. Yeah. Uh --

09:57 4 THE COURT: Mr. Schultz, I'm going to ask  
09:57 5 you to pass the witness in about ten minutes.

09:57 6 MR. SCHULTZ: Yes, sir, thank you. I  
09:58 7 appreciate the warning, Judge. Thank you.

09:58 8 A. Yeah. I don't know. More often than not, that  
09:58 9 to me that means slightly over 50 percent. But, yeah,  
09:58 10 probably, if you were to define a mathematical or a  
09:58 11 value to it, probably between -- I don't know, yeah, 60  
09:58 12 to, you know, a hundred percent, I guess.

09:58 13 Q. If I ask you: Are you going to the office  
09:58 14 party tomorrow night? And you told me probably.  
09:58 15 Assuming you are telling me true and not just a guy that  
09:58 16 never likes to say no, just kind of thinks it. But  
09:58 17 assuming that you mean it, when you say, I probably will  
09:58 18 be there, I tend to think more than -- more than likely  
09:58 19 I'll see you there if I go. Would you agree with that?

09:58 20 A. Sure.

09:58 21 Q. Now, whether you mean I'm 90 percent sure or  
09:58 22 I'm 51 percent sure, it's kind of up to you. You don't  
09:58 23 have to go that high. Probability does not require the  
09:59 24 individual juror to find it more than 50 percent. Most  
09:59 25 of us may do that, but there's not a definition for it.

09:59 1 What must be done, though, is it can't  
09:59 2 be -- it has to be more than a mere theoretical  
09:59 3 possibility. And if I pull out a quarter out of my  
09:59 4 pocket and I say, I'm going to flip this one time and  
09:59 5 see how it comes up, first thing we all think of is a  
09:59 6 50-50 chance it could be heads or tails, assuming it's  
09:59 7 not heavier on one side than the other.

09:59 8 There's actually a possibility of a third  
09:59 9 of that happening. And that is, it could end up on its  
09:59 10 edge. You've probably done that somewhere in your life.  
09:59 11 You put a coin and you do it enough, and it's real level  
09:59 12 you can get it to stand on its edge. Not very likely,  
09:59 13 don't you agree?

09:59 14 A. Yeah.

09:59 15 Q. I don't know how many decimal places we'd go to  
09:59 16 for that to be a possibility. But since it could happen  
09:59 17 in the physical laboratory, then -- then that's -- that  
09:59 18 wouldn't be a probability merely because I could express  
10:00 19 the fact that, you know, that -- that this could happen.  
10:00 20 Does that make sense?

10:00 21 A. Yes.

10:00 22 Q. I'll give you an example. Let's assume I've  
10:00 23 got the world's most atrocious capital murderer, and  
10:00 24 I've got to get him convicted. The world's most  
10:00 25 atrocious capital murderer of capital murder, beyond a

10:00 1 reasonable doubt. But when he got arrested, he got in a  
10:00 2 gun fight with the police officers, and he got paralyzed  
10:00 3 from the scalp down.

10:00 4 I mean, how this guy's alive, nobody even  
10:00 5 seems to understand. He's got tubes in him. They feed  
10:00 6 him food through some kind of a slurry that goes in  
10:00 7 through a tube. And I mean, nobody even knows if he's  
10:00 8 thinking or not because he can't even -- I mean, you  
10:00 9 could walk in and say hi, and you don't even know if he  
10:00 10 knows you are there or not because the only thing that  
10:00 11 moves is his scalp.

10:00 12 Now, it's pretty hard to say that no  
10:00 13 matter how bad he used to be that in his present  
10:00 14 condition that he's going to be dangerous to anybody.  
10:00 15 Would you agree?

10:00 16 A. Yeah.

10:00 17 Q. Now, I could bring in a doctor and they could  
10:01 18 say, you know, I've got some radical new theories I've  
10:01 19 been studying, and I believe I can save this fellow, and  
10:01 20 I think I can make him dance again. But when you try to  
10:01 21 get this doctor to quantify that and he talks to it, and  
10:01 22 he says, nobody but me has ever thought about it and it  
10:01 23 is rather unorthodox. And still, the fact that I  
10:01 24 suppose it's theoretically possible that this guy could  
10:01 25 go back to dancing again, that's not a probability. Do

10:01 1 you see what I'm saying?

10:01 2 A. Yes, of course.

10:01 3 Q. And that's what we're talking about. I  
10:01 4 wouldn't want to try to hustle any juror and say, oh,  
10:01 5 well if I could -- because anything is possible.

10:01 6 A. Sure.

10:01 7 Q. It's got to be realistically. It's got to be  
10:01 8 real-world possible, not theoretically, because  
10:01 9 everything is theoretically possible. If I proved that  
10:01 10 to you beyond a reasonable doubt, you'll vote yes on  
10:01 11 that; is that correct?

10:01 12 A. Yes.

10:01 13 Q. Okay. Next question then becomes what I often  
10:01 14 refer to as the take-one-more-look question. Are you  
10:02 15 with me?

10:02 16 A. Uh-huh.

10:02 17 Q. Now, one of the things that it focuses your  
10:02 18 attention on is the crime itself. Do you see that?

10:02 19 A. Uh-huh.

10:02 20 Q. Just the circumstances of the offense. And you  
10:02 21 would have used that greatly probably in that first  
10:02 22 question because you looked at what the defendant did.  
10:02 23 That may be the biggest evidence you would have.  
10:02 24 Anybody who could do this enormous a crime will always  
10:02 25 be dangerous in a probability sort of way. You know,

10:02 1 nobody could get to that point if you didn't have a  
10:02 2 dangerous personality.

10:02 3 This question asks you to look at the  
10:02 4 evidence one more time with a little different focus.  
10:02 5 Same evidence, different -- different question. It's  
10:02 6 like the same football play. They isolate on the line.  
10:02 7 You were watching the receiver catching the ball, but  
10:02 8 now you are going to look at the line and see how the  
10:03 9 block had set that all up.

10:03 10 And what it is going to do is ask you to  
10:03 11 consider the following and anything else you want to  
10:03 12 consider. Consider the crime itself, the defendant's  
10:03 13 character, his background, and his personal moral  
10:03 14 culpability. And look at all that, consider it and ask  
10:03 15 yourself, first of all, is there mitigating evidence?  
10:03 16 Is there sympathy, lessening, explanatory-type evidence.

10:03 17 And I'll tell you there's going to be.  
10:03 18 Every one of us has had things in our life that didn't  
10:03 19 go well. Every one of us has had sad things. Some of  
10:03 20 us worse than others. Many of us have come from broken  
10:03 21 homes. Many of us have had abusive parents. Many of us  
10:03 22 had chemical abuse. Many of us have had lonely nights  
10:03 23 where we got -- we go to our beds just in sadness or  
10:03 24 terror or all kinds of things. That's living. Some of  
10:03 25 it's worse than others. Some of it is much worse than

10:03 1 others.

10:03 2 So I am going to tell you: You are going  
10:03 3 to find mitigating evidence. And you add all that  
10:04 4 mitigating evidence up, including those things up there,  
10:04 5 including his character and background.

10:04 6 By the way, character and background  
10:04 7 aren't the same thing. And not all those things they  
10:04 8 ask you to consider go for the benefit of the defendant.  
10:04 9 They may -- that question may be directing you to look  
10:04 10 at the bad stuff of the defendant. In fact, I think it  
10:04 11 does. It asks you to look at the crime, the  
10:04 12 circumstances of the offense.

10:04 13 And, my goodness, that's focusing your  
10:04 14 attention on something enormous, something awful. And  
10:04 15 it's asking you to look at the defendant's character,  
10:04 16 and you've already found his character makes him  
10:04 17 dangerous, a likely -- a likely violent offender. It's  
10:04 18 saying, look at that.

10:04 19 Consider -- consider all that character  
10:04 20 evidence that you found in that first question. In  
10:04 21 other words, you don't have to just look at the good.  
10:04 22 You can look at all the bad too, and that question  
10:04 23 directs you to look at the good and the bad. Are you  
10:04 24 with me?

10:04 25 A. Uh-huh.



10:04 1 Q. And then look at background. And background  
 10:04 2 may be the sympathy area. I mean, it may be all those  
 10:04 3 things I've talked about. The -- the sadness and the --  
 10:04 4 you know, you didn't get elected class president or  
 10:04 5 whatever might be important to you growing up.  
 10:05 6 That's -- that's certainly maybe somewhat favorable to  
 10:05 7 the defendant. Personal moral culpability.

10:05 8 MR. SCHULTZ: Judge Sandoval, I'm  
 10:05 9 hustling, and I'm just trying to get to the end of this.  
 10:05 10 I'm cognizant of your warning.

10:05 11 THE COURT: All right.

10:05 12 Q. (BY MR. SCHULTZ) And personal moral  
 10:05 13 culpability. When you look at all of that and you say,  
 10:05 14 okay, yeah, there's this. There's mitigating. I've got  
 10:05 15 a heart. I know little boys need their dads around. I  
 10:05 16 understand that. I hope to be around for my little boy  
 10:05 17 or my little girl. I hope to be. That's important. I  
 10:05 18 understand being in a school where you wanted to fit in  
 10:05 19 and you couldn't. I understand all of that, and it's  
 10:05 20 important, and it makes me sad.

10:05 21 And if I were considering his punishment  
 10:05 22 for shoplifting, that might have a lot more weight in  
 10:05 23 terms of how I did sentencing than it does when I'm  
 10:05 24 looking at a capital murder. Because you might say,  
 10:05 25 well, all that stuff is important, but that doesn't make

10:05 1 a person become a capital murderer because there's some  
 10:06 2 people who have had worse lives than this person who are  
 10:06 3 doing decent and are achieving and are doing a lot  
 10:06 4 better than what they came from. Do you agree with  
 10:06 5 that?

10:06 6 A. Uh-huh.

10:06 7 Q. But you once again have to have a willingness  
 10:06 8 to look at that and say: Is there sufficient mitigating  
 10:06 9 circumstances to warrant that a sentence of a life in  
 10:06 10 prison rather than death be posed, and there may be.

10:06 11 I don't know what that would be. Maybe he  
 10:06 12 was a Medal of Honor winner in the Navy. I talk about  
 10:06 13 the hypothetical deserter in the Navy. Maybe he was  
 10:06 14 gallant. Maybe he saved a lot of people through heroic  
 10:06 15 efforts. And somehow, later in life, it went bad.

10:06 16 And maybe, yeah, he's dangerous, and he  
 10:06 17 did a capital murder. But maybe in your mind that --  
 10:06 18 that one moment of gallantry and heroism is enough to  
 10:06 19 spare his life, if he wants his life spared. Do you  
 10:06 20 follow what I'm saying?

10:06 21 A. I follow what you are saying.

10:06 22 Q. It doesn't mean you excuse it. It just means  
 10:06 23 that maybe it becomes the right thing to do. That  
 10:06 24 question lets you do the right thing based on the  
 10:07 25 evidence, not the automatic thing of death.

10:07 1 Maybe it's that guy that killed the  
 10:07 2 killers of his child. Maybe you say, God, that's awful.  
 10:07 3 And he -- and maybe you decided he's dangerous because  
 10:07 4 he did break down and maybe that could happen again.  
 10:07 5 But maybe those circumstances in your mind are  
 10:07 6 sufficient because it's not saying, turn him loose.  
 10:07 7 It's saying, give him a life sentence. Does the concept  
 10:07 8 seem okay to you?

10:07 9 A. Yes.

10:07 10 Q. Do you see yourself as a person that could  
 10:07 11 fairly look for mitigation evidence. And if you found  
 10:07 12 it, weigh that mitigation evidence and say, is it enough  
 10:07 13 to change what's otherwise going to be a death sentence  
 10:07 14 into a life sentence? Does that seem --

10:07 15 A. I mean, yeah, yeah, that's --

10:07 16 Q. All right. And you could see yourself doing  
 10:07 17 that depending on what the circumstances might be?

10:07 18 A. Circumstances, yes, absolutely play a big part,  
 10:07 19 yeah.

10:07 20 Q. You got any questions of me before I turn you  
 10:07 21 over to the other side?

10:07 22 A. No. Thank you.

10:07 23 MR. SCHULTZ: Thank you very much, Judge.

10:08 24 THE COURT: Thank you, Mr. Schultz.

10:08 25 Mr. Stratton, let me ask you a couple questions.

10:08 1 VENIREPERSON: Yes.  
 10:08 2 THE COURT: I assume you are a music  
 10:08 3 producer.

10:08 4 VENIREPERSON: I am or was?

10:08 5 THE COURT: That you were.

10:08 6 VENIREPERSON: Not really. No. More a  
 10:08 7 music composer, that kind of thing.

10:08 8 THE COURT: What kind of producer?

10:08 9 VENIREPERSON: Way back? Oh, a producer  
 10:08 10 in my -- no, I'm actually -- I was a video game  
 10:08 11 producer. Computer video games.

10:08 12 THE COURT: In L. A.?

10:08 13 VENIREPERSON: Yes.

10:08 14 THE COURT: Did you do any work that we  
 10:08 15 recognize?

10:08 16 VENIREPERSON: Well, I actually worked a  
 10:08 17 lot with a -- if you are familiar with video games,  
 10:08 18 computer video games, specifically. Any -- any games by  
 10:08 19 id Software like the Quake series, the Doom series.

10:08 20 THE COURT: Those are the guys you are  
 10:08 21 working for now?

10:08 22 VENIREPERSON: Those are the guys I work  
 10:08 23 for now. And I also worked for them when I was at my  
 10:08 24 previous job in Los Angeles.

10:08 25 THE COURT: What do they do? What's some

10:08 1 of the names of some of their stuff?  
 10:08 2 VENIREPERSON: Doom, Quake. The Doom  
 10:08 3 games have gotten a lot of publicity lately. Quake  
 10:08 4 series of games, Wolfenstein series of games.  
 10:09 5 THE COURT: What did you think of L. A.?  
 10:09 6 VENIREPERSON: What did I think of L. A.?  
 10:09 7 It was a pretty crazy place, but fun while I was there.  
 10:09 8 Most of the time I lived there I was just working just  
 10:09 9 ridiculous hours. So, you know, it was a good start for  
 10:09 10 me. My wife, my girlfriend at the time, wife now, lived  
 10:09 11 in New York. I lived in Los Angeles, so I had a lot of  
 10:09 12 time to work and hang out with friends and that kind of  
 10:09 13 thing. It's a good place for that. But as soon as I  
 10:09 14 got married and start thinking about having a family, it  
 10:09 15 was definitely a place to leave.  
 10:09 16 THE COURT: You had a trip to New York  
 10:09 17 scheduled, right?  
 10:09 18 VENIREPERSON: Yeah, I did.  
 10:09 19 THE COURT: Did you cancel that?  
 10:09 20 VENIREPERSON: Just recently?  
 10:09 21 THE COURT: Yes.  
 10:09 22 VENIREPERSON: Actually, I was supposed to  
 10:09 23 leave at 12:45 on last Tuesday, so it was canceled for  
 10:09 24 me.  
 10:09 25 THE COURT: Okay. So there's no immediate

10:09 1 plans.  
 10:09 2 VENIREPERSON: I actually have -- I  
 10:10 3 have -- that trip might be rescheduled for mid-October.  
 10:10 4 And then I have another trip that is probable in the  
 10:10 5 beginning of October 10th, I believe, to San Francisco.  
 10:10 6 THE COURT: Okay. Thanks. Mr. Goeller?  
 10:10 7 MR. GOELLER: Thank you, Judge.  
 10:10 8 VOIR DIRE EXAMINATION  
 10:10 9 BY MR. GOELLER:  
 10:10 10 Q. Good morning, sir.  
 10:10 11 A. Good morning.  
 10:10 12 Q. Along the same lines that Judge Sandoval was  
 10:10 13 questioning you, on your questionnaire you wrote: "No,  
 10:10 14 you don't want to serve as a juror." You said, "My job  
 10:10 15 is very demanding, and I can't be away for an extended  
 10:10 16 period of time. If I didn't work, I would."  
 10:10 17 I suppose you mean you would serve as a  
 10:10 18 juror?  
 10:10 19 A. Absolutely.  
 10:10 20 Q. Tell me about that. You can't be away from  
 10:10 21 your work for an extended period of time. Your job is  
 10:10 22 very demanding?  
 10:10 23 A. I do work for a small -- from a personnel  
 10:10 24 standpoint, big from a business standpoint company.  
 10:11 25 Q. What does that mean, small?

10:11 1 A. I mean, we're one of the largest companies in  
 10:11 2 our field, most recognized companies in our field.  
 10:11 3 Q. What is the field?  
 10:11 4 A. Development of computer video games.  
 10:11 5 Q. Okay.  
 10:11 6 A. We sell millions of copies of games. And are  
 10:11 7 one of the most recognized in the industry, but we're  
 10:11 8 small from people. There's two of us that run the  
 10:11 9 business -- the CEO and myself.  
 10:11 10 I'm primarily responsible for, and pretty  
 10:11 11 much the only person in our company that's responsible  
 10:11 12 for coordinating the PR and marketing for all of our  
 10:11 13 titles. This time of year, as you can imagine with any  
 10:11 14 retail business, is incredibly busy for us. We have  
 10:11 15 about five products coming out between now and  
 10:11 16 Christmas, all of which have had major campaigns behind  
 10:11 17 them promoting them and marketing them.  
 10:11 18 So it's -- generally I work 10 to 14 hours  
 10:11 19 a day everyday, aside from weekends. And, you know, if  
 10:12 20 I was on this given -- given the -- if I was picked as a  
 10:12 21 juror for this, given the -- the time requirements of my  
 10:12 22 job, I would actually probably end up being here for  
 10:12 23 that, and then going to work for, you know, seven, eight  
 10:12 24 hours until, you know, early in the morning. It is just  
 10:12 25 quite demanding.

10:12 1 Q. What we're predicting is this trial lasting  
 10:12 2 somewhere between, say, three to four weeks, probably  
 10:12 3 five at the outside, probably three on the inside. So  
 10:12 4 it's, say, three and a half what most of us are  
 10:12 5 predicting. That would normally be Monday through  
 10:12 6 Friday from about eight or nine in the morning to five  
 10:12 7 or six at night. An hour for lunch, I would anticipate,  
 10:12 8 45 minutes, something like that.  
 10:12 9 So you are saying that for three and a  
 10:13 10 half weeks, you would put in that kind of day here and  
 10:13 11 then have to go work seven to eight hours after that?  
 10:13 12 A. Not always seven, eight. But absolutely I  
 10:13 13 would have to go to work after this just to -- to make  
 10:13 14 sure things were happening the way they should at work.  
 10:13 15 Q. You had mentioned seven or eight hours. I was  
 10:13 16 wondering why you thought you might have to work that  
 10:13 17 much?  
 10:13 18 A. It's just -- I rarely work less than eight  
 10:13 19 hours in -- given the -- the time. I mean, sometimes I  
 10:13 20 might be able to go in and work, two or three. I rarely  
 10:13 21 can go to the office even to do a simple task and have  
 10:13 22 it take less than two hours, it seems. So that was just  
 10:13 23 a ballpark -- ballpark figure.  
 10:13 24 Q. Talk to me about that. I'm wondering what kind  
 10:13 25 of juror you'd make just from a getting-sleep standard.

10:14 1 A. Probably a somewhat tired juror.  
 10:14 2 Q. I mean, honestly.  
 10:14 3 A. I'm being absolutely honest with you, which is  
 10:14 4 why I put, you know, that if I didn't have such demands,  
 10:14 5 I would be absolutely, you know, eager to. When you got  
 10:14 6 up and spoke a couple of weeks ago, I was very onboard  
 10:14 7 with you as far as Americans and as, you know, as people  
 10:14 8 in this country. We have a right to -- or we have a  
 10:14 9 duty to do this, and I'm a very patriotic person and  
 10:14 10 believe in the judicial system and being a part of it.  
 10:14 11 It's -- it's -- at the same time it's just an  
 10:14 12 unfortunate -- unfortunate time. And to be fair, I have  
 10:14 13 to bring that up.  
 10:14 14 Q. Okay. Because when you mentioned you would  
 10:14 15 probably be a -- knowing what you got coming and the  
 10:14 16 time of year, the personnel situation. Is it called ID  
 10:15 17 or id?  
 10:15 18 A. Id. It's spelled ID, but it is like Freud's  
 10:15 19 id.  
 10:15 20 Q. Id Software Company?  
 10:15 21 A. It's software, yes.  
 10:15 22 Q. Where are they located?  
 10:15 23 A. Mesquite, Texas.  
 10:15 24 Q. I'm wondering if you would be a tired juror.  
 10:15 25 This is the kind of case or any case you would be a good

10:15 1 juror. What do you think about that?  
 10:15 2 A. Probably, you know, probably tired. You know,  
 10:15 3 I'd -- I'd always try and do my best. But, you know, as  
 10:15 4 everybody knows, when you get tired, you maybe lose  
 10:15 5 focus.  
 10:15 6 Q. Right.  
 10:15 7 THE COURT: Just following up on that,  
 10:15 8 what's true of you, is true of everybody, right?  
 10:15 9 VENIREPERSON: Sure.  
 10:15 10 THE COURT: Everybody works.  
 10:15 11 VENIREPERSON: Yes.  
 10:15 12 THE COURT: A lot of people have jury  
 10:15 13 duty, right?  
 10:15 14 VENIREPERSON: Absolutely.  
 10:15 15 THE COURT: And so, if you are here 8  
 10:15 16 hours a day, how you spend the other 16 is your  
 10:16 17 business, right?  
 10:16 18 VENIREPERSON: Yes.  
 10:16 19 THE COURT: All right. Go ahead,  
 10:16 20 Mr. Goeller.  
 10:16 21 VENIREPERSON: Also, following along with  
 10:16 22 that, I also do have a family. So, it would,  
 10:16 23 weighing -- weighing that as well, it would -- it would  
 10:16 24 be tough, for that time period.  
 10:16 25 THE COURT: Just like everybody else has a

10:16 1 family, right?  
 10:16 2 VENIREPERSON: Well, not everybody but,  
 10:16 3 yeah, a lot of people do.  
 10:16 4 THE COURT: You have a one and a half year  
 10:16 5 old?  
 10:16 6 VENIREPERSON: Yes.  
 10:16 7 THE COURT: Great. Go ahead.  
 10:16 8 Q. (BY MR. GOELLER) I notice on your  
 10:16 9 questionnaire you are a relatively new dad. You have  
 10:16 10 been for about 15 months?  
 10:16 11 A. Yes.  
 10:16 12 Q. That's busy, huh?  
 10:16 13 A. It is busy.  
 10:16 14 Q. Yes.  
 10:16 15 A. Luckily a very good wife.  
 10:16 16 Q. Good for you. In the questionnaire,  
 10:16 17 Mr. Stratton -- oh, before I forget, you had mentioned  
 10:17 18 that there was another trip coming up in mid-October?  
 10:17 19 A. Yeah. Possibly two trips in October. And  
 10:17 20 neither one of them have been scheduled just because of  
 10:17 21 everything that's been happening with the airlines. But  
 10:17 22 we do have a rescheduling of my trip from last week  
 10:17 23 planned in mid-October, and then another trip to San  
 10:17 24 Francisco, October 10th.  
 10:17 25 Q. I think we're reasonably certain that this case

10:17 1 will go to mid-October. How would that affect you and  
 10:17 2 your business?  
 10:17 3 A. It would be difficult. I'd have to check  
 10:17 4 with -- we work with our distributor on those types of  
 10:17 5 events. I'd have to check with them, but most of them  
 10:17 6 are based on -- what the trips are are going out to  
 10:17 7 visit magazines, media outlets to promote our titles.  
 10:17 8 They are deadlines. We try and get coverage in the  
 10:18 9 holiday time frame when our products are coming out. So  
 10:18 10 it would -- it would -- it would be difficult.  
 10:18 11 Q. Okay.  
 10:18 12 A. But I would have to consult with them about  
 10:18 13 time lines and deadlines.  
 10:18 14 Q. And how would those time lines and deadlines  
 10:18 15 factor into your ability to be a juror in this case?  
 10:18 16 Say, you know, I think it's -- it's certainly -- I don't  
 10:18 17 think this case will be over by October 15th. It might  
 10:18 18 be, but I doubt it. Maybe even the next week. So  
 10:18 19 somewhere maybe around the 20th, 18th, 19th. What about  
 10:18 20 the deadlines and getting the product out for the  
 10:18 21 holidays if you are stuck up here?  
 10:18 22 A. Well, I mean, the products -- the product will  
 10:18 23 go out. You know, as I said, I'm the primary contact at  
 10:18 24 my company for -- for managing the PR and marketing  
 10:19 25 stuff. That would end up probably having to fall upon

10:19 1 our CEO who doesn't have the experience and doesn't have  
10:19 2 the general working relationships with our distributor.  
10:19 3 So it would -- it would probably affect our ability  
10:19 4 to -- to have the type of marketing and PR push that we  
10:19 5 normally would if I was there in a normal facet.

10:19 6 Q. Is any of that tied to your income?

10:19 7 A. I'm -- I'm bonused based on how well our  
10:19 8 products do. I am a salaried employee and not an hourly  
10:19 9 employee. So, I will still be paid, and I doubt I would  
10:19 10 be fired. But, it could -- it could affect -- affect  
10:20 11 bonus, possibly.

10:20 12 Q. In your questionnaire you, regarding your views  
10:20 13 on capital punishment, obviously you stated you believed  
10:20 14 in it. And you said, "I believe the death penalty is a  
10:20 15 reasonable punishment in some, but not all capital  
10:20 16 murder cases."

10:20 17 Give me your thoughts on that. Go a  
10:20 18 little bit deeper for me on some, but not all capital  
10:20 19 murder cases.

10:20 20 A. Did I actually say, "Some, but not all capital  
10:20 21 murder cases"?

10:20 22 Q. "In some, but not all capital murder cases."

10:20 23 A. I guess probably my thinking in writing that  
10:20 24 is, you know, it's hard. Just like talking to the  
10:20 25 prosecutor. You know, it's hard to think of all

10:20 1 possibilities -- all possibilities in a vacuum without,  
10:20 2 you know, without having examples, without having, you  
10:20 3 know, as much information as possible. And I try to be  
10:21 4 a type of person that has as much information as  
10:21 5 possible.

10:21 6 So -- so it's -- so I guess my thinking in  
10:21 7 saying, "some, but not all" maybe was -- was that, you  
10:21 8 know, there conceivably could be a situation that I  
10:21 9 can't think of right off the top of my head that maybe  
10:21 10 would warrant not, you know, not -- not imposing the  
10:21 11 death penalty.

10:21 12 Q. Okay. Along the same lines, your best argument  
10:21 13 in favor of the death penalty, you wrote: "There are  
10:21 14 cases where it is fair to impose a penalty that fits the  
10:21 15 crime." I think I understand that.

10:21 16 And your best argument in opposition to  
10:21 17 the death penalty, you put down, "innocent people put to  
10:21 18 death." I suppose that -- that is a very good argument  
10:21 19 against the death penalty. Kind of, I guess, a  
10:21 20 post-fact way. Hopefully not. I guess it happens.

10:22 21 Innocent people have been put to death. But if we took  
10:22 22 away the mere fact that -- that innocent people somehow  
10:22 23 end up on death row, can you come up with any other --  
10:22 24 have you ever thought about any other arguments against  
10:22 25 the death penalty outside of innocent folks being there?

10:22 1 A. Not particularly.

10:22 2 Q. Okay. And I understand that. Are you saying  
10:22 3 you basically, you -- you don't have any? You couldn't  
10:22 4 think of a reason, or you know of no reason to be  
10:22 5 against the death penalty?

10:22 6 A. I mean, people against death penalty for  
10:22 7 various -- various reasons. I wouldn't say that -- I  
10:22 8 mean, I can think of reasons that someone probably could  
10:23 9 be against it. Be it religious beliefs or just the fact  
10:23 10 that they wouldn't want to -- to be responsible for  
10:23 11 putting someone to death via being a juror or that they  
10:23 12 just don't believe that it's -- it's our place or that  
10:23 13 it's our -- our responsibility to -- to carry out that  
10:23 14 severe of a punishment.

10:23 15 Q. Okay. You wrote down that life confinement is  
10:23 16 appropriate in some capital murder cases. Tell me what  
10:23 17 your thoughts were when you chose between those.

10:23 18 A. Again, you know, I suppose I could probably  
10:23 19 come up with a hypothetical where, you know, again, just  
10:23 20 as the prosecutor has where there would be  
10:23 21 circumstances. You know, the example with the -- the  
10:23 22 father who kills the two men coming out of the  
10:23 23 courtroom. I mean, that kind of thing.

10:23 24 Again, a lot of circumstances would play  
10:24 25 into that, but it might not be appropriate in that type

10:24 1 of situation. And probably other situations that I  
10:24 2 might not be able to think of, again, off the top of my  
10:24 3 head.

10:24 4 Q. Okay. In response to -- there is this page in  
10:24 5 the questionnaire where you were given a phrase or an  
10:24 6 idea and you were asked to complete it or fill in the  
10:24 7 blanks, so to speak. The death penalty in Texas is  
10:24 8 reasonable punishment in certain murder cases. What  
10:24 9 were your thoughts there?

10:24 10 A. Generally the same as, you know, as -- as -- as  
10:24 11 the capital murder question. You know, again, I -- if I  
10:24 12 had the knowledge of every case and every potential case  
10:24 13 that I could probably be a little bit more definitive in  
10:24 14 my answer about that. But there are probably situations  
10:25 15 and circumstances that -- that would warrant, you know,  
10:25 16 either a -- either capital punishment or life  
10:25 17 confinement or --

10:25 18 Q. As a general proposition, not really getting  
10:25 19 into facts specific. But generally speaking, do you  
10:25 20 think capital punishment or death penalty is more  
10:25 21 appropriate across-the-board than life confinement?

10:25 22 A. In capital murder?

10:25 23 Q. Yes.

10:25 24 A. Yeah.

10:25 25 Q. Tell me why.

10:25 1 A. I just think, when -- when a person is  
10:25 2 convicted of -- of that type of crime, of taking someone  
10:25 3 or more than one person's life, my -- my tolerance level  
10:25 4 for that is pretty low.

10:25 5 Q. Okay.

10:25 6 A. And I think it, at that point when they've made  
10:26 7 the decision that -- that they -- that they have -- that  
10:26 8 their right is to take somebody else's life and that  
10:26 9 they have that ability and power and control, that as --  
10:26 10 as a society, we should make the same determination.  
10:26 11 And -- and they, if proven, that they lose -- that they  
10:26 12 lose that right to life as well.

10:26 13 Q. With that in mind and your feelings in general  
10:26 14 about this, does the defendant accused of capital murder  
10:26 15 really have a fair shot in you really considering those  
10:26 16 special issues?

10:26 17 A. Sure.

10:26 18 Q. Okay. Tell me why.

10:26 19 A. Because -- well, I mean, I would say I  
10:26 20 probably, you know, as you just asked me, I probably am  
10:27 21 more on the side of -- of if a -- if a person is accused  
10:27 22 of capital murder, I probably am more on the side of the  
10:27 23 death penalty as the appropriate.

10:27 24 But, you know, as I've also said, I can  
10:27 25 understand circumstances and other, you know, mitigating

10:27 1 factors that -- that -- that could influence that  
10:27 2 decision, and I think would influence that decision.

10:27 3 Q. When you -- when you hear the word and use the  
10:27 4 word mitigating factors, what kind of things come to  
10:27 5 mind?

10:27 6 A. Issues like, well, again to use the  
10:27 7 prosecutor's example, you know, a person who -- who, a  
10:27 8 father, for example in that example. Again, there's  
10:28 9 tons of factors that we haven't -- that we haven't  
10:28 10 thrown in there for the hypothetical, and that's always  
10:28 11 the problem with hypotheticals.

10:28 12 But I could imagine there being --  
10:28 13 being -- issues that come up that -- that would, I don't  
10:28 14 know, make -- make you -- make me more sympathetic. And  
10:28 15 I'm not sure if sympathetic is the right word because  
10:28 16 then it becomes an emotional thing. And it's not -- I  
10:28 17 wouldn't -- I wouldn't say that it's quite an emotional  
10:28 18 thing, but -- but that would lend you to believe that  
10:28 19 that person doesn't deserve to die.

10:28 20 Q. Okay. I guess the hypothetical that the State  
10:28 21 uses with the father --

10:28 22 A. Yeah.

10:28 23 Q. -- I guess that would come under circumstances  
10:28 24 of the offense. And that -- that special issue on top  
10:28 25 of their character, background, personal moral

10:28 1 culpability. What kind of things do you think they are  
10:29 2 getting at or come to mind when we talk about  
10:29 3 mitigating, outside of the offense, what are the --

10:29 4 A. And outside of the other stuff listed there?

10:29 5 Q. No. Inclusive of character, background and  
10:29 6 personal moral culpability.

10:29 7 A. What do I think they are getting at with  
10:29 8 mitigating?

10:29 9 Q. Yeah. What are your thoughts on what --

10:29 10 A. Basically their -- their life and their  
10:29 11 response to life leading up to that. The way they  
10:29 12 handle issues. The way they deal with people.  
10:29 13 Everything that's presented up to the point of the  
10:29 14 offense.

10:29 15 Q. Do you think there are mitigating circumstances  
10:29 16 that exist?

10:29 17 A. Yeah.

10:30 18 Q. What kind of things are you thinking?

10:30 19 A. That's a tough question. Specifically,  
10:30 20 probably, I don't know. You know, I suppose, growing up  
10:30 21 to an extent, their background and -- and -- and how  
10:30 22 they were -- how they were treated. How they have been  
10:30 23 treated, the types of issues they have had to deal with  
10:30 24 in their life. You know, I think -- I think all of that  
10:30 25 is mitigating and is -- is -- should -- can be and

10:31 1 should be considered. I think --

10:31 2 Q. Why do you think it should be?

10:31 3 A. -- it takes a lot of that to -- what?

10:31 4 Q. Why do you think it should be considered?

10:31 5 A. Because I think it's important. I think  
10:31 6 there's -- there's -- there's certain pieces of that --  
10:31 7 of that mitigating circumstances that -- that weigh  
10:31 8 heavier than others and -- and probably some of it  
10:31 9 shouldn't be considered at all or, you know.

10:31 10 I think there's a lot of people that --  
10:31 11 that make it through difficult circumstances in their  
10:31 12 life and -- and do just fine. So, again, I probably  
10:31 13 fall on the heavier hand side of that.

10:31 14 Q. Right.

10:31 15 A. But it's -- it certainly is something that, you  
10:31 16 know, when you are considering it, considering a severe  
10:31 17 penalty like that should be -- should be thrown into --  
10:31 18 thrown into the mix.

10:31 19 Q. You indicated that at one time, and I think you  
10:31 20 talked a little bit with the State about previous  
10:32 21 feelings about the death penalty. And you wrote down,  
10:32 22 "Always have thought it's reasonable for certain crimes,  
10:32 23 but it is something so serious my opinion always wavers  
10:32 24 of it." Tell me what you mean by that?

10:32 25 A. I would say I probably should have put, wavered

10:32 1 a bit. I've pretty much been a proponent, you know,  
 10:32 2 over the last -- I would say throughout my 20s. At  
 10:32 3 least since I was 21, 22. But, you know, it is -- it  
 10:32 4 is -- it is serious when you consider it.  
 10:32 5 Taking the life of another person is  
 10:32 6 something that I think, if anybody doesn't think about  
 10:32 7 it or -- or at least come up with counterarguments in  
 10:32 8 their head to discuss internally with themselves on, that  
 10:32 9 it's -- I mean, I think any rational person would think  
 10:32 10 of it and -- and at least, you know, consider both sides  
 10:33 11 of it. And I would say, I've probably, you know, over  
 10:33 12 the last five weeks thought about it more, as I've said.  
 10:33 13 Q. When you wrote, "My opinion always wavers a  
 10:33 14 bit." Wavering in what way?  
 10:33 15 A. Probably wavering in how -- how strongly I feel  
 10:33 16 about it. Again, like I've said, I've always been a  
 10:33 17 proponent of it. But within that, I would say, you  
 10:33 18 know, when you -- when you -- there's times where, you  
 10:33 19 think, is this -- is that -- is that really what we  
 10:33 20 should be doing? Is that the proper thing to be doing?  
 10:33 21 And, you know, I've always come back to the answer of,  
 10:33 22 yeah, I think it is.  
 10:33 23 Q. Okay. Then the -- the -- you've mentioned --  
 10:34 24 you've worked on -- on games, Doom and Quake. Is Doom  
 10:34 25 a -- is that *Doom Tomb* or something like that?

10:34 1 A. *Doom 2*?  
 10:34 2 Q. *Doom Tomb*.  
 10:34 3 A. No.  
 10:34 4 Q. I don't know anything about that kind of stuff.  
 10:34 5 What's the gist of those games? What are they really  
 10:34 6 all about?  
 10:34 7 A. They are shooting games. We call them first-  
 10:34 8 person shooters. You basically play a character on --  
 10:34 9 usually in some fight against evil or aliens or  
 10:34 10 something.  
 10:34 11 Q. I think I saw this once. Is it kind of in a  
 10:34 12 building, and a guy has all sorts of weapons. Guns,  
 10:34 13 shotguns --  
 10:34 14 A. Yep.  
 10:34 15 Q. -- grenade launchers. And you are actually --  
 10:34 16 you are actually blowing people away, I guess?  
 10:34 17 A. Yes.  
 10:34 18 Q. And blood, and it's pretty realistic.  
 10:35 19 A. Yeah.  
 10:35 20 Q. Is that marketed to children?  
 10:35 21 A. No. It depends on -- it depends on the rating  
 10:35 22 of the game. But we -- we are -- we volunteer to --  
 10:35 23 we -- we have a voluntary rating system that all games  
 10:35 24 are submitted to the ESRP. And if -- if a game is rated  
 10:35 25 mature, it is not marketed to children under 17.

10:35 1 Q. And then the -- is there a law, or how do the  
 10:35 2 stores enforce that?  
 10:35 3 A. Some stores have taken up checking IDs. Some  
 10:35 4 stores don't. We -- we -- we -- there's varying degrees  
 10:35 5 of opinion, as you can imagine, within the industry.  
 10:35 6 Q. I bet.  
 10:35 7 A. And within the retail industry. But, you know,  
 10:35 8 I'm -- I'm supportive of retailers checking IDs and, you  
 10:35 9 know, trying to keep the sales to children as minimal as  
 10:36 10 possible.  
 10:36 11 Ultimately, I think getting into that type  
 10:36 12 of thing and getting into government, you know, watch  
 10:36 13 groups and that sort of thing is dangerous. I'm  
 10:36 14 always -- I've always been a proponent of parents really  
 10:36 15 keeping track of their children. I think where we get  
 10:36 16 into issues with any type of thing is when parents don't  
 10:36 17 do their job.  
 10:36 18 Q. All right. Okay. Is there -- is there a  
 10:36 19 pretty good demand for that kind of stuff?  
 10:36 20 A. Yeah.  
 10:36 21 Q. It's high selling kind of stuff?  
 10:36 22 A. Yes.  
 10:36 23 Q. Big volume?  
 10:36 24 A. Generally, yeah.  
 10:36 25 Q. Do you have any questions for me?

10:36 1 A. No, not specifically.  
 10:36 2 MR. GOELLER: Thank you, sir.  
 10:36 3 VENIREPERSON: Thank you.  
 10:36 4 THE COURT: Okay. I'm going to ask you to  
 10:36 5 step down in a few minutes. We'll have you back.  
 10:36 6 (Venireperson Stratton not present.)  
 10:37 7 THE COURT: All right. What says the  
 10:37 8 State?  
 10:37 9 MS. FALCO: This juror is acceptable to  
 10:37 10 the State, Your Honor.  
 10:37 11 MR. GOELLER: Actually, Judge, I would --  
 10:37 12 I would actually move this juror for cause based on his  
 10:37 13 responses regarding the logistics of this trial. The  
 10:37 14 juror's flatly admitted he is not going to be a good  
 10:37 15 juror. Because he said, "I will be a tired juror." He  
 10:37 16 stated that, specifically seven to eight hours, and then  
 10:37 17 he came off that a little bit. It could be two to  
 10:37 18 three, but generally speaking, he would work a full day  
 10:37 19 after he works here.  
 10:37 20 I don't know why in the world we'd want to  
 10:37 21 put a juror on this jury. I can't imagine the other 11  
 10:37 22 folks, granted we all have families, we all have things  
 10:37 23 to do, but that's the first time I've ever heard a juror  
 10:37 24 say I'll put in a full day's work after here in his  
 10:37 25 prime time of his business marketing that stuff.

10:38 1 I just don't think he's going to be -- he  
10:38 2 could be a fair juror to either side when he tells the  
10:38 3 Court right from his lips, I'm going to be a tired juror  
10:38 4 in a capital murder case. So I think he's -- he's -- he  
10:38 5 will be physically impaired and therefore and mentally  
10:38 6 impaired from sitting as a juror. And so I'm going to  
10:38 7 move him for cause.

10:38 8 THE COURT: Denied. What says the  
10:38 9 defense?

10:38 10 MR. GOELLER: And then in light of the  
10:38 11 Court's ruling, I'll use a peremptory challenge, Your  
10:38 12 Honor.

10:38 13 THE COURT: All right. And I tell you  
10:38 14 what. The next person we're going to take up is out of  
10:38 15 order. She was scheduled for this afternoon. Her name  
10:38 16 is Amy Nguyen. And the reason I'm taking her up out of  
10:38 17 order is she's scheduled to see an oncologist this  
10:38 18 afternoon.

10:38 19 MS. FALCO: She might be disqualified,  
10:38 20 Your Honor.

10:38 21 THE COURT: She might be?

10:38 22 MS. FALCO: I believe she's currently on  
10:38 23 deferred adjudication for theft.

10:38 24 THE COURT: Oh, is she?

10:38 25 MS. FALCO: Which would be the same

10:38 1 situation as that juror that we had previously that was  
10:39 2 on deferred for --

10:39 3 THE COURT: Do you want to invite her in  
10:39 4 just to find out, or do you want to -- if you can  
10:39 5 confirm that.

10:39 6 MS. FALCO: Well, she got a six-month  
10:39 7 deferred back in April. So she should be on until  
10:39 8 October unless she got early release. She'd gone to law  
10:39 9 school. She may be smart enough to know you can get  
10:39 10 off.

10:39 11 THE COURT: She's got a year of law  
10:39 12 school, and she's single.

10:39 13 MR. GOELLER: Yeah, her questionnaire.

10:39 14 MR. HIGH: Doesn't mention a thing  
10:39 15 about --

10:39 16 MR. GOELLER: Nguyen, as the Court  
10:39 17 probably knows, Nguyen is the most common Vietnamese  
10:39 18 derivative name.

10:39 19 MS. FALCO: Her social security number is  
10:39 20 the same.

10:39 21 MR. GOELLER: Is it the same? I would  
10:39 22 like to confirm that.

10:39 23 THE COURT: Let's take no more than ten  
10:39 24 minutes and come back and invite Ms. Nguyen in, and then  
10:39 25 we'll move onto the next one.

10:39 1 THE BAILIFF: All rise.

10:39 2 (Break.)

10:56 3 THE COURT: All right. Are both sides  
10:56 4 ready? All right. Let's have Ms. Nguyen come in.

10:56 5 THE BAILIFF: Yes, Your Honor.  
10:56 6 (Venireperson Nguyen present.)

10:57 7 THE COURT: Hi, are you Amy Nguyen?

10:57 8 VENIREPERSON: Yes.

10:57 9 THE COURT: Perhaps you recall about a  
10:57 10 month ago, I swore in all 200 jurors.

10:57 11 VENIREPERSON: Uh-huh.

10:57 12 THE COURT: And the oath was to tell the  
10:57 13 truth to all the questions that were asked by the Court  
10:57 14 by both sides. Do you recall that?

10:57 15 VENIREPERSON: Yes.

10:57 16 THE COURT: You are still under that oath.  
10:57 17 If you'd be seated, I'd like to ask you a few questions.  
10:57 18 Do I understand you have an appointment with an  
10:57 19 oncologist this afternoon?

10:57 20 VENIREPERSON: Yes.

10:57 21 THE COURT: And I want to ask you some  
10:57 22 questions about that only as it relates to this matter.

10:57 23 VENIREPERSON: Yes, ma'am.

10:57 24 THE COURT: Have you been diagnosed with  
10:57 25 cancer?

10:57 1 VENIREPERSON: No. And I think that's why  
10:57 2 I'm coming back because he wants to do further testing  
10:57 3 still.

10:57 4 THE COURT: What's the nature of the  
10:57 5 problem.

10:58 6 VENIREPERSON: In my kidney.

10:58 7 THE COURT: And so it's --

10:58 8 VENIREPERSON: They found something, well,  
10:58 9 interesting for right now. And we haven't done a biopsy  
10:58 10 right now. So they -- that's why he wanted to speak to  
10:58 11 me. I really don't know about what.

10:58 12 THE COURT: You are seeing him?

10:58 13 VENIREPERSON: Yes.

10:58 14 THE COURT: And you are 25 years old?

10:58 15 VENIREPERSON: Yes.

10:58 16 THE COURT: Are you still unemployed?

10:58 17 VENIREPERSON: No. I am contracting out.

10:58 18 THE COURT: Where at?

10:58 19 VENIREPERSON: It's environmental. It's  
10:58 20 Environmental Services.

10:58 21 THE COURT: How long have you been there?

10:58 22 VENIREPERSON: Oh, just a couple weeks,  
10:58 23 like three weeks.

10:58 24 THE COURT: If you will spin around, the  
10:58 25 State would like to ask you some questions and then the

10:58 1 defense.

10:58 2 THE COURT: Ms. Falco?

10:58 3 MS. FALCO: Yes, sir.

10:58 4 VOIR DIRE EXAMINATION

10:58 5 BY MS. FALCO:

10:58 6 Q. Good morning, Ms. Nguyen.

10:58 7 A. Hi.

10:58 8 Q. And I guess, I don't mean to cut to the chase,  
10:58 9 but I'm going to ask you a couple questions initially  
10:58 10 because basically, the way you answer those questions,  
10:58 11 that might end our interview quickly. Otherwise I'll  
10:58 12 move on, and it will be a little bit lengthy.

10:58 13 I don't mean to be personal or embarrass  
10:58 14 you or pry, but I have to ask you about a situation that  
10:58 15 did appear on your questionnaire, but when we ran your  
10:58 16 criminal history, it showed up. I show on my criminal  
10:58 17 history that you had received deferred for theft?

10:58 18 A. Uh-huh.

10:58 19 Q. Are you still on deferred?

10:58 20 A. No. It ended in August, and that's the reason  
10:58 21 why because my attorney had said that it didn't show up  
10:58 22 as a conviction, and I guess I was confused about that  
10:58 23 question.

10:58 24 Q. And you are right. It doesn't. It's deferred.  
10:58 25 But if you had currently still been on deferred, that

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10:59 1 might have been a different issue.

10:59 2 A. It ended in mid-August.

10:59 3 Q. Okay. That's what I need to know. Okay. And  
10:59 4 I'm sorry to talk about that right away.

10:59 5 A. That's okay.

10:59 6 Q. Ms. Nguyen, obviously, this is your third time  
10:59 7 up here, and you understand that it's only in cases  
10:59 8 where the State is seeking the death penalty that we  
10:59 9 have this one-on-one individual voir dire. And I know  
10:59 10 you've got a little bit of background that shows you  
11:00 11 went to law school for year, so probably a lot of these  
11:00 12 terms we don't have to discuss in detail, or your  
11:00 13 understanding is better than the average person.

11:00 14 But as far as this process goes, when you  
11:00 15 first came in on that very first day, obviously at some  
11:00 16 point you realized this was a death penalty case. What  
11:00 17 were your initial thoughts back then that first day, a  
11:00 18 month ago when you realized it was a death penalty case?

11:00 19 A. Concerning what? Like about how --

11:00 20 Q. What were your thoughts regarding your  
11:00 21 involvement in the death penalty case?

11:00 22 A. To tell you the truth, I really didn't have any  
11:00 23 certain thoughts about it. I was just kind of going  
11:00 24 through the process, I guess.

11:00 25 Q. Have you ever had jury duty before?

11:00 1 A. No. So that's why. I really didn't know.

11:00 2 Q. Obviously, at some point in time you learned it  
11:00 3 was a death penalty case. And when you come in and fill  
11:00 4 out the questionnaire, you realize -- you fill them out  
11:00 5 without a whole lot of time for reflection. It's kind  
11:00 6 of what your gut instinct is.

11:01 7 And I know you probably had some time to  
11:01 8 think about it over the past month and what your  
11:01 9 thoughts are. And understanding it's one thing to be in  
11:01 10 favor of the death penalty to something that comes on  
11:01 11 the news. And you think that person should or should  
11:01 12 not get the death penalty.

11:01 13 It's a completely different ball game when  
11:01 14 you are saying, can you be involved in that process that  
11:01 15 could result in someone's death. Have you done some  
11:01 16 thinking about that in the past month?

11:01 17 A. I guess so, yes.

11:01 18 Q. When you filled out your questionnaire, you  
11:01 19 stated you were in favor of the death penalty, and that  
11:01 20 in the appropriate case you could return a verdict  
11:01 21 resulting in death?

11:01 22 A. Yes.

11:01 23 Q. Have you done some thinking about that?

11:01 24 A. Yes.

11:01 25 Q. Are you still in the same place, or have you

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11:01 1 wavered any?

11:01 2 A. No. I'm in the same place.

11:01 3 Q. And have you thought about -- have you thought  
11:01 4 about your involvement in whether or not you could be  
11:02 5 personally involved in a situation that could result in  
11:02 6 the death of a defendant?

11:02 7 A. How do you mean? What?

11:02 8 Q. Could you, if the facts were such, I mean,  
11:02 9 could you vote in such a way that resulted in a guilty  
11:02 10 verdict for capital murder? And could you answer the  
11:02 11 questions in such a way if the evidence showed that  
11:02 12 resulted in a death sentence?

11:02 13 A. I believe so.

11:02 14 Q. Okay. If you'll excuse me for just one minute.  
11:02 15 Tell me kind of why -- why you are in favor. You wrote  
11:02 16 down here, "I believe people are responsible for their  
11:02 17 actions and should be held accountable." Can you do  
11:02 18 some expanding on that, or why are you in favor of the  
11:02 19 death penalty?

11:02 20 A. Well, what I wrote is exactly how I feel. I  
11:03 21 just -- I think that's pretty clear about my feelings  
11:03 22 toward it. I think, well, if the facts do tend toward  
11:03 23 that he is guilty or if he is innocent, there --  
11:03 24 everyone should be accountable for their actions. And  
11:03 25 if -- and I believe in the death penalty. And if that's



11:03 1 one of the cases, then I think it's okay.  
 11:03 2 Q. Okay. What are your thoughts so far as far as  
 11:03 3 this process? Being this is the first time you've been  
 11:03 4 called to jury duty and probably everybody's number one  
 11:03 5 complaint about the criminal justice system is it's too  
 11:03 6 slow, and takes too long. Do you think we're being too  
 11:03 7 careful, too cautious, spending too much time in  
 11:03 8 selecting this jury in trying this case in a capital  
 11:03 9 murder case?  
 11:03 10 A. Well, I would think it would be necessary for  
 11:03 11 it to be a long process because I'm sure you want to  
 11:03 12 choose the right person, and I know that it always takes  
 11:04 13 a long time.  
 11:04 14 Q. Where did you go to law school?  
 11:04 15 A. Tulane.  
 11:04 16 Q. Tulane. And did you just lose interest after a  
 11:04 17 year or decide to pursue a different career path?  
 11:04 18 A. Well, I had family problems. So I left after  
 11:04 19 my -- well, in mid third semester. I was going to  
 11:04 20 return and transfer to UT this past fall, but I decided  
 11:04 21 against it.  
 11:04 22 Q. And you said, you were telling the Judge you  
 11:04 23 were currently working for an environmental services  
 11:04 24 firm?  
 11:04 25 A. Consulting. It's lake Phase I site

11:04 1 assessments, and Phase II site assessments.  
 11:04 2 Q. When you went to the law school, what was your  
 11:04 3 interest?  
 11:04 4 A. I went to Tulane because they had an  
 11:04 5 environmental law program.  
 11:04 6 Q. Environmental law is your major interest?  
 11:04 7 A. Well, environmental subjects remain my  
 11:04 8 interest. I'm thinking about going to grad school for  
 11:04 9 environmental policy instead.  
 11:04 10 Q. Okay. When you were a paralegal -- did you do  
 11:05 11 paralegaling or did you work for some law firms?  
 11:05 12 A. At Baron & Budd, yes. And a paralegal, yes.  
 11:05 13 Q. What type of law firms did you work in?  
 11:05 14 A. I mainly worked at Baron & Budd when I was in  
 11:05 15 Dallas. Well, I'm in Dallas now, but when I moved back  
 11:05 16 to Dallas, and it was asbestos litigation.  
 11:05 17 Q. So you never had any involvement with criminal  
 11:05 18 lawyers or --  
 11:05 19 A. No. They are just mainly toxic tort.  
 11:05 20 Q. Now, with regard to this jury selection, we're  
 11:05 21 going to talk about -- a little bit about the guilt-  
 11:05 22 innocence, but most of the time that we talked to you  
 11:05 23 it's going to be about the punishment phase.  
 11:05 24 And obviously we're not discounting or  
 11:05 25 trying to override the defendant's presumption of

11:05 1 innocence. It's just that we pick one jury that's going  
 11:05 2 to decide the guilt and if that's a guilty verdict, the  
 11:05 3 same jury is going to do punishment.  
 11:05 4 So necessarily we have to talk about  
 11:05 5 punishment at this time because it's our only  
 11:05 6 opportunity to talk about that and explore people's  
 11:05 7 views of the death penalty. If we wait until after the  
 11:05 8 guilty verdict, obviously it will be too late. So when  
 11:06 9 we start talking about the punishment phase, we're not  
 11:06 10 discounting the defendant's presumption. Do you  
 11:06 11 understand?  
 11:06 12 A. Yes.  
 11:06 13 Q. With regard to capital murder, you understand  
 11:06 14 it's murder plus some aggravating factor. And in this  
 11:06 15 case we're talking about murder in the course of  
 11:06 16 burglary or murder in the course of robbery or double  
 11:06 17 homicide. And obviously, as you understand, the burden  
 11:06 18 of proof is on the State, and it never shifts.  
 11:06 19 With regard to murder in the course of a  
 11:06 20 burglary, in your opinion, is that the type of a case  
 11:06 21 where the death penalty ought to at least be an option?  
 11:06 22 A. For the person that's doing the burglary?  
 11:06 23 Q. Right. Entering somebody's home and then  
 11:06 24 killing someone once they are inside the home, should  
 11:06 25 that be the type of case where the death penalty should

11:06 1 at least be an option?  
 11:06 2 A. Yes.  
 11:06 3 Q. And murder in the course of robbery. Is that  
 11:06 4 the type of case where the death penalty should at least  
 11:06 5 be an option?  
 11:06 6 A. Yes.  
 11:06 7 Q. And double homicide. Is that the type of case  
 11:07 8 where the death penalty should always be an option?  
 11:07 9 A. Yes.  
 11:07 10 Q. Assuming that all 12 jurors find the defendant  
 11:07 11 guilty of capital murder, you then move onto the  
 11:07 12 punishment phase. And as I explained a couple weeks  
 11:07 13 ago, when you get to the punishment phase of a capital  
 11:07 14 murder trial, it's not just automatic death, automatic  
 11:07 15 life.  
 11:07 16 You don't go back there and say life or  
 11:07 17 death depending on how you think it ought to come out.  
 11:07 18 You answer a series of questions. And it's the way you  
 11:07 19 answer those questions that results in a death sentence  
 11:07 20 or a life sentence.  
 11:07 21 And to be a qualified juror, to be a fair  
 11:07 22 juror, you have to be able to fairly answer the  
 11:07 23 questions based on the evidence and the law. And not  
 11:07 24 have a result that you want and answer the questions in  
 11:07 25 a way that achieve that result. Does that make sense?

11:07 1 A. Yes.  
 11:07 2 Q. And assuming you find a defendant guilty of  
 11:07 3 capital murder, the first question that you get to is  
 11:07 4 what we call the future dangerousness question. And  
 11:08 5 I'll go ahead and keep this down here. Can you see that  
 11:08 6 from where you are?

11:08 7 A. Uh-huh.

11:08 8 Q. And if you want to take a second to refresh  
 11:08 9 your memory.

11:08 10 A. Okay.

11:08 11 Q. And, again, with that question, the burden of  
 11:08 12 proof is on the State. We have to prove to you beyond a  
 11:08 13 reasonable doubt that there's a probability a defendant  
 11:08 14 will commit criminal acts of violence that constitutes a  
 11:08 15 continuing threat to society.

11:08 16 And now that question doesn't ask with a  
 11:08 17 certainty, will a defendant commit criminal acts of  
 11:08 18 violence? It doesn't say, you know, will he? It's not  
 11:08 19 asking for that. It's asking if there's a probability.

11:08 20 And that word probability is going to be  
 11:08 21 undefined for you as a juror. It's going to be up to  
 11:08 22 you to decide what that means. People that are  
 11:08 23 mathematically minded will say that's a number. That's  
 11:08 24 a percentage.

11:08 25 Other people would look at that and say,

11:08 1 well, that means more likely than not. But it's  
 11:08 2 something more than just a mere possibility because you  
 11:08 3 would agree with me that anything is possible?

11:08 4 A. Uh-huh.

11:08 5 Q. Is that fair to say?

11:09 6 A. Uh-huh.

11:09 7 Q. If it's raining outside, that rain could turn  
 11:09 8 to snow. It's not probable, but it's possible.  
 11:09 9 Anything is possible.

11:09 10 A. Uh-huh.

11:09 11 Q. So do you understand that that word probability  
 11:09 12 means something less than a certainty, but something  
 11:09 13 more than a possibility?

11:09 14 A. I can see that, yes.

11:09 15 Q. What does that word probability mean to you?

11:09 16 A. I guess like you had said. It's more of a  
 11:09 17 percentage to me.

11:09 18 Q. If you had to attach a number to that, what  
 11:09 19 would that be?

11:09 20 A. When you say -- well, when you say more likely  
 11:09 21 than not, I would say 51 percent.

11:09 22 Q. And going along in that question, in that  
 11:09 23 phrase, that you get to that again will not be defined  
 11:09 24 for you as far as telling you this is a criminal act of  
 11:09 25 violence. It's up to you as a juror to decide is it a

11:09 1 criminal act of violence?

11:09 2 And I think all of us would agree that  
 11:09 3 violence to a person, such as murder, aggravated sexual  
 11:10 4 assault, things like that, are violence, criminal acts  
 11:10 5 of violence.

11:10 6 It gets a little fuzzier when you start  
 11:10 7 talking about property. If I were to get very mad. I  
 11:10 8 had a real bad day at work today, and I were going to  
 11:10 9 take a baseball bat and go to the parking lot and start  
 11:10 10 smashing up windshields. In your opinion, is that an  
 11:10 11 act of violence?

11:10 12 A. Yes.

11:10 13 Q. It gets a little fuzzier still when you start  
 11:10 14 talking about drugs. And I'm talking about illegal  
 11:10 15 drugs such as cocaine, heroin, that type of thing. And  
 11:10 16 whether you are selling them or just taking them as a  
 11:10 17 person, some people may say, well, when you're taking  
 11:10 18 drugs in your body, it causes violence to your body. It  
 11:10 19 could cause you to overdose, do those kinds of things to  
 11:10 20 your body. And when you take those drugs, it could  
 11:10 21 change your personality. It could make you violent. It  
 11:10 22 could lead to violent results. Therefore, it's an act  
 11:10 23 of violence.

11:10 24 Other people may say, well, that's just  
 11:10 25 one person doing drugs. And if there's any violent

11:10 1 result, that's an indirect consequence. So in my  
 11:11 2 opinion, it's not an act of violence. Where do you fall  
 11:11 3 in that continuum?

11:11 4 A. I guess depending on the drug, I would think  
 11:11 5 that if they took the drug and they committed an act of  
 11:11 6 violence, it would be their responsibility.

11:11 7 Q. Okay. And then there's some things that are  
 11:11 8 clearly not acts of violence, like deserting the  
 11:11 9 military. And assuming you are not, you know, hitting a  
 11:11 10 sentry or a guard on your way out, you just desert the  
 11:11 11 military.

11:11 12 Or running from the police. If the police  
 11:11 13 tell you to stop, and you keep on running. Or if the  
 11:11 14 police tell you to get out of the car, and you don't get  
 11:11 15 out of the car. Not an act of violence, but would it  
 11:11 16 tend to show you somebody's character? Do you think  
 11:11 17 those type of things, they are not an act of violence --

11:11 18 A. Yes.

11:11 19 Q. -- would give you some insight into their care?

11:11 20 A. Yes.

11:11 21 Q. And understanding a little bit about their  
 11:11 22 character and their general lack of regard for authority  
 11:11 23 or lack of lawlessness, or, I guess, inherent  
 11:11 24 lawlessness, do you think that would help you answer  
 11:12 25 that question, whether or not there's a probability that

11:12 1 they would be a future danger?

11:12 2 A. If -- so you are saying that inherent acts of  
11:12 3 lawlessness, if there would be a probability that they  
11:12 4 would commit a future --

11:12 5 Q. Would it help you answer that question in  
11:12 6 determining if there's a probability of them committing  
11:12 7 criminal acts of violence?

11:12 8 A. I guess it would depend on the situation. But  
11:12 9 yeah, maybe, yes.

11:12 10 Q. How about wife beating? Like somebody that  
11:12 11 beats their wife and more than one wife. Let's say they  
11:12 12 have been married two or three times or there's  
11:12 13 girlfriends in there, and they've abused all of them.  
11:12 14 What does that tell you about a person?

11:12 15 A. I would say that that would definitely give you  
11:12 16 a character study.

11:12 17 Q. Would that help you answer that question if  
11:12 18 there's probability of criminal acts violence in the  
11:12 19 future?

11:12 20 A. Yes, I think it would.

11:12 21 Q. And there's some people that are more tolerant  
11:12 22 of spousal abuse, whether they have been a victim  
11:12 23 themselves and stayed in it and can understand it or  
11:12 24 grew up with it. Maybe had parents that way that are  
11:13 25 more tolerant. Whereas other people are like, I don't

11:13 1 understand that at all. Where do you fall in that  
11:13 2 continuum?

11:13 3 A. Well, I personally haven't been affected by it,  
11:13 4 but I feel strongly about it.

11:13 5 Q. Against it or?

11:13 6 A. Against it.

11:13 7 Q. Against it?

11:13 8 A. Yes.

11:13 9 Q. And the last phrase or the last word that you  
11:13 10 get to that's going to be undefined for you, and it's  
11:13 11 going to be debated is that word "society." And you are  
11:13 12 not going to be given a definition of that word. It  
11:13 13 includes prison society. But I don't think that  
11:13 14 question limits itself to prison society.

11:13 15 I don't -- they could have worded the  
11:13 16 question, would he be a continuing threat to the prison,  
11:13 17 or would he be a continuing threat to prison society,  
11:13 18 but the question doesn't limit itself.

11:13 19 Society definitely includes prison because  
11:13 20 the prison is paid for by the taxpayers. And we send  
11:13 21 our civilians in there as guards, as ministers, as  
11:13 22 doctors, and there's definitely civilians working in  
11:14 23 there and paid for by our tax money. So, therefore,  
11:14 24 it's part of our society. But I think that word society  
11:14 25 can also include -- what if this person was your next

11:14 1 door neighbor? Would you have concerns if they were  
11:14 2 your neighbor?

11:14 3 A. I agree.

11:14 4 Q. Would you have concerns if this person was  
11:14 5 dating your sister?

11:14 6 A. I agree.

11:14 7 Q. You agree with that. Now, with regard to this  
11:14 8 question, what type of evidence would you want to see?  
11:14 9 Obviously, this is the punishment phase. You've already  
11:14 10 heard everything about the facts of case. Now, you are  
11:14 11 in the punishment phase. What type of evidence would  
11:14 12 you like to see to answer this question?

11:14 13 A. I haven't really thought about that because I  
11:14 14 really don't have any of the facts of the -- I haven't  
11:14 15 really thought about that. I don't think I could answer  
11:14 16 that question.

11:14 17 Q. Well, in just looking at this question in  
11:14 18 general and knowing just all the life experiences you  
11:14 19 have and education that you had, do you think you could  
11:15 20 look at a fact situation and look at a person's  
11:15 21 background and character and the crime they committed  
11:15 22 and be able to answer that question?

11:15 23 A. Oh, yes, I believe so.

11:15 24 Q. Just like if you went to the circus with your  
11:15 25 family, and you had young nieces and nephews there. And

11:15 1 one of the tigers got loose and started running around  
11:15 2 the arena. You don't need a veterinarian to come in and  
11:15 3 say, grab those kids and get out of there because that  
11:15 4 tiger is dangerous, do you?

11:15 5 A. No.

11:15 6 Q. Kind of along the same lines, typically, and I  
11:15 7 don't know how familiar you are with capital murder  
11:15 8 cases, how closely you might have followed them. But  
11:15 9 typically in a capital murder case, one side or the  
11:15 10 other might call a psychiatrist or a psychologist to  
11:15 11 testify.

11:15 12 And assuming they are in testifying as to  
11:15 13 a mental disorder, mental defect or brain tumor, you  
11:15 14 know, on how it might impact or any kind of mental  
11:15 15 retardation. But assuming they are just coming in to  
11:15 16 talk about patterns of behavior.

11:15 17 I looked at his pattern of behavior, and,  
11:15 18 in my opinion, I think he's going to be dangerous or  
11:15 19 vice versa. I looked at his pattern of behavior, and I  
11:15 20 don't think he'll be dangerous. How important is that  
11:15 21 type of testimony to you?

11:15 22 A. I guess it could shed light on the probability.

11:15 23 Q. Do you see how one side can call in an expert  
11:15 24 to say one thing, and the other side can turn around and  
11:15 25 get an expert to say the opposite?

11:16 1 A. Oh, I understand that, yes.  
 11:16 2 Q. Now, with regard to that question, all 12  
 11:16 3 jurors have to answer that question yes for you to still  
 11:16 4 be in the process of assessing a death sentence. If 10  
 11:16 5 or more jurors say no, and the State didn't prove beyond  
 11:16 6 a reasonable doubt he's going to be a future danger,  
 11:16 7 then that's an automatic life sentence. The trial is  
 11:16 8 over. Okay? Assuming all 12 jurors say yes, you would  
 11:16 9 then move onto the next question up at the top. Can you  
 11:16 10 see that?

11:16 11 A. Uh-huh.

11:16 12 Q. Do you want to take a second to refresh your  
 11:17 13 memory?

11:17 14 A. Okay.

11:17 15 Q. And that's what we call the mitigation  
 11:17 16 question. Again, mitigation is a word. It's not going  
 11:17 17 to be defined for you, but typically means to reduce or  
 11:17 18 lessen. And in this situation to reduce or lessen the  
 11:17 19 defendant's blameworthiness or guiltiness.

11:17 20 A. Uh-huh.

11:17 21 Q. Now, with regard to this question, there's no  
 11:17 22 burden of proof on either side. This question is for  
 11:17 23 the jury. And it's for you to give whatever weight to  
 11:17 24 the evidence you decide to give it. You look at the  
 11:17 25 circumstances of the offense, you give it -- that may

11:17 1 have a lot of weight to you. That may have a little  
 11:17 2 weight. But you give it whatever weight you want to  
 11:17 3 give it.

11:17 4 You look at the defendant's character and  
 11:17 5 background, both good and bad. You take all that into  
 11:17 6 consideration and give that whatever weight you want to  
 11:17 7 give it. Any mitigating evidence you hear, you put it  
 11:17 8 all on the scales and you weigh it.

11:17 9 And the question is, after looking at all  
 11:17 10 the evidence, giving it the weight you want to give it,  
 11:18 11 is there sufficient mitigating evidence to warrant a  
 11:18 12 life sentence? And if so, then you answer that question  
 11:18 13 yes, resulting in a life sentence. Does that make sense  
 11:18 14 to you?

11:18 15 A. Yes.

11:18 16 Q. Does that seem fair that we do this in a  
 11:18 17 capital murder case, giving the jury an opportunity to  
 11:18 18 consider all of that evidence. And if there's something  
 11:18 19 there, if there's something that's -- you look at that  
 11:18 20 and you think, you know, that person doesn't deserve the  
 11:18 21 death penalty. That person deserves to live because of  
 11:18 22 that. This question gives you the opportunity to do  
 11:18 23 that. Does that seem fair?

11:18 24 A. It seems fair.

11:18 25 Q. And to be a qualified juror, you have to be

11:18 1 able to fairly answer this question, which means you got  
 11:18 2 to be able to keep an open mind and just not shut your  
 11:18 3 mind out and say, I'm just not even going to listen to  
 11:18 4 that. That doesn't matter to me. But just to sit there  
 11:18 5 and keep an open mind. Listen to the evidence and to  
 11:18 6 give it whatever weight you want to give it. Do you  
 11:18 7 think you could do that in this question?

11:18 8 A. I think so.

11:18 9 Q. Now, with regard to mitigating evidence, you  
 11:18 10 are not going to be given a list from the Judge that  
 11:19 11 says, here's a list of mitigating factors for you to  
 11:19 12 consider. It's going to be up to you to decide what is  
 11:19 13 mitigating, if it's mitigating at all. And some things  
 11:19 14 may be viewed as mitigating to one juror, and another  
 11:19 15 juror may see it as aggravating. And an example of that  
 11:19 16 is drugs.

11:19 17 One person may say, well, this person  
 11:19 18 never did drugs before, and they started taking them,  
 11:19 19 and it changed their personality. And they did this  
 11:19 20 crime while they were on drugs, but they don't do them  
 11:19 21 anymore, and they are better. And so that's mitigating  
 11:19 22 to me because that's not really the way they are.

11:19 23 Another person may say, no, as a society,  
 11:19 24 we're taught not to take drugs. And we're taught not to  
 11:19 25 take drugs because it can change our personality. It

11:19 1 can lead to violent results. And that person knew  
 11:19 2 better, and they still took the drugs. And so that is  
 11:19 3 aggravating to me. Where do you fall on that continuum?

11:19 4 A. Probably the second one, depending on the  
 11:19 5 drugs.

11:19 6 Q. It would be more aggravating?

11:19 7 A. Yeah.

11:20 8 Q. And as you can probably imagine, if any of us  
 11:20 9 were called upon, and we had to go to trial, we probably  
 11:20 10 all have something in our background, something in our  
 11:20 11 lives that's particularly heartbreaking or particularly  
 11:20 12 sympathetic. Maybe a single parent family, or there's  
 11:20 13 been abuse, whether it's physical or alcohol or sexual  
 11:20 14 abuse. Something that's heartbreaking in our life that  
 11:20 15 we could come up with, if we had to, and say, here's  
 11:20 16 some mitigating evidence.

11:20 17 So the question is not really: Is there  
 11:20 18 any mitigating evidence? It's putting it on the scale  
 11:20 19 with everything else you've seen and heard. Is it  
 11:20 20 sufficiently mitigating to warrant a life sentence?  
 11:20 21 Does that make sense to you?

11:20 22 A. Yes.

11:20 23 Q. Now, with regard to this question, do you  
 11:20 24 recall in the questionnaire, there were, there's a  
 11:20 25 one-page that gave you statements. And it had anything

11:20 1 from strongly agree to strongly disagree.  
 11:20 2 A. Uh-huh.  
 11:20 3 Q. Do you recall that question?  
 11:20 4 A. Yeah.  
 11:21 5 Q. And one of those statements was: Persons  
 11:21 6 determine their destiny or fate by choices they make in  
 11:21 7 life. And you put "strongly agree."  
 11:21 8 A. Uh-huh.  
 11:21 9 Q. Tell me what your thinking was on that.  
 11:21 10 A. I guess it goes to how you are just saying a  
 11:21 11 second ago, things that you do or things that you say  
 11:21 12 will determine a lot of things that happen.  
 11:21 13 Q. Okay. And comparing that, the very next  
 11:21 14 statement says: A person's destiny or fate is  
 11:21 15 determined by the circumstances of their birth and their  
 11:21 16 upbringing. And you put, "I disagree." And we probably  
 11:21 17 all can think of people that have come from bad  
 11:21 18 situations or bad family life or heartbreaking  
 11:21 19 incidences in their life that they were able to overcome  
 11:21 20 that and become successful in life.  
 11:21 21 And on the flip side, we can probably all  
 11:21 22 think of somebody who had everything. They had family.  
 11:21 23 They had both parents. They had material wealth.  
 11:22 24 Everything that a child could want to be happy, but yet  
 11:22 25 they still turned out rotten. Like the Menendez

11:22 1 brothers. That's a perfect example.  
 11:22 2 A. Uh-huh.  
 11:22 3 Q. Tell me what your thinking was when you put you  
 11:22 4 disagreed that someone's fate is determined by the  
 11:22 5 circumstances of their birth and their upbringing.  
 11:22 6 A. I think fate is -- I don't think there are like  
 11:22 7 any environmental -- well, there could be actually. But  
 11:22 8 I don't think, well, like you said, there are a lot of  
 11:22 9 people out there that do overcome difficulties in their  
 11:22 10 life.  
 11:22 11 And I think it's what is instilled in you  
 11:22 12 by your parents and your family. But I think there are  
 11:22 13 other circumstances, your friends, the people you hang  
 11:22 14 around with also help you decide what to do. But in the  
 11:22 15 end it's how you, as a person, act on anything at all.  
 11:22 16 Q. Okay. And that's kind of what that question  
 11:23 17 contemplates, is you taking into consideration all those  
 11:23 18 things you are going to hear and what weight you want to  
 11:23 19 give it. When it comes to character and background and  
 11:23 20 it could be bad character and bad background as well.  
 11:23 21 And you give that whatever weight you want to give that  
 11:23 22 as well.  
 11:23 23 With regard to that question, it seems to  
 11:23 24 focus, other than the phrase, circumstances of the  
 11:23 25 offense, it seems to focus on the defendant. The

11:23 1 defendant's character, defendant's background,  
 11:23 2 defendant's personal moral culpability. And I mentioned  
 11:23 3 this briefly a couple weeks ago about the victim and  
 11:23 4 whether that victim was a nun praying in church or a  
 11:23 5 drug dealer on the street.  
 11:23 6 Does it matter to you who the killer  
 11:23 7 kills, or is it more important the fact that he killed?  
 11:23 8 He's a killer, and that's the reaction he had was to  
 11:23 9 kill somebody?  
 11:23 10 A. I guess it would be the second. Of course,  
 11:24 11 like you said, or I don't remember who said. But if it  
 11:24 12 was a police officer, it would be entirely different.  
 11:24 13 Well, I guess it --  
 11:24 14 Q. Well, that would make it capital murder,  
 11:24 15 actually. Just by nature of it being a police officer.  
 11:24 16 A. Yeah. But I mean, well, what I'm saying is  
 11:24 17 like I guess, well, if it's his duty to defend himself,  
 11:24 18 and he can kill someone. But, yeah, I think it would  
 11:24 19 probably be the second. Because, like you said, I think  
 11:24 20 if a drug -- drug dealer killed another drug dealer, it  
 11:24 21 would still be the same to me.  
 11:24 22 Q. Just the fact that they killed, that they took  
 11:24 23 that step to kill as opposed to resolve their  
 11:24 24 differences.  
 11:24 25 A. Yes.

11:24 1 Q. And would it make a killer any less dangerous  
 11:24 2 based on who he -- does it make him less dangerous  
 11:24 3 because he killed a drug dealer or he killed a nun or,  
 11:24 4 no, just the fact that he's a killer and he's dangerous?  
 11:25 5 A. I think -- well, yeah, I mean, he's still a  
 11:25 6 killer. I think a lot of people probably were  
 11:25 7 sympathetic because it is a nun.  
 11:25 8 Q. Okay. Let's take that one step further. Let's  
 11:25 9 talk about the victim's family. Let's decide -- let's  
 11:25 10 assume that there is a person that decided they want to  
 11:25 11 live the good life, and they didn't want to have to work  
 11:25 12 for a living. So they are going to go rob a 7-Eleven,  
 11:25 13 and they are going to kill any witnesses that get in the  
 11:25 14 way because they want to get away with it.  
 11:25 15 So they decide on the way home from work  
 11:25 16 to stop at a 7-Eleven, and they go in and they rob the  
 11:25 17 clerk, and they take all the money, and they kill the  
 11:25 18 clerks so that there's no witnesses. They don't know  
 11:25 19 this person from Adam. They don't know if they have a  
 11:25 20 family or not. They don't know what impact his death  
 11:25 21 will have on the family.  
 11:25 22 And compare that to a person who decides  
 11:25 23 to rob a 7-Eleven in the neighborhood where he grew up.  
 11:25 24 And he picks that 7-Eleven because he knows that family,  
 11:25 25 and he knows them very well.

11:26 1 These are close friends of his that have  
 11:26 2 had him over for dinner and had him sleep over and have  
 11:26 3 loved him and supported him. But he also knows when  
 11:26 4 they work, and he knows how much money that they keep  
 11:26 5 behind the counter, and that's who he's going to choose  
 11:26 6 to rob. And he goes in, and he robs his friend. And as  
 11:26 7 soon as his friend gives him the money, he kills his  
 11:26 8 friend knowing how it's going to impact that friend's  
 11:26 9 family, this family that loved him. Is there a  
 11:26 10 difference in those two scenarios to you?

11:26 11 A. No.

11:26 12 Q. Still the fact that he killed is just what's  
 11:26 13 important?

11:26 14 A. In that situation, yeah.

11:26 15 Q. Do you have any nieces or nephews?

11:26 16 A. I will.

11:26 17 Q. You will?

11:26 18 A. Yeah, my sister is expecting.

11:26 19 Q. When is she expecting?

11:26 20 A. Actually, probably soon.

11:26 21 Q. Like within the month?

11:26 22 A. Yeah.

11:26 23 Q. Does she live locally or --

11:26 24 A. No. She lives in Minnesota.

11:26 25 Q. Were you planning on seeing her when the baby

11:26 1 was born?

11:26 2 A. Yes.

11:26 3 Q. Do you know when her due date is?

11:27 4 A. Her due date is the beginning of October.

11:27 5 Well, yeah, the beginning of October, but we think she's  
 11:27 6 probably going to be within the next couple weeks, two  
 11:27 7 weeks or so.

11:27 8 Q. So this is probably the first grandchild, first  
 11:27 9 niece or nephew for you?

11:27 10 A. Uh-huh.

11:27 11 Q. Let's assume -- do you know if it's a little  
 11:27 12 boy or a little girl?

11:27 13 A. It's a girl.

11:27 14 Q. Let's assume this little girl is born, and you  
 11:27 15 loved her very much. And when she got older, she got in  
 11:27 16 trouble. You can imagine you would probably still love  
 11:27 17 her and support her even though she got in trouble with  
 11:27 18 the law; is that correct?

11:27 19 A. Uh-huh.

11:27 20 Q. And if she needed you to testify as her aunt to  
 11:27 21 say, I love her and I support her, you would do that as  
 11:27 22 a loving aunt?

11:27 23 A. Uh-huh.

11:27 24 Q. Wouldn't you?

11:27 25 A. Yes.

11:27 1 Q. And you can imagine the same would be true for  
 11:27 2 somebody accused of capital murder, that they've  
 11:27 3 probably got a parent or a -- you know, somebody in  
 11:27 4 their family that loves them and supports them and is  
 11:27 5 willing to come testify for them.

11:27 6 A. I would hope so.

11:27 7 Q. Let's assume it was a mom. And all moms that  
 11:28 8 testify are going to take the stand and say, I love my  
 11:28 9 child. And because I love them, please don't kill my  
 11:28 10 child. How would that argument sit with you?

11:28 11 A. Well, I don't know if it would be an argument  
 11:28 12 because I guess I say I would hope he or she had someone  
 11:28 13 there to support him, but I think it would just be  
 11:28 14 support like for that person.

11:28 15 Q. Have you ever heard that phrase: There are no  
 11:28 16 atheists in foxholes? There's no atheists in wartime?

11:28 17 A. No.

11:28 18 Q. What do you think that phrase might mean?

11:28 19 A. There are no atheists in wartime?

11:28 20 Q. Yes.

11:28 21 A. I guess people tend to --

11:28 22 MR. SCHULTZ: Excuse me just a moment.

11:28 23 Judge, may we request a very brief recess?

11:28 24 THE COURT: All right. Ma'am, I'm going  
 11:28 25 to ask you to step out for just a few minutes, and we'll

11:29 1 call you back in a little bit.

11:29 2 VENIREPERSON: Okay.

11:29 3 (Venireperson Nguyen not present.)

11:29 4 THE COURT: All right.

11:29 5 MR. SCHULTZ: Sorry to interrupt, but I  
 11:29 6 think it's dispositive. Ms. Lowry has done some  
 11:29 7 investigating on the Tarrant County issue.

11:29 8 MS. LOWRY: Judge, we've talked to the  
 11:29 9 probation department -- or Kenneth Moore, up in our  
 11:29 10 office, has talked to the probation department over in  
 11:29 11 Tarrant County. Ms. Nguyen was apparently -- her  
 11:29 12 probation was modified June 1st of 2001 to nonreporting  
 11:29 13 status. However, her probation does not formally end  
 11:29 14 until October 12th.

11:29 15 THE COURT: Okay. Do you agree it's  
 11:29 16 dispositive?

11:29 17 MR. HIGH: Yeah.

11:29 18 MR. GOELLER: I think she's absolutely  
 11:29 19 disqualified as a juror because she's under legal  
 11:30 20 accusation for theft.

11:30 21 MR. SCHULTZ: Perhaps falsely, however.

11:30 22 MR. GOELLER: In addition, her having  
 11:30 23 committed perjury on two occasions, perhaps aggravated  
 11:30 24 perjury.

11:30 25 MR. SCHULTZ: In the alternative, would

11:30 1 you agree to excuse her by consent?  
 11:30 2 THE COURT: If you would, tell Ms. Nguyen  
 11:30 3 that she's finally excused, and ask Leslie Linden to  
 11:30 4 step in.  
 11:30 5 THE BAILIFF: Yes, Your Honor.  
 11:30 6 THE COURT: I've got to step down at  
 11:30 7 11:55.  
 11:45 8 (Discussion off the record.)  
 11:45 9 THE COURT: All right. I understand that  
 11:45 10 our efforts were fruitless; is that correct?  
 11:45 11 MR. GOELLER: Yes, sir.  
 11:45 12 THE COURT: Let's ask Leslie Linden to  
 11:45 13 come in.  
 11:46 14 (Venireperson Linden present.)  
 11:46 15 THE COURT: All right. Leslie Linden?  
 11:46 16 VENIREPERSON: Yes, I am.  
 11:46 17 THE COURT: Your face looks familiar. Did  
 11:46 18 we talk at the first -- at the first -- the first time  
 11:46 19 you came to court?  
 11:46 20 VENIREPERSON: No.  
 11:46 21 THE COURT: Okay. I just want to remind  
 11:46 22 you that when you did come to court that first time  
 11:46 23 there were about 200 of you.  
 11:46 24 VENIREPERSON: Yes.  
 11:46 25 THE COURT: I put everybody under oath.

11:46 1 And the oath was to answer truthfully to anything asked  
 11:46 2 by the Court or the attorneys. Do you recall that?  
 11:46 3 VENIREPERSON: Yes, I do.  
 11:46 4 THE COURT: You are still under that oath.  
 11:46 5 I want to ask you to be seated right here, and the  
 11:46 6 attorneys will ask you questions.  
 11:46 7 VENIREPERSON: Okay.  
 11:46 8 THE COURT: All right. Mr. Schultz?  
 11:46 9 MR. SCHULTZ: Yes, sir.  
 11:46 10 VOIR DIRE EXAMINATION  
 11:46 11 BY MR. SCHULTZ:  
 11:46 12 Q. Good afternoon.  
 11:46 13 A. Hi.  
 11:46 14 Q. My name is Bill Schultz. I'm one of the  
 11:46 15 assistant district attorneys representing the State of  
 11:46 16 Texas in its capital prosecution of Ivan Cantu. Next to  
 11:47 17 me is Ms. Gail Falco. And next to her is  
 11:47 18 Ms. Jami Lowry, and we're all three assistant district  
 11:47 19 attorneys representing the State in this case.  
 11:47 20 At the other table is the defendant Ivan  
 11:47 21 Cantu. And next to him in the middle is Mr. Don High,  
 11:47 22 and to your far right is Mr. Matt Goeller. Both of the  
 11:47 23 latter two gentlemen are very fine and honorable  
 11:47 24 attorneys engaged in the practice of law in Plano,  
 11:47 25 Texas.

11:47 1 I believe you don't know any of us; is  
 11:47 2 that correct?  
 11:47 3 A. No, correct.  
 11:47 4 Q. And you don't know the defendant?  
 11:47 5 A. Correct.  
 11:47 6 Q. Now, before we get into the very important  
 11:47 7 questions relating to the death penalty issues, I have  
 11:47 8 been instructed by my co-counsel to inquire of you how  
 11:47 9 much that star bed is that you have in -- it must mean  
 11:47 10 something to them. It means nothing to me.  
 11:47 11 A. I know exactly what they mean. I work at a  
 11:47 12 store called Just Little Western. And depends on if you  
 11:48 13 want it in a twin, queen or king size.  
 11:48 14 Q. We need to know about the king.  
 11:48 15 A. And you want it decorated? Okay. I think  
 11:48 16 it's -- I want to just off the top of my head, but, you  
 11:48 17 know, I am under oath. So I'm going to have to defer  
 11:48 18 for you to call later because I think it's about 500,  
 11:48 19 560, something like that.  
 11:48 20 Q. Is it shaped like a star? Is that why it's  
 11:48 21 called a star bed?  
 11:48 22 A. No. Actually it's a bed that's made out of --  
 11:48 23 I want to say pine. And she can decorate it with  
 11:48 24 cowhide in the star -- a shape of a star, or you can  
 11:48 25 have a cutter or whatever. Anyway, it's personalized

11:48 1 and decorated, but I don't own that store, so...  
 11:48 2 Q. Anything else?  
 11:48 3 MS. FALCO: That's it. Thank you.  
 11:48 4 VENIREPERSON: I'm glad to know that you  
 11:48 5 like it, though.  
 11:48 6 Q. (BY MR. SCHULTZ) What we're doing at this  
 11:48 7 point is an individual examination of the jury. And  
 11:49 8 it's not, when I say examination, I hope you are not  
 11:49 9 nervous because this ought to be relaxed. It's not --  
 11:49 10 I'm sure it's not delightful to anybody.  
 11:49 11 It's not fun to us, really, but it's a  
 11:49 12 process that's extremely fair and extremely American and  
 11:49 13 extremely open. And we encourage views, whatever they  
 11:49 14 are, and respect them. There's room -- there's room in  
 11:49 15 America for -- for everybody that's at least tolerant of  
 11:49 16 other people's views. And we are and Mr. Goeller is.  
 11:49 17 There are no right or wrong answers at all here.  
 11:49 18 And it's also possible that a person could  
 11:49 19 be absolutely fine as a juror in one type of case and  
 11:49 20 absolutely unable to be fair in another. Not that they  
 11:49 21 are unfair people but because either their background,  
 11:49 22 their upbringing or their special circumstances, there  
 11:49 23 is no way that they -- that the way they would approach  
 11:50 24 these cases would truly be based on the evidence. But  
 11:50 25 there would be constant influences of other stuff that

11:50 1 really wasn't evidence in this case. Does that make  
11:50 2 sense to you?

11:50 3 A. I, totally.

11:50 4 Q. And why I say that, I'm thinking to myself,  
11:50 5 suppose this were some crime in which a defendant were  
11:50 6 accused of kidnapping and assaulting a young child in a  
11:50 7 sexual kind of way.

11:50 8 Let's just say, suppose a juror came in  
11:50 9 who had had that when he or she was little, had that  
11:50 10 happen to them. Or perhaps had a child who had been  
11:50 11 abducted and those same things that would happen.

11:50 12 It's easy to say, why, sure. I could just  
11:50 13 follow the law and look at the evidence. But when you  
11:50 14 start thinking about it, I mean, that's big stuff. And  
11:50 15 that's stuff that it scars you for life. It certainly  
11:50 16 affects you for life, and to say that you could ignore  
11:50 17 it and that situation is silly. Don't you think?

11:50 18 A. I agree, in that exact situation, yes.

11:50 19 Q. Okay. I mean, I can't imagine. I mean, some  
11:50 20 day if we ever end up prosecuting -- if we ever  
11:51 21 apprehend a lot of people and start prosecuting them for  
11:51 22 what's happened in New York or in -- in Washington some  
11:51 23 day, they'll have to get juries for that, somebody  
11:51 24 that's in those buildings or had somebody in those  
11:51 25 buildings.

11:51 1 I mean, sure, they could say, I'll follow  
11:51 2 the law, and I'll be a robot about the evidence. But if  
11:51 3 they would be honest, how could you be? How could you,  
11:51 4 like, keep in your mind only -- only what's being  
11:51 5 presented as evidence and not worry about the result and  
11:51 6 all of that? Do you know what I'm saying?

11:51 7 A. I do. The only thing that I believe, however,  
11:51 8 and I have a very very firm belief of is that, as this  
11:51 9 man stands here, he's innocent until proven guilty.

11:51 10 Q. Right.

11:51 11 A. As is anyone who comes before any -- any jury.  
11:51 12 And so, again, it is a tragedy and all of us have  
11:51 13 mourned and cried over what has happened. However, when  
11:51 14 those people come and are before a jury trial, they have  
11:52 15 to be proven that they have conspired. But I do agree  
11:52 16 with you that certain life events can taint or can sway  
11:52 17 a jury member.

11:52 18 Q. Right. And there are probably very few things  
11:52 19 in our society about which people are so passionate that  
11:52 20 they would actually say, no matter what the law is, I'm  
11:52 21 going to be honest and tell everybody, I don't believe.  
11:52 22 Because of my personal views on a particular thing or my  
11:52 23 personal experience, no matter how hard I tried, that I  
11:52 24 would give it everything I had, there is no way that I  
11:52 25 could give fair consideration to all of the things that

11:52 1 are required.

11:52 2 Let me give you some examples. Obviously,  
11:52 3 I'm getting to the death penalty. Because on your  
11:52 4 questionnaire, that is certainly -- you've been  
11:52 5 forthright about it. And I respect, not only your  
11:53 6 views, but your willingness to just state your views,  
11:53 7 and you may keep that quiet to yourself. If you want to  
11:53 8 be, you can be the kind of juror that would just say the  
11:53 9 right things to me, and I would say, well, she would be  
11:53 10 fair to the State.

11:53 11 Next thing I know, you are on the jury,  
11:53 12 you know. And maybe because of your views you wouldn't  
11:53 13 be fair to the State. Do you follow what I'm saying?

11:53 14 A. I do.

11:53 15 Q. I'm not saying that. We're not there yet. I'm  
11:53 16 not saying that, but you have been honest about it, and  
11:53 17 I'm on notice that -- and I'll be frank with you.  
11:53 18 I'm -- just from your questionnaire answers, I'm already  
11:53 19 concerned about your ability to -- to look at our case  
11:53 20 fairly just because of your views of the death penalty.  
11:53 21 I'm wondering -- do you think that's a fair take on my  
11:53 22 part?

11:53 23 A. Of what points? Because if you -- to me, I'm  
11:53 24 very up front on -- I think that the death penalty is  
11:53 25 harsh. However, there are many cases where the death

11:53 1 penalty is the means of action.

11:54 2 Q. I'm sorry.

11:54 3 A. I mean, I am conservative. However, I think in  
11:54 4 certain instances, if somebody shoots somebody in the  
11:54 5 head at point-blank distance, then, yes, I think that --  
11:54 6 that that possibly would be a motive for the death  
11:54 7 penalty. As opposed to an instance where it's an  
11:54 8 accident, the revolver goes off and --

11:54 9 Q. Okay.

11:54 10 A. Do you see what I mean? There are certain  
11:54 11 instances where I would say, yes, a death penalty is  
11:54 12 warranted. Or somebody who has history of criminal  
11:54 13 actions with a gun or a history of crime where it has  
11:54 14 escalated, and you see the personality or their life in  
11:54 15 society as it unfolds.

11:55 16 Q. Okay. Let me tell you where I was coming from.  
11:55 17 And I hope you didn't -- I wasn't being critical when I  
11:55 18 said, I have some concerns because of your answers. If  
11:55 19 you took it that way, please don't, because that's not  
11:55 20 where I'm coming from. When you were asked: "Are you  
11:55 21 in favor of the death penalty," do you remember your  
11:55 22 answer to that?

11:55 23 A. I thought I said, yes.

11:55 24 Q. May I approach the --

11:55 25 A. Please let me see it, again. I want to tell



11:55 1 you when I walked in for this --  
 11:55 2 Q. I know.  
 11:55 3 A. -- I was quite shocked.  
 11:55 4 Q. I apologize. That's fine because a lot of  
 11:55 5 people --  
 11:55 6 A. Okay. Well, I do believe that there are  
 11:55 7 innocent individuals who are found guilty. And later,  
 11:55 8 yes, I do agree with this. However, at the same time, I  
 11:55 9 do find that as evidence, I guess it's more in the  
 11:55 10 evidence that is prepared in front of you. If the  
 11:55 11 evidence shows that -- that somebody shot -- shot,  
 11:56 12 sorry, a gun -- at point-blank range.  
 11:56 13 Q. Fired.  
 11:56 14 A. Okay. That's a good word. They fired a shot  
 11:56 15 at point-blank range, then my feeling is they have  
 11:56 16 crossed that barrier and have disdain or no feeling for  
 11:56 17 life of the person that they have -- they have done this  
 11:56 18 to.  
 11:56 19 Q. Okay. Can I stop you just a second?  
 11:56 20 A. Yes.  
 11:56 21 Q. You see that first question up there? Are you  
 11:56 22 in favor of death penalty? Do you see what you circled?  
 11:56 23 A. Yes.  
 11:56 24 Q. That's the first -- it's not critical. That's  
 11:56 25 what gives me concern. If a person says he or she is

11:56 1 not in favor of the death penalty, that doesn't make  
 11:56 2 them disqualified, of course.  
 11:56 3 A. I guess I used the word favor. Am I in favor  
 11:56 4 of it? No. I don't favor that means of action handed  
 11:56 5 out liberally or just nonchalantly. I think it has to  
 11:57 6 be extremely thought out. Extremely -- I guess I treat  
 11:57 7 life and the giving or taking of life very seriously.  
 11:57 8 So I'm not in favor of using the death penalty, but,  
 11:57 9 yes, in society it is needed.  
 11:57 10 Q. Okay. Well, do me a favor. Look down at the  
 11:57 11 next one. Kind of on that same first page there: Which  
 11:57 12 of the following statements best represents your  
 11:57 13 feelings about the death penalty?  
 11:57 14 And I think you'll see why I have some  
 11:57 15 concerns. See the one that you circled?  
 11:57 16 A. Yes.  
 11:57 17 Q. When someone says, I do not believe that the  
 11:57 18 death penalty should ever be imposed -- and we're  
 11:57 19 starting to communicate. You can see where I might  
 11:57 20 think this juror could be a problem for the State. Do  
 11:57 21 you follow?  
 11:57 22 A. Yes. My personal feeling is a lot of this is  
 11:57 23 so precise and so worded that it doesn't give you leeway  
 11:58 24 for certain exceptions or -- I'd -- like No. 4, I mean,  
 11:58 25 I could render -- I just never felt like any of these

11:58 1 were --  
 11:58 2 Q. Okay.  
 11:58 3 A. I mean, I guess -- I guess probably No. 2 would  
 11:58 4 have been better. But I use the word, I guess I look at  
 11:58 5 the word: Do I favor it? No. I don't favor that  
 11:58 6 method of choice.  
 11:58 7 Q. Okay. I'm with you. I mean, I'll bet you and  
 11:58 8 I would agree, we wish we didn't have to have -- we wish  
 11:58 9 we didn't live in a world where we even have to worry  
 11:58 10 about whether to have a death penalty or not.  
 11:58 11 A. Right.  
 11:58 12 Q. Kind of like war. I know we got to wish we  
 11:58 13 were in a place where we don't need attack aircraft and  
 11:58 14 things like that.  
 11:58 15 A. Right. Right. Yeah, in a favorable world none  
 11:58 16 of that would. And I guess -- I guess I probably should  
 11:58 17 have circled 2.  
 11:59 18 Q. Okay. Okay.  
 11:59 19 A. But I -- I would hesitate, or I don't want to  
 11:59 20 say hesitate. I would think very long and hard.  
 11:59 21 Q. I hope you would. I mean, contrary to what you  
 11:59 22 might expect from the prosecution, the object of this  
 11:59 23 trial is not to create an injustice for it to somehow  
 11:59 24 bamboozle the jury with running along with us and doing  
 11:59 25 our bidding. That's not the object. This is a

11:59 1 democracy. And if what we're doing is right, 12 people  
 11:59 2 are going to know it and vote that way.  
 11:59 3 THE COURT: Mr. Schultz, even though this  
 11:59 4 is a democracy, I must assert my own prerogative. I  
 11:59 5 tell you what, we're going to break for lunch. And I'm  
 11:59 6 going to ask you to come back at 12:45, and we'll  
 11:59 7 continue with this. So you can grab a real quick bite  
 11:59 8 someplace.  
 11:59 9 VENTIREPERSON: Okay. Thank you.  
 11:59 10 THE COURT: We'll be back and continue at  
 11:59 11 12:45.  
 11:59 12 THE BAILIFF: All rise.  
 12:00 13 (Lunch break.)  
 12:00 14 (Open court, defendant present.)  
 12:56 15 THE COURT: Do we have anything to say?  
 12:56 16 MR. SCHULTZ: I've got something quickly  
 12:56 17 to put on the record.  
 12:56 18 THE COURT: All right.  
 12:56 19 MR. SCHULTZ: It's small, but Ms. Lowry  
 12:56 20 will address the Court.  
 12:56 21 MS. LOWRY: Just for the record purposes,  
 12:56 22 as I was coming back up from lunch, the juror who had  
 12:56 23 been on the stand previously was talking out with a  
 12:56 24 transfer staff when I walked by. She mentioned to me  
 12:57 25 that she did check on the bed to see how much it was and

12:57 1 just kind of engaged me in that conversation. And I  
12:57 2 said, thank you. It's nice, and I walked off. It  
12:57 3 wasn't anything other than that.

12:57 4 THE COURT: How much is it?

12:57 5 MS. LOWRY: 610.

12:57 6 THE COURT: Okay. Well, with your  
12:57 7 handsome salary, it will be a piece of cake.

12:57 8 MR. SCHULTZ: Cow skin is extra, though.

12:57 9 MS. LOWRY: I don't like the cow skin.

12:57 10 THE COURT: All right.

12:57 11 MR. GOELLER: Yes, Your Honor. I need to  
12:58 12 make a few motions and put a few things on the record.  
12:58 13 Your Honor, first of all, in regards to Juror No. 122,  
12:58 14 that would be.

12:58 15 THE COURT: Shala Jones.

12:58 16 MR. GOELLER: Yeah. Juror Shala Jones, we  
12:58 17 were given a fax that she sent to the Court, and we'd  
12:58 18 ask that that fax be made part of the record in this  
12:58 19 case.

12:58 20 THE COURT: All right. I tell you, she's  
12:58 21 not here today.

12:58 22 MR. GOELLER: I understand.

12:58 23 THE COURT: And she is coming up later.

12:58 24 MR. GOELLER: Yes, I understand.

12:58 25 THE COURT: Go ahead.

12:58 1 MR. GOELLER: And I have been given a  
12:58 2 proposed schedule of individual voir dire for the week  
12:58 3 starting Monday, September 24th. And I would ask that  
12:58 4 the proposed voir dire schedule be made a part of the  
12:58 5 record, as well, and may that be part of the record,  
12:58 6 Your Honor.

12:58 7 THE COURT: Yeah. This -- this last  
12:58 8 piece?

12:58 9 MR. GOELLER: Yes, sir.

12:58 10 THE COURT: Yeah, sure.

12:59 11 MR. GOELLER: The one I was handed to by  
12:59 12 court staff just about five minutes ago.

12:59 13 THE COURT: Yeah, sure.

12:59 14 MR. GOELLER: And I noticed that on that  
12:59 15 voir dire schedule for the week of September 24th that  
12:59 16 Ms. Shala Jones is scheduled to appear for individual  
12:59 17 voir dire on Thursday, September 27th.

12:59 18 THE COURT: Right.

12:59 19 MR. GOELLER: The Court -- or the defense  
12:59 20 notes that she is a No. 1 and would also note that the  
12:59 21 fax that she sent to the Court indicates a strong desire  
12:59 22 not to serve on this jury. Or at least indicates a  
12:59 23 strong desire not to serve during pertinent times that  
12:59 24 this case would most likely be in trial.

12:59 25 In any event, Judge, at this time, as soon

13:00 1 as we're done with the present juror that's on the  
13:00 2 witness stand, Ms. Leslie Linden, we would ask for a  
13:00 3 brief recess until Thursday, September 27th, so that we  
13:00 4 may take Juror No. 122, Shala Jones, in order.

13:00 5 The reason we ask for this brief recess,  
13:00 6 Your Honor, is because, as the Court's well aware and  
13:00 7 the record certainly reflects that we have only one  
13:00 8 peremptory strike remaining, we have looked at the order  
13:00 9 of the last -- the jurors that have appeared before the  
13:00 10 Court, the last few days of the upcoming days. And we  
13:00 11 have arrived at a strategy and formed certain opinions  
13:00 12 as to how we are going to make an intelligent use of our  
13:00 13 peremptory strikes. We have some reservations about  
13:01 14 Juror No. 27, and we were perhaps --

13:01 15 THE COURT: Hey, wait a minute. There's  
13:01 16 no Juror No. 27.

13:01 17 MR. GOELLER: I'm sorry, Juror No. 122,  
13:01 18 Shala Jones -- thank you, Your Honor -- scheduled for  
13:01 19 Thursday, September 27th. And in our overall strategy,  
13:01 20 we have to be concerned about that juror based on her  
13:01 21 questionnaire, based on the facts she has sent to the  
13:01 22 Court. And if we are going to take her out of order, we  
13:01 23 would object.

13:01 24 And we object on the grounds that it  
13:01 25 violates my client's 14th Amendment due process rights

13:01 1 and Article I, Section 3, Section 19, and Section 10 of  
13:01 2 the Texas Constitution because now, by taking her out of  
13:01 3 order, to our detriment, we are not able to exercise our  
13:02 4 remaining peremptory strike in an intelligent manner.

13:02 5 And based on that, it would violate my  
13:02 6 client's rights under the United States Constitution and  
13:02 7 the Texas Constitution. Specifically, Amendment 14 of  
13:02 8 the U.S. Constitution and Article I, Section 3, Section  
13:02 9 19, Section 10 of the Texas Constitution and Article  
13:02 10 1.04 of the Code of Criminal Procedure.

13:02 11 THE COURT: Say, what's the date on that  
13:02 12 memorandum from Shala Jones?

13:02 13 MR. GOELLER: September -- it says on the  
13:02 14 fax cover sheet, September 17th.

13:02 15 THE COURT: All right.

13:02 16 MR. GOELLER: 2001.

13:02 17 THE COURT: And that's the same day that I  
13:02 18 gave it to you folks. So y'all have had it since that  
13:02 19 time, and I also indicated several days ago that we  
13:02 20 could do Shala Jones, 25th, 26th, and 27th, and asked  
13:02 21 you if there was a preference to which there was no  
13:02 22 preference. Thus, the list and the schedule.

13:03 23 So you've had ample opportunity to  
13:03 24 complain about where she fits. But I tell you what?  
13:03 25 Where do you want to put her? Where do you want to put

13:03 1 her? What day? What's the first day she's going to be  
13:03 2 back? Yeah, and I don't have the memorandum in front of  
13:03 3 you right now. I can get it if you are having trouble  
13:03 4 with it. Give me a copy of that memorandum.

13:03 5 THE BAILIFF: Yes, Your Honor.

13:03 6 THE COURT: Does the State have their  
13:03 7 copy? Let me see your copy.

13:03 8 MR. GOELLER: Yes, sir.

13:03 9 THE COURT: Okay. She's going to be gone,  
13:03 10 now she was scheduled to be out of town the 28th through  
13:04 11 the 1st. And she asked to be assigned. She would have  
13:04 12 come in on September 21st, but she faxed us on September  
13:04 13 17th and said that she requested, because of business  
13:04 14 arrangements, to be rescheduled. And for several days  
13:04 15 prior to the 21st, I brought up Shala Jones's name and  
13:04 16 was told by both sides we still had ample time to take  
13:04 17 up her matter.

13:04 18 And, finally, I suppose it was -- it was  
13:04 19 within the last couple of days that, in fact, I guess it  
13:04 20 was on -- yeah, it was yesterday. We finally indicated  
13:04 21 she could be scheduled 25th, 26th, 27th to accommodate  
13:04 22 her vacation. There was nothing from either side at  
13:04 23 that point. But I'll tell you what, we can -- we can  
13:04 24 move her up to the -- we can move her up to the -- to  
13:05 25 the 24th, I guess.

13:05 1 MR. GOELLER: Judge, part of -- part of my  
13:05 2 concern is yesterday the Court told us that we would --  
13:05 3 the order of -- the batting order of today, so to speak,  
13:05 4 would have been Stratton, Linden, Jones, Nguyen, Peters,  
13:05 5 and Odom.

13:05 6 THE COURT: All right.

13:05 7 MR. GOELLER: And that Jones being 122,  
13:05 8 Shala Jones.

13:05 9 THE COURT: Weren't you here when we said  
13:05 10 we were rescheduling her? Shala Jones?

13:05 11 MR. GOELLER: I'm sure I was, Your Honor.  
13:05 12 The last thing the Court told me last, I was never -- I  
13:05 13 don't recall where she was going to be put in. But I  
13:05 14 know the Court said, at the close of business yesterday,  
13:06 15 that's who we are going to do today.

13:06 16 THE COURT: That's where she was  
13:06 17 originally scheduled. But if you read the memorandum,  
13:06 18 she asked to be rescheduled and we did. And I  
13:06 19 specifically said we could do her the 25th, the 26th,  
13:06 20 and the 27th. So here -- here is what I'm telling you.

13:06 21 Today is the 21st, I'm not going to ask  
13:06 22 her to come in today because I've allowed her to do her  
13:06 23 business thing today. But if you are that concerned  
13:06 24 about it, then we'll bring her in Monday afternoon.  
13:06 25 We'll have her come in Monday afternoon. And will that

13:06 1 make you happy, Mr. Goeller?

13:06 2 MR. GOELLER: Would that -- if she, if  
13:06 3 we're going to go -- if she's brought in Monday, and  
13:06 4 she's the next juror we do after this one, yes, Your  
13:06 5 Honor.

13:06 6 THE COURT: Okay.

13:07 7 THE COURT: All right. Then, Billy, get  
13:07 8 ahold of Janie and tell her to call Ms. Shala Jones and  
13:07 9 tell her that she's been rescheduled from the 27th when  
13:07 10 she was expected to come in Monday afternoon at one  
13:07 11 o'clock. All right. Is there anything else from either  
13:07 12 side?

13:07 13 MR. SCHULTZ: Just to be sure, so there  
13:07 14 isn't any problem, the fact that, I guess, she's still  
13:07 15 out of order. It's just that she is not going to get  
13:07 16 any more out of order.

13:07 17 THE COURT: No. And I tell you what,  
13:07 18 she's out of the order at this point with the agreement  
13:07 19 of both sides.

13:07 20 MR. SCHULTZ: I just want to make sure  
13:07 21 that the Court's correct in that assumption.

13:07 22 THE COURT: Yeah. That she's going to be  
13:07 23 taken up on Monday?

13:07 24 MR. SCHULTZ: No. That they don't have  
13:07 25 any complaint about the fact that she's out of order.

13:07 1 It's just that they had a complaint about waiting until  
13:07 2 Thursday for her. What I see is the problem in this --  
13:07 3 and it's not critical -- as I see the problem, their  
13:08 4 position could be, well, we had to take an unacceptable  
13:08 5 juror knowing we're down to our last strike because  
13:08 6 we're worried about Ms. Jones not getting kicked as a  
13:08 7 one, and, therefore, they say we need an extra  
13:08 8 peremptory challenge to cover the situation we were in  
13:08 9 to which we didn't agree. That being, taking her out of  
13:08 10 order and forcing us to make a strike decision thinking  
13:08 11 about her in the back of their mind.

13:08 12 I guess all I'm saying is, if the  
13:08 13 complaint, come Monday, is still going to be she's still  
13:08 14 out of order because we've been doing some 150s before  
13:08 15 we were doing some 120s, I'd like us to know about that  
13:08 16 so we can at least be thinking protectively of the  
13:08 17 record and thinking of a way to -- to thwart that avenue  
13:08 18 of opportunity.

13:08 19 THE COURT: But that's what I understand.  
13:08 20 You are going to be happy if she's scheduled first thing  
13:08 21 Monday afternoon?

13:08 22 MR. GOELLER: Yes, sir.

13:08 23 THE COURT: So, and let me add something  
13:09 24 else just to add to the scenario, just so it's real  
13:09 25 clear. I asked both sides, if all sides would be

13:09 1 agreeable to striking all the ones and the fives. The  
 13:09 2 State said they would be happy to do it. The defense  
 13:09 3 didn't want to do it. So if the -- if the defense  
 13:09 4 doesn't want to get rid of the ones and the fives,  
 13:09 5 that's fine with me. All right.

13:09 6 Would you tell Janie to bring Ms. Shala  
 13:09 7 Jones in at one o'clock on Monday?

13:09 8 THE BAILIFF: Yes, Your Honor.

13:09 9 THE COURT: In fact, just tell her to come  
 13:09 10 in. I'd rather tell her myself.

13:09 11 Say, for the record, when we're talking  
 13:09 12 about ones and fives, what we're talking about is the  
 13:10 13 questionnaire that the jurors answered. And on the very  
 13:10 14 first page of every questionnaire are five questions,  
 13:10 15 numbered 1, 2, 3, 4, 5. And ones and fives are people  
 13:10 16 that circled either question No. 1 or question No. 5,  
 13:10 17 which have to do with their feelings on the death  
 13:10 18 penalty. We're going to move Shala Jones from September  
 13:10 19 27th to Monday at one o'clock. All right. Is there  
 13:10 20 anything else to put on the record before we start?

13:10 21 MR. SCHULTZ: No, Judge.

13:10 22 THE COURT: Let's get Ms. Leslie Linden  
 13:10 23 back in here.

13:11 24 THE COURT: Ms. Linden, I just want to  
 13:11 25 tell you you are still under oath.

13:11 1 VENIREPERSON: Thank you.

13:11 2 THE COURT: Did the State -- have you  
 13:11 3 passed?

13:11 4 MR. SCHULTZ: No, Your Honor.

13:11 5 THE COURT: Go ahead.

13:11 6 MR. SCHULTZ: You informed us that  
 13:11 7 democracy was over.

13:11 8 THE COURT: All right. The democracy is  
 13:11 9 back in effect.

13:11 10 MR. SCHULTZ: Thank you.

13:11 11 VOIR DIRE EXAMINATION (CONT'D)

13:11 12 BY MR. SCHULTZ:

13:11 13 Q. Kind of on the same subject what I told you  
 13:11 14 earlier, just from the answers, I think I got one take  
 13:11 15 on you about the death penalty. And what you are saying  
 13:12 16 now, I don't get the same feeling from you --

13:12 17 A. Okay.

13:12 18 Q. -- as the answers. When asked for the best  
 13:12 19 argument in favor of the death penalty, you said  
 13:12 20 "extreme premeditated." You didn't know. And you put,  
 13:12 21 "I don't agree with the death penalty."

13:12 22 A. I think honestly, when -- when I came to jury  
 13:12 23 duty, I just assumed it was, you know, not quite. It  
 13:12 24 was -- I totally assumed it wouldn't be as serious. And  
 13:12 25 then I think, once it was explained, I think I was quite

13:12 1 shocked at kind of this -- what was before me and the  
 13:12 2 responsibility of it.

13:12 3 I -- I truly believe that the death  
 13:12 4 penalty is extremely harsh. I think it only in extreme  
 13:12 5 cases is when it should be used. I don't necessarily --  
 13:12 6 I don't like the death penalty. I don't agree with it  
 13:13 7 in cases where there's any doubt that -- and I mean, I  
 13:13 8 guess, with forensic evidence, proof, just beyond a  
 13:13 9 shadow of a doubt for myself. Because I -- and I guess  
 13:13 10 that's where I say, I don't believe in it unless extreme  
 13:13 11 measures are needed. I -- it's very -- it's a very very  
 13:13 12 serious decision.

13:13 13 And in some cases, if there are doubts,  
 13:13 14 then life imprisonment is more of an avenue that I would  
 13:13 15 favor than in evidence -- than having somebody put to  
 13:13 16 death because of their actions. Does that make sense,  
 13:13 17 or am I going around in circles?

13:13 18 Q. That sounds like about what you might hear from  
 13:14 19 11 other people if you became the 12th juror in this  
 13:14 20 case. That nobody -- nobody but a ghoul, some fiend,  
 13:14 21 perhaps a savage would like the death penalty, that  
 13:14 22 would think that's wonderful. I doubt if the  
 13:14 23 executioners enjoy doing it.

13:14 24 I mean, I know we all look at work that  
 13:14 25 satisfies us and provides meaning. I hope that's not

13:14 1 the only job they do down there. Because I wouldn't  
 13:14 2 think anybody -- they wouldn't be very busy. We don't  
 13:14 3 do a whole lot of them numerically, I guess.

13:14 4 A. I guess I just feel, you know, if somebody  
 13:14 5 confesses to it.

13:14 6 Q. Right.

13:14 7 A. So it's blatant evidence or evidence that draws  
 13:14 8 you straight to that conclusion. Period.

13:14 9 Q. Uh-huh.

13:14 10 A. Those are instances where in society, them  
 13:14 11 being allowed to just -- even if it's the 40 years.

13:14 12 Q. Uh-huh.

13:14 13 A. That they will be able to go back into society.  
 13:15 14 And you need to really evaluate what that life  
 13:15 15 imprisonment means versus the death penalty.

13:15 16 Q. Okay.

13:15 17 A. Okay.

13:15 18 Q. Here's what I'm -- here's what I think I'm  
 13:15 19 hearing from you. But if I've got it wrong, correct me.  
 13:15 20 Because I'm going to operate on what I think I'm  
 13:15 21 hearing. So if I got it wrong, help me. You have a  
 13:15 22 huge concern with the possibility -- you don't like the  
 13:15 23 death penalty and wish we didn't have to have it in our  
 13:15 24 society for starters like everybody. You don't --

13:15 25 A. No. Backtrack, because there are certain

13:15 1 people, Jeffrey Dahmer. There are certain people in  
 13:15 2 society, I would not hesitate.  
 13:15 3 Q. Okay.  
 13:15 4 A. That, no, thank heavens, that is an avenue to  
 13:15 5 pursue.  
 13:15 6 Q. Then you understand my --  
 13:15 7 A. Right.  
 13:15 8 Q. You understand how we're communicating. But  
 13:15 9 when -- when -- all the things you say, I agree with. I  
 13:15 10 think the death penalty is harsh. I think it is  
 13:15 11 certainly harsh if the defendant would want to be  
 13:15 12 executed. It may be harsh anyway but -- but for sure --  
 13:16 13 we don't know about this case. If I were guessing, I  
 13:16 14 would guess the defendant doesn't want to be executed.  
 13:16 15 I don't think most people would if they had a choice,  
 13:16 16 right?  
 13:16 17 A. Correct. Choices, no. But did what the  
 13:16 18 actions of that person do, cause the death of another  
 13:16 19 person in such that I guess what, where I go with it is,  
 13:16 20 if their actions are such that they have -- have killed,  
 13:16 21 have proven, then their society rights to their own  
 13:16 22 life --  
 13:16 23 Q. Uh-huh.  
 13:16 24 A. -- is negated. And then it comes up subject to  
 13:16 25 whatever the governing laws are as far as what should be

13:16 1 done. Okay?  
 13:16 2 Q. Uh-huh. And I'm glad we had this talk. And  
 13:16 3 that's the beauty of this. Because if you just did it  
 13:16 4 off of questionnaires, you can see how we might have  
 13:16 5 thought something different.  
 13:16 6 A. Even just the word, are you in favor? No, I'm  
 13:16 7 not in favor. I mean, that word alone just negates. Am  
 13:16 8 I for the death penalty, or am I not for the death  
 13:16 9 penalty?  
 13:16 10 Q. Right.  
 13:16 11 A. Okay.  
 13:17 12 Q. I can tell it's maybe even more for you than  
 13:17 13 other people. Although, every decent person would be  
 13:17 14 horrified at even the remote possibility that an  
 13:17 15 innocent person could be executed.  
 13:17 16 A. Correct.  
 13:17 17 Q. There may be worse things that our society may  
 13:17 18 be doing, but that's got to be close, don't you think?  
 13:17 19 A. Uh-huh.  
 13:17 20 Q. If the worse thing -- isn't that just about the  
 13:17 21 worst mistake that our society could make that you can  
 13:17 22 think of?  
 13:17 23 A. No. I mean, I hate to say, no. But in society  
 13:17 24 even given the World Trade Center thing, us rounding up  
 13:17 25 the Japanese that are innocent civilians into -- into

13:17 1 war camps or wherever we put them.  
 13:17 2 Q. That's pretty bad.  
 13:17 3 A. That's really. No. I could say there are a  
 13:17 4 lot of other things that could be worse in a multiplied  
 13:17 5 avenue. But, yes, it is very very bad, killing somebody  
 13:17 6 that's innocent.  
 13:17 7 Q. And, in fact, actually some of the things that  
 13:18 8 you've said at least suggest that you might hold the  
 13:18 9 State to even a higher burden on some of this than the  
 13:18 10 law requires. But when I talk with you, you are so  
 13:18 11 reasonable, I'm sure it's probably it's just the  
 13:18 12 questionnaire and how it was worded.  
 13:18 13 You used the term a couple of times about  
 13:18 14 it being premeditated. You at least use it over on  
 13:18 15 that -- on the second page. What's the best argument?  
 13:18 16 A. Uh-huh.  
 13:18 17 Q. Extreme premeditation, which I'm thinking, I  
 13:18 18 mean, an obvious example of extreme premeditation is  
 13:18 19 probably what happened in New York and the Pentagon.  
 13:18 20 Apparently, it's not only been premeditated, it's been  
 13:18 21 planned for years, from what we read. So that sort of  
 13:18 22 thing, right?  
 13:18 23 A. Well, a lot of -- I guess moreover is, in the  
 13:18 24 questionnaire, yes, I own a gun. Is my gun on my  
 13:18 25 person? No, it's in my home. It's in a closet. It's

13:18 1 locked. And so if I walk down the street, and I have a  
 13:18 2 gun, I kind of open up myself to events that wouldn't  
 13:19 3 happen. That's what I mean by premeditated.  
 13:19 4 Most people don't have bombs or guns on  
 13:19 5 them, so it's kind of -- how do I want to say?  
 13:19 6 Premeditated to me means you plan to do it. You planned  
 13:19 7 to shoot somebody. On occasion it comes on an accident,  
 13:19 8 and on occasion it comes where you are defending  
 13:19 9 yourself. Okay?  
 13:19 10 Q. Uh-huh.  
 13:19 11 A. But I guess.  
 13:19 12 Q. So you are not requiring the State to prove it  
 13:19 13 was a lot of planning in order for it to have a death  
 13:19 14 sentence?  
 13:19 15 A. No.  
 13:19 16 Q. But, for example, going to somebody's house  
 13:19 17 where you are going to burglar them and taking a gun  
 13:19 18 with you?  
 13:19 19 A. That to me is premeditated.  
 13:19 20 Q. Okay.  
 13:19 21 A. In my mind, you are taking a gun. Thus, you  
 13:19 22 are anticipating that you may have to use the gun.  
 13:19 23 Q. Right.  
 13:19 24 A. And do you see what I mean? To me that's  
 13:19 25 premeditated.

13:19 1 Q. If it's more of a social call, for example, you  
 13:19 2 probably wouldn't have a need for a gun, would you?  
 13:20 3 A. Right. I don't go to dinner parties with a  
 13:20 4 gun.  
 13:20 5 Q. Okay.  
 13:20 6 A. There are certain things that is inappropriate.  
 13:20 7 Q. I guess you don't eat where I eat.  
 13:20 8 THE COURT: And they provide knives.  
 13:20 9 Q. (BY MR. SCHULTZ) If you don't have one, they  
 13:20 10 give you one when you come in. Okay. Well, that makes  
 13:20 11 sense to me.  
 13:20 12 A. So I guess, my wording may be a little harsher  
 13:20 13 than -- I don't know. I just feel that --  
 13:20 14 Q. Now, one of your answers seems to -- seems to  
 13:20 15 suggest to me that we might have a burden of proving  
 13:20 16 that a defendant confessed to the murder before we could  
 13:20 17 get a death sentence from you. And I'm not sure that  
 13:20 18 you would really hold us to that because your answer, on  
 13:20 19 -- same page, next question. The best argument in  
 13:20 20 opposition has to be proven beyond a shadow of a doubt.  
 13:20 21 That's fine. It's technically beyond a reasonable  
 13:20 22 doubt.  
 13:20 23 A. Right. You know what I mean.  
 13:20 24 Q. Words don't make a difference in a capital case  
 13:20 25 anyway. You are going to hold us to the huge burden of

13:21 1 proof if you want to, no matter how we couch it. And  
 13:21 2 so, if you say beyond all doubt or a shadow of a doubt,  
 13:21 3 I don't care.  
 13:21 4 A. Right. And to me, a confession versus forensic  
 13:21 5 evidence, that is to me beyond a shadow of a doubt. Do  
 13:21 6 you know what -- there are some things that evidence can  
 13:21 7 be, I guess, equivalent to a confession.  
 13:21 8 Q. Like maybe fingerprints.  
 13:21 9 A. Right.  
 13:21 10 Q. DNA?  
 13:21 11 A. Right.  
 13:21 12 Q. Maybe telling your friends about it. When I  
 13:21 13 think about a confession, I think about the police  
 13:21 14 asking you stuff and getting answers.  
 13:21 15 A. Right. And they admit, yes, I did it. But  
 13:21 16 there is also, I think later somewhere, we were talking  
 13:21 17 about something about -- something about, I thought  
 13:21 18 there was in there about forensic evidence and, yes,  
 13:21 19 DNA, blood. Evidence of being there, having the gun,  
 13:21 20 fingerprints.  
 13:21 21 Q. How about having some of the property on you  
 13:21 22 that was taken from there, that kind of stuff? Maybe,  
 13:21 23 maybe not. That might be --  
 13:21 24 A. That would really depend. Because it would  
 13:21 25 greatly depend on how long afterwards. Because items

13:22 1 can be sold. Items can, you know, pawned or -- greatly  
 13:22 2 a lot of it would -- it would all depend.  
 13:22 3 Q. Okay.  
 13:22 4 A. On the whole story.  
 13:22 5 Q. Now, when we talk about capital murder, the  
 13:22 6 kinds that we're talking about really here, is it's the  
 13:22 7 same murder, the same murders, but it is alleged three  
 13:22 8 different ways in our indictment. One way is murder of  
 13:22 9 an individual by murdering him in the course of  
 13:22 10 burglary.  
 13:22 11 A. Uh-huh.  
 13:22 12 Q. One is murdering the same person in the course  
 13:22 13 of a robbery. And one is murder in the course of  
 13:22 14 another murder. That is, the double murder.  
 13:22 15 A. Uh-huh.  
 13:22 16 Q. All of which are capital murders. The reason  
 13:22 17 we allege them in those alternatives is because  
 13:22 18 sometimes there can be a technical deficiency in the  
 13:22 19 proof of one of the elements in one of the varieties of  
 13:22 20 capital murder.  
 13:23 21 Maybe it's clearly a murder, but for some  
 13:23 22 technical reason like ownership of a property or whether  
 13:23 23 consent might have been effected to enter. Maybe we  
 13:23 24 don't have a valid burglary. We have a murder only, but  
 13:23 25 not a burglary?

13:23 1 A. Uh-huh.  
 13:23 2 Q. The thinking is, if we allege all of the --  
 13:23 3 because the same act can violate several laws.  
 13:23 4 A. Uh-huh.  
 13:23 5 Q. If I -- if I call you on the telephone and  
 13:23 6 threaten your life, for example, I probably violated  
 13:23 7 several laws by that. I probably, it's obviously a  
 13:23 8 harassment. It may be terroristic threats, probably  
 13:23 9 some federal crime for threatening people or a federal  
 13:23 10 communications instrumentality. It could probably be a  
 13:23 11 whole lot of crimes.  
 13:23 12 And the general rule is we can allege all  
 13:23 13 the crimes that an act could be and give the jury the  
 13:23 14 option of convicting on one or more of those, but you  
 13:23 15 still only get one sentence. You only get one. He's  
 13:23 16 guilty or not guilty. And it's guilty if it's a three.  
 13:23 17 But if we prove beyond a reasonable doubt  
 13:24 18 to you, however you define that term, that the person  
 13:24 19 has committed the crime of capital murder, any problem  
 13:24 20 getting a vote from you for guilty for proving beyond a  
 13:24 21 reasonable doubt?  
 13:24 22 A. No.  
 13:24 23 Q. All right. And if we fail to do it, any  
 13:24 24 problem getting a not guilty vote from you?  
 13:24 25 A. No.

13:24 1 Q. And that's easy to say in theory. But what  
13:24 2 could sometimes happen is, and I've talked to jurors,  
13:24 3 they think the person is guilty. They are pretty sure  
13:24 4 the person is guilty, but they are not convinced beyond  
13:24 5 a reasonable doubt that the person is guilty.

13:24 6 And why that can be tough takes courage on  
13:24 7 the part of juror because what you are saying is, I'm  
13:24 8 probably turning a capital murderer loose on our society  
13:24 9 again because I don't find the scales of justice have  
13:24 10 been tipped enough.

13:24 11 A. Uh-huh.

13:24 12 Q. And are you the kind of person that could  
13:24 13 measure the evidence? And even though you might hate  
13:24 14 that result or think the prosecutor has dropped the ball  
13:24 15 or think somehow the way the Judge's instructions were  
13:24 16 that they made it impossible, whatever you might, are  
13:25 17 you able to still do the right thing, based on the law  
13:25 18 and the evidence?

13:25 19 A. I believe so, yes.

13:25 20 Q. And it goes the other way, also. Because it's  
13:25 21 very possible that -- that the evidence is overwhelming.  
13:25 22 And yet you have some compassion for the defendant and  
13:25 23 you think, gosh, under all of this, I see how this all  
13:25 24 happened. And I don't even want to set him up with a  
13:25 25 possibility of a death sentence. I'd like to find him

13:25 1 guilty of some lesser crime or find him not guilty  
13:25 2 because if I disregard the law for a minute, and just  
13:25 3 simply do what I want to do, what I think is the right  
13:25 4 thing to do, make my own law, maybe I'm thinking he  
13:25 5 ought to just get turned loose anyway.

13:25 6 So, see, you have to have the ability to  
13:25 7 make the hard calls as well as the easy calls.

13:25 8 A. I'm a firm firm believer on the obedience of  
13:25 9 the laws and following whatever and however I'm  
13:25 10 instructed. I guess I have extreme high regards for the  
13:25 11 Judge and his position and your position and your  
13:25 12 position. I guess to me, I will do the best and, you  
13:25 13 know, forthright with what I've been told to do, and  
13:25 14 follow those laws that I'm given.

13:26 15 Q. Okay. Because we all have those situations  
13:26 16 where a big part of us would want to say no to some law  
13:26 17 that collides with us or is difficult. I mean, we all  
13:26 18 got that about us. I can't think of a lot of examples.

13:26 19 A. Well, similar to the death penalty itself,  
13:26 20 though --

13:26 21 Q. Uh-huh.

13:26 22 A. -- no one here, sitting here would ever, in a  
13:26 23 perfect world, we'd never want it or wish it. But there  
13:26 24 are times where, though, it's a decision that's hard,  
13:26 25 that it's painful, that it will always be with whoever

13:27 1 the jury is, that you just can't be taken lightly. And  
13:27 2 I think -- I think though we may be put into positions  
13:27 3 that we don't like that we do what's in the best  
13:27 4 interest of society and just in the best interests of --

13:27 5 Q. Okay. What's required --

13:27 6 A. -- the law.

13:27 7 Q. I'm sorry. What's required of jurors is -- and  
13:27 8 it's -- it's good that you do respect the law, because I  
13:27 9 know you do, and that you respect the instructions the  
13:27 10 Court will give you. You have to actually be able to  
13:27 11 follow them. Sometimes it's a snap. Sometimes there  
13:27 12 may be the perfect case for capital murder. And the  
13:27 13 evidence may be not only overwhelming. It may be  
13:27 14 screaming out that clearly the person is guilty, clearly  
13:27 15 he's dangerous. If anybody ever needs to be executed,  
13:27 16 it is this person. And nobody has trouble with those  
13:27 17 cases. I bet that Oklahoma City jury had no trouble  
13:27 18 with that case.

13:28 19 A. Correct.

13:28 20 Q. But it's not always like that because there are  
13:28 21 times when part of you wants to do something opposite,  
13:28 22 kind of wants to in the human sense, opposite from what  
13:28 23 the evidence requires you to do.

13:28 24 Sometimes the law obliges you to do some  
13:28 25 things that some people just can't do it. Not always,

13:28 1 but just sometimes. And that's what I want to talk with  
13:28 2 you about a little bit. No problem finding somebody  
13:28 3 guilty if the State proves it beyond a reasonable doubt,  
13:28 4 right?

13:28 5 A. Correct.

13:28 6 Q. No problem finding him not guilty if the State  
13:28 7 doesn't prove it beyond a reasonable doubt. You can do  
13:28 8 that?

13:28 9 A. Okay. There's a lot of negatives there. Let  
13:28 10 me follow. Say that again.

13:28 11 Q. If we prove he's guilty of capital murder and  
13:28 12 we do that beyond a reasonable doubt, however you define  
13:28 13 that term, but we know it's huge one.

13:28 14 A. Beyond, right.

13:28 15 Q. And it ought to be, you will vote guilty for  
13:28 16 capital murder?

13:28 17 A. Yes. If it's proven such.

13:28 18 Q. Right. And if we don't prove it, or we don't  
13:28 19 prove it enough, in other words, you are saying, boy,  
13:28 20 he's probably guilty, or I guess he's guilty or I think  
13:28 21 he's guilty, but they haven't convinced me beyond a  
13:28 22 reasonable doubt. It's not there. That's the truth.  
13:28 23 It's not there. What do you do?

13:29 24 A. Then you would not -- say not guilty. I mean,  
13:29 25 because it is with a reasonable doubt.

13:29 1 Q. Exactly. And that's what I'm saying.  
 13:29 2 A. And that's a hard one, but in -- but as he sits  
 13:29 3 here, he is innocent until he's proven guilty. So to me  
 13:29 4 he needs to be proven guilty.  
 13:29 5 Q. Right.  
 13:29 6 A. And there needs to be no doubt or within a  
 13:29 7 reasonable doubt.  
 13:29 8 Q. He has a Constitutional right not to help us do  
 13:29 9 that in any way. Do you understand that?  
 13:29 10 A. Yes, I do.  
 13:29 11 Q. For example, you mentioned confession. I want  
 13:29 12 to talk about that kind of in context with the whole  
 13:29 13 Fifth Amendment privilege. Confessions are legal  
 13:29 14 evidence, if they exist. Police seek them in many cases  
 13:29 15 and their rules about how they take them and what the  
 13:29 16 circumstances are, but a defendant has an absolute right  
 13:30 17 not to confess.  
 13:30 18 A. Correct.  
 13:30 19 Q. He has the right to remain silent, and he gets  
 13:30 20 warned about what happens if he does otherwise. And  
 13:30 21 whether a person confessed or not, it's not even  
 13:30 22 evidence that a jury would ever be allowed to hear.  
 13:30 23 I'm not talking about this case. I'm talking in  
 13:30 24 general.  
 13:30 25 I couldn't, for example, say in another

13:30 1 murder case, well, officer, did you try to find out from  
 13:30 2 him what happened? Yeah. What did he say? He refused  
 13:30 3 to answer. I can't do that because that's like --  
 13:30 4 that's beating him over the head with the exercise of  
 13:30 5 the Constitutional right. Does that make sense to you?  
 13:30 6 A. Uh-huh.  
 13:30 7 Q. So I guess a defendant has the right to give a  
 13:30 8 statement to the police if he wants to. And if they,  
 13:30 9 you know, if they care enough about it to write it down,  
 13:30 10 I suppose. But he doesn't have to, and nothing about  
 13:30 11 that can be used against him. Okay?  
 13:30 12 A. Yes.  
 13:30 13 Q. Any problem with that?  
 13:30 14 A. No.  
 13:30 15 Q. The defendant doesn't have to testify if he  
 13:30 16 doesn't want to.  
 13:30 17 A. Uh-huh.  
 13:30 18 Q. He can just sit there and behave himself, and  
 13:30 19 that's not evidence of anything.  
 13:30 20 A. Correct.  
 13:30 21 Q. And you can't later on say, you must be guilty  
 13:30 22 or he would have told us he was innocent. You can't do  
 13:31 23 that.  
 13:31 24 A. No. Right.  
 13:31 25 Q. I can't argue that to you. I can't say, ladies

13:31 1 and gentlemen, look at him. He didn't testify. That  
 13:31 2 must mean something because it doesn't. And that's  
 13:31 3 unconstitutional for me to do that.  
 13:31 4 A. Correct.  
 13:31 5 Q. Can't do it. They don't have to offer any  
 13:31 6 evidence if they don't want to. Now, they are good  
 13:31 7 lawyers, and I'd be very surprised if they don't offer  
 13:31 8 evidence either through their own witnesses or getting  
 13:31 9 the State's witnesses to say things inconsistent  
 13:31 10 sometimes with what they've said to us. But they don't  
 13:31 11 have to do that if they don't want to. And you can't  
 13:31 12 say, well, the defendant must be guilty because his  
 13:31 13 lawyers didn't offer any evidence or call any witnesses.  
 13:31 14 Any problem with that?  
 13:31 15 A. No.  
 13:31 16 Q. It's not a benefit for them. You can't say --  
 13:31 17 A. Right.  
 13:31 18 Q. You can't give them a break for it. And just  
 13:31 19 say, boy, the State had all these witnesses, and they  
 13:31 20 didn't have any, so let me help them out a little. It  
 13:31 21 doesn't work that way.  
 13:31 22 A. Correct.  
 13:31 23 Q. But you can't hold it against them.  
 13:31 24 A. Correct.  
 13:31 25 Q. Now, sometimes when we try a case, sometimes

13:32 1 there is something about the evidence in the case that  
 13:32 2 makes the person guilty of the primary crime of murder,  
 13:32 3 but one of the elements is missing to make it capital  
 13:32 4 murder. That can happen. And remember I told you,  
 13:32 5 maybe there's some technical reason why the burglary  
 13:32 6 didn't really happen, and that's why we have this  
 13:32 7 flexibility.  
 13:32 8 I'll illustrate it in different ways.  
 13:32 9 It's a crime in Texas of capital murder to murder a  
 13:32 10 police officer in the discharge of his or her duties.  
 13:32 11 That's kind of how that George Rivas execution was when  
 13:32 12 he murdered the Arlington police officer.  
 13:32 13 And that's all good and well if the police  
 13:32 14 officer is trying to arrest you or you are burgling a  
 13:32 15 place and you get in a shoot-out with the police. And  
 13:32 16 you know he's wearing a uniform and patrol car with  
 13:32 17 lights. And everybody knows that.  
 13:32 18 But if it's a police officer that's your  
 13:32 19 next-door neighbor, and you get into a fight with a  
 13:32 20 third neighbor, and you get in a fight with a spouse or  
 13:32 21 a relative, and he comes over and says: Stop this. You  
 13:32 22 can't be fighting out here and arguing, and it's  
 13:32 23 disturbing me, and it's disturbing the neighborhood.  
 13:32 24 And he's just in his shorts and T-shirt because he's off  
 13:32 25 duty, and you pull out a gun and kill him, that may or



13:33 1 may not be a capital murder. Because he may or may not  
 13:33 2 be -- depending on how the jury sees it -- be in the  
 13:33 3 official discharge of his police duties. Is he over  
 13:33 4 there breaking it up as a neighbor or as a police  
 13:33 5 officer?

13:33 6 A. Right. But doesn't it -- on that that would  
 13:33 7 depend on if he knew that it was a police officer.

13:33 8 Q. Good point.

13:33 9 A. Because --

13:33 10 Q. But the jury has -- the jury has to consider  
 13:33 11 these things. And it may be that the Judge would give  
 13:33 12 an instruction on a lesser-included offense of regular  
 13:33 13 murder because if you knock out the police officer in  
 13:33 14 the discharge of duties, it goes back down to a regular  
 13:33 15 murder case again. Does that make sense?

13:33 16 A. Yes.

13:33 17 Q. And when that happens, juries have to be able  
 13:33 18 to give fair consideration to anything that the Court  
 13:33 19 instructs you to consider, which means that the Judge  
 13:33 20 says, I want you to first consider capital murder. And  
 13:33 21 if you've got a reasonable doubt about any part of that,  
 13:33 22 next consider regular murder. You've got to be able to  
 13:33 23 do that. And you seem like the kind of person that  
 13:33 24 could do that.

13:33 25 A. Yeah. I would have no problem.

13:34 1 Q. By the way, if you get knocked down to a lesser  
 13:34 2 offense, normally what that means is that it's a lesser  
 13:34 3 punishment range. When we talk about lesser, we don't  
 13:34 4 mean lesser or lesser words or lesser or anything other  
 13:34 5 than lesser punishment. That's really what a lesser-  
 13:34 6 included offense is.

13:34 7 And when we do that, what occurs is that  
 13:34 8 the jury would have, instead of that 5 year to 99 -- I'm  
 13:34 9 sorry, instead of that life or death punishment range of  
 13:34 10 capital murder, it has the same punishment range as it  
 13:34 11 would have if the case had started out as a murder from  
 13:34 12 the beginning and there had been a conviction.

13:34 13 Now, here's where it gets tricky, and  
 13:34 14 here's where a person's willingness to follow the law  
 13:34 15 and be law abiding and recognize that, in our society,  
 13:34 16 if we revolt because of our own feelings in the jury box  
 13:34 17 about how a law ought to be, we really, in our little  
 13:34 18 way, doing a real mini-revolution every time we decide  
 13:34 19 that we're going to do what we want to do, rather than  
 13:35 20 what the law requires because it's almost kind of like  
 13:35 21 we're criminals, only not as bad. But that is what  
 13:35 22 criminals do. They do what they want to do, instead of  
 13:35 23 what the law requires them to do.

13:35 24 A. It would be like -- I hate to say it. It would  
 13:35 25 be like hijacking and thwarting the jury by doing that.

13:35 1 Q. Absolutely.

13:35 2 A. You can't take the law into your own hands.

13:35 3 Q. You realize how awful it would be to ever not  
 13:35 4 follow whatever instruction the Court gives you, if it's  
 13:35 5 the law, because that's the rightest thing to do there  
 13:35 6 is.

13:35 7 A. It's -- it's well, it's the law. I, again, I  
 13:35 8 guess I hold a high regard to the law, and it would be  
 13:35 9 thwarting everything that we all stand for here if -- if  
 13:35 10 somebody takes on their own -- I don't want to say  
 13:35 11 vendetta, but their own beliefs, their own -- as we come  
 13:35 12 to you, we need to be as honest as we possibly can,  
 13:35 13 otherwise we have thwarted it.

13:35 14 Q. Yes, ma'am. I agree. Now, let's say the  
 13:36 15 question I asked you -- this would start out in a  
 13:36 16 regular murder case. Being asked about punishment  
 13:36 17 because it goes -- what the full range of punishment and  
 13:36 18 the jury has to consider, sometimes when you hear about  
 13:36 19 it, it sounds so extremely either harsh or extremely  
 13:36 20 easy. And like a slap on the wrist, the jurors at first  
 13:36 21 say, well, how could anybody on a jury ever give  
 13:36 22 somebody so much or so little for a crime?

13:36 23 There are some fact situations where  
 13:36 24 theft, depending upon what's happened, could cost a  
 13:36 25 person a life sentence. You could actually get a life

13:36 1 sentence for thieving. And a lot of us would say, how  
 13:36 2 could it make any sense to give somebody a life sentence  
 13:36 3 for thieving? But there's some circumstances where the  
 13:36 4 punishment range would be that high.

13:36 5 And they have to recognize, if the  
 13:36 6 legislature says that that's the punishment range, I've  
 13:36 7 got to consider that. I might not do it often, but I've  
 13:37 8 got to consider it and give a fair appraisal of the  
 13:37 9 evidence and see if that fits as well as the other end,  
 13:37 10 the easy end.

13:37 11 A. I think that goes back to giving the law and, I  
 13:37 12 guess, time and -- and how we have evolved as a society.  
 13:37 13 I give the lawyers and the -- whoever has set up the law  
 13:37 14 and the way that the punishment phases have been  
 13:37 15 initiated and how they have developed, I -- I guess I  
 13:37 16 just don't question any of that. And I wouldn't  
 13:37 17 question it because --

13:37 18 Q. Okay.

13:37 19 A. Because I just assume that they just know far  
 13:37 20 more than I do.

13:37 21 Q. Now, actually I'm sure you are very wise, and  
 13:37 22 not everyone has that wisdom. Especially not doing this  
 13:37 23 for a living, and you do. What that sometimes might  
 13:37 24 mean, however, is that you might be called upon to  
 13:37 25 consider in a murder case as little as 5 years'

13:37 1 probation, depending on the facts that you found the  
13:37 2 person guilty of.

13:37 3 Now, I don't know about you, but when  
13:37 4 somebody comes to me and says, how do you feel about 5  
13:38 5 years' probated for murder? My reaction to that is, I  
13:38 6 don't feel so very good about that. I'm thinking human  
13:38 7 life counts. And I know there are all kinds of  
13:38 8 different takings of human life, but I don't feel so  
13:38 9 great about murder getting -- getting 5 years'  
13:38 10 probation.

13:38 11 But when you back off of it and when you  
13:38 12 say, and you realize that the law has set that as a  
13:38 13 possible range, then -- then the enlightened answer, it  
13:38 14 seems to me is, I will trust our legislature who made  
13:38 15 this law, that there are cases where 5 years' probation  
13:38 16 is appropriate.

13:38 17 A. I --

13:38 18 Q. And if I see one, I'll give it.

13:38 19 A. And that is truly how -- I believe I give it  
13:38 20 over to those people who know far more than I do.

13:38 21 Q. Yes, ma'am.

13:38 22 A. As to the laws and the wheres and the why fors.  
13:38 23 I guess I stringently believe in just listening and  
13:38 24 obeying to what --

13:38 25 Q. Yes, ma'am.

13:38 1 A. -- the rules are and abiding by them.

13:38 2 Q. Okay. And, well, you -- I'm not sure they are  
13:39 3 wiser than you are.

13:39 4 MR. SCHULTZ: Yes, sir, I'm moving along.

13:39 5 THE COURT: Yeah.

13:39 6 Q. (BY MR. SCHULTZ) Let me explain something to  
13:39 7 you. I love listening to you, but I'm on a time limit  
13:39 8 from the Judge. And if you volunteer too much -- I'm  
13:39 9 not critical -- you are using my time, and then I don't  
13:39 10 get to all the questions. So help me out a little bit  
13:39 11 if you can.

13:39 12 A. Okay.

13:39 13 Q. Because the Judge has just given me that look.  
13:39 14 And I know how much you respect the Judge, and so do I,  
13:39 15 and so we're working.

13:39 16 A. Okay.

13:39 17 Q. Now, the rest of this requires that same  
13:39 18 trusting commitment to the good of our society, which is  
13:39 19 that our laws are good, and they are only as good as  
13:39 20 those honorable people who will always enforce them.

13:39 21 So if you have found a defendant guilty of  
13:39 22 capital murder beyond a reasonable doubt, you go to this  
13:39 23 question. If -- if we -- if you have not found him  
13:39 24 guilty of that, beyond a reasonable doubt, of capital  
13:39 25 murder, we don't deal with that question.

13:39 1 We either deal with an acquittal because  
13:39 2 we didn't prove enough of that for anything or the  
13:40 3 lesser-included offense of murder. You said you could  
13:40 4 go all across that range of punishment, no problem.

13:40 5 And I also know that you told me you could  
13:40 6 go both ways in death penalty cases. You could vote for  
13:40 7 death sentence or a life sentence, depending on the  
13:40 8 evidence, correct?

13:40 9 A. Correct.

13:40 10 Q. Well, the first thing that you get focused on  
13:40 11 is that first question there. Take a moment, if you  
13:40 12 would, and look at that, and let me know when you are  
13:40 13 finished.

13:40 14 A. Finished.

13:40 15 Q. Good. That question is called a lot of things.  
13:40 16 For example, it's called a future danger question. It's  
13:40 17 called a protection-of-society question. It is called,  
13:40 18 sometimes in the degrading way, the fortune-telling  
13:40 19 question because it requires us, I suppose, to look into  
13:40 20 the future and make predictions based on the evidence  
13:40 21 that's with us.

13:40 22 And yet, just looking at that, does that  
13:40 23 look like the kind of thing that sensible human beings  
13:40 24 in our society could answer yes or no according to  
13:40 25 evidence?

13:40 1 A. Yes.

13:40 2 Q. And that's what -- we may not think about it.  
13:41 3 We do that all the time in our life. We make -- we take  
13:41 4 action. We make evaluations based on what we think. I  
13:41 5 mean, none of us know. We get married, and we think it  
13:41 6 might last forever. We don't know.

13:41 7 I mean, hopefully we don't get married to  
13:41 8 somebody we know it won't last but a couple years, but  
13:41 9 sometimes that still happens. Right? We look at  
13:41 10 evidence. We buy a car. We try to pick a car that we  
13:41 11 think is going to be the best use of our money.  
13:41 12 Sometimes it's not. We get -- we make mistakes buying  
13:41 13 cars, and we do it, do it that way.

13:41 14 We're asking you to look at a defendant's  
13:41 15 character which, by the way, includes the crime itself.  
13:41 16 You already found him guilty of capital murder. Look at  
13:41 17 his character trait; look at his personality trait for  
13:41 18 criminal acts of violence, and decide whether or not  
13:41 19 there's a probability that he would commit criminal acts  
13:41 20 of violence that threaten our society.

13:41 21 Now, what that, first of all, there's no  
13:41 22 definition of probability. It's got to be more than a  
13:42 23 possibility. That's about all we know. If I flip a  
13:42 24 coin a hundred times in theory, it ought to be 50-50.  
13:42 25 50 heads, 50 tails, right? Not quite. It could always

13:42 1 land on its edge. That could happen once, you know,  
13:42 2 every 10 million flips or something like that, which  
13:42 3 means that's a possibility, but that could never be a  
13:42 4 probability.

13:42 5 I mean, you know, you can watch me do that  
13:42 6 right now, and you know it's not going to land on its  
13:42 7 edge, even though that's theoretically possible.  
13:42 8 Probability, most people say, means more likely than  
13:42 9 not. Does that seem about right to you?

13:42 10 A. Yes.

13:42 11 Q. Maybe 51 percent, maybe 58 percent. If you  
13:42 12 tell me -- if I ask you: Are you going to have any  
13:42 13 sales at your store next month? And you tell me  
13:42 14 probably. To me I'm hearing that more likely than not  
13:42 15 you'll have a sale next month there, right?

13:42 16 A. Yes.

13:42 17 Q. So you have to find, beyond a reasonable doubt,  
13:42 18 that there is a probability the defendant would commit  
13:42 19 criminal acts of violence. Now, the question is not,  
13:42 20 will he kill again? In fact, it's not even, will he do  
13:42 21 anything? And it's -- it's, is there a probability that  
13:42 22 he would? And what that means is is there a probability  
13:42 23 that given -- that if given the opportunity that he  
13:42 24 would. All right?

13:42 25 A. Correct.

13:43 1 Q. That he would commit acts of violence in the  
13:43 2 future. Now, as you sit there then, do you see yourself  
13:43 3 as being able to answer that question yes in some cases  
13:43 4 and no in some cases?

13:43 5 A. Yes.

13:43 6 Q. Now, people can do capital murders for reasons  
13:43 7 we understand. If Dr. Kevorkian gets called to a  
13:43 8 nursing home by the parent and said, Doctor, I'm in  
13:43 9 extreme pain. I want to die and these doctors won't  
13:43 10 kill me. And Dr. Kevorkian says, I'll be right there.

13:43 11 Well, they won't let him in the lobby of  
13:43 12 the nursing homes because they know what he's there for.  
13:43 13 He's not there to help anybody, in their mind. So he  
13:43 14 probably has to go in through a window because that's  
13:43 15 the only way Dr. Kevorkian gets in this nursing home.  
13:43 16 That's a burglary. If you make a nonconsensual entry  
13:43 17 into a building of another person, that's a burglary.  
13:43 18 Are you with me?

13:43 19 A. Yes.

13:43 20 Q. And if he goes in there, and we have the family  
13:43 21 holding hands and singing songs, and there's a  
13:43 22 candle-lit service. And the soon to be expatient is  
13:43 23 happy as a clam over the whole prospect of going on to  
13:43 24 his or her reward. And Dr. Kevorkian takes his ghoulish  
13:43 25 machine and kills that person. Nevertheless, that's a

13:44 1 capital murder. Do you see how that would be a capital  
13:44 2 murder?

13:44 3 A. Yes, yes.

13:44 4 Q. Now, it might be that under all that evidence,  
13:44 5 you might answer that question no. Here's how you might  
13:44 6 do that. For example, you might say what Dr. Kevorkian  
13:44 7 does is not even an act of violence. It's an act of  
13:44 8 love.

13:44 9 Now, I'm not saying you say that. But  
13:44 10 there are people who say that is an act of love or  
13:44 11 tenderness or mercy compassion, altruism, to help  
13:44 12 someone to rid themselves from abject suffering.

13:44 13 Or you might say, well, he's never going  
13:44 14 to do it again because he's not really a dangerous  
13:44 15 person. He's just a little different. Dr. Kevorkian  
13:44 16 never killed anybody that didn't want to be killed, from  
13:44 17 what I can tell. So, you know, I don't consider that  
13:44 18 dangerous. I just consider that enlightened.

13:45 19 Maybe you might think, like, 20 years from  
13:45 20 now Dr. Kevorkian is a hero because he's enlightened.  
13:45 21 That might be an example of how you can answer that  
13:45 22 question no. No, he's a capital murderer, but he's not  
13:45 23 dangerous.

13:45 24 Maybe he had a stroke before the trial.  
13:45 25 Maybe Dr. Kevorkian has had a stroke. He is paralyzed

13:45 1 from the scalp down, and he can't move any muscles in  
13:45 2 the body and they have to feed him through a tube, some  
13:45 3 kind of a mush or a slurry or something like that to  
13:45 4 give him nourishment. He couldn't be dangerous to  
13:45 5 anybody in that condition. Are you with me?

13:45 6 A. Uh-huh.

13:45 7 Q. All right. Maybe the person has only done, in  
13:45 8 his whole life, only done one single bad act and that's  
13:45 9 the crime that he's on trial for, and we understand that  
13:45 10 bad act.

13:45 11 For example, a daddy watches the two  
13:45 12 killers of his little child go out of court scot-free  
13:45 13 over some technicality. And they are laughing at him as  
13:45 14 they go out of court. He may just decide, they are not  
13:45 15 fit to live.

13:45 16 He may say, I'm going to go get those two  
13:45 17 people. I'm going to do a double homicide for two  
13:45 18 reasons. One, it is not fair, and they are not fit to  
13:45 19 live. And two, I don't want other children threatened  
13:45 20 by a couple of two-legged jackals like them. I don't  
13:45 21 want that to happen. So he goes and gets a gun and  
13:45 22 kills them. It's a capital murder. It's a double  
13:45 23 homicide.

13:45 24 And yet, you might look at that question  
13:45 25 and you might say -- you might say to yourself: That

13:46 1 person is never going to do anything wrong again. He  
 13:46 2 did it one time. He's a great citizen and loved his  
 13:46 3 children and loved life, went to church and behaved  
 13:46 4 himself. And but for this awful thing, and all you say  
 13:46 5 is he's not dangerous. You are not saying he's  
 13:46 6 innocent. He's still a capital murderer. If you answer  
 13:46 7 that question no, then the answer means a life sentence.

13:46 8 A. Correct.

13:46 9 Q. Now, could you vote, depending on the evidence?

13:46 10 A. Yes. Because in the second case, it wouldn't  
 13:46 11 be a continuing threat to society.

13:46 12 Q. Exactly. You know, or maybe Dr. Kevorkian  
 13:46 13 is -- maybe you figure he's never going to stop. There  
 13:46 14 are lots of nursing homes and lots of phones. And maybe  
 13:46 15 you figure he'll always do it, so maybe he's a yes. I  
 13:46 16 don't know. I don't know what the answer to that  
 13:46 17 question will be.

13:46 18 But if you answer that question yes, we  
 13:47 19 have another question for you. And that's that  
 13:47 20 so-called mitigation question up there. Okay? I like  
 13:47 21 to call that the take-one-more-look-at-the-evidence  
 13:47 22 question.

13:47 23 I'd like to call that the let's make  
 13:47 24 absolutely sure there is symmetry between the answers  
 13:47 25 that have gotten you there. And those are death

13:47 1 answers, capital murder, future danger. But there's  
 13:47 2 symmetry between that and the rightness of the death  
 13:47 3 penalty. Why I say that is because it's the same  
 13:47 4 evidence that you've already considered at least in one  
 13:47 5 context, maybe two, but you are being directed, not  
 13:47 6 asked, being directed by the Judge, to consider all of  
 13:47 7 the evidence, whatever that evidence is, in including  
 13:47 8 circumstances of the offense which we know is going to  
 13:47 9 be huge probably against the defendant, and it's capital  
 13:47 10 murder.

13:47 11 There's no way that's going to be great.  
 13:48 12 It's probably never going to be a way-to-go defendant.  
 13:48 13 That's probably bad for the defendant. Consider his  
 13:48 14 character. Well, that's very possibly going to be very  
 13:48 15 bad for the defendant because you found he's a  
 13:48 16 continuing threat to our society. Are you with me?

13:48 17 A. Uh-huh.

13:48 18 Q. It doesn't ask you to consider background, and  
 13:48 19 that might be different because we don't have all equal  
 13:48 20 growing-up situations. We like to think that we do, but  
 13:48 21 sometimes people have really bad things happen to them  
 13:48 22 when they are growing up. Unspeakable things.

13:48 23 There can be atrocities committed on young  
 13:48 24 children that you and I couldn't even understand. And  
 13:48 25 we don't know what that all could mean. There could be

13:48 1 an abusive relationship that we can't even begin to  
 13:48 2 understand. And we might say, all right, well, that's  
 13:48 3 mitigating. That is -- that is certainly something that  
 13:48 4 we would overlook a lot based on that, I mean, if a  
 13:48 5 person grew up in those conditions.

13:49 6 And as a theft case we don't -- we got a  
 13:49 7 lot of compassion for them. If we're -- if we're -- if  
 13:49 8 somebody in school is not performing very well in  
 13:49 9 school, we got lots of understanding on how those things  
 13:49 10 can make you not do very well in school when you got  
 13:49 11 that stuff going on inside of you.

13:49 12 And that question contemplates you to look  
 13:49 13 at the mitigation evidence for starters, and I can  
 13:49 14 promise you there is in every one of our lives. We all  
 13:49 15 have things that didn't go right that we can point to.  
 13:49 16 We say, you know, if only. If only my dad had been home  
 13:49 17 all the time. If only my mom had done this, or if only  
 13:49 18 my husband hadn't done this. We've all got that. It's  
 13:49 19 legit. It affects us.

13:49 20 Then you look at that mitigation evidence  
 13:49 21 and you say, okay, I found all the mitigation evidence I  
 13:49 22 could pull out of this. I found every bit of it. I  
 13:49 23 shook the trees, and everything that was up there came  
 13:49 24 down.

13:49 25 Now I'm going to put it on the scales and

13:49 1 see how much mitigation fruit I've shaken out of those  
 13:49 2 trees, and I'm going to see whether that's sufficient  
 13:49 3 mitigating proof to deprive the State of its up-to-then  
 13:50 4 proven right to a death sentence.

13:50 5 MR. GOELLER: Objection to that. That's a  
 13:50 6 misstatement of the law, Your Honor. I object to that  
 13:50 7 last statement. "The State's right to a death  
 13:50 8 sentence." That's not the state of the law.

13:50 9 MR. SCHULTZ: Up to that question, it  
 13:50 10 certainly is our right to a death sentence, and that's  
 13:50 11 what that question directs the jury to consider.

13:50 12 MR. GOELLER: No, sir, I disagree. That's  
 13:50 13 an independent question of itself. There's no right to  
 13:50 14 the death sentence. The State has no right to the death  
 13:50 15 sentence, up to that question.

13:50 16 THE COURT: All right.

13:50 17 MR. GOELLER: That's a misstatement of the  
 13:50 18 law.

13:50 19 THE COURT: I sustain the objection.

13:50 20 Q. (BY MR. SCHULTZ) Up to the -- up to the point  
 13:50 21 where you get that -- to that question, he's been found  
 13:50 22 guilty of being a -- an ongoing threat in a capital  
 13:50 23 murder. That's what you actually found by that first  
 13:50 24 question plus the verdict.

13:50 25 That question asks you to consider all the

13:50 1 evidence used in finding those two things guilty and  
13:50 2 then future danger. And then it directs you to consider  
13:50 3 the mitigation evidence and see if that's enough, if  
13:51 4 that's sufficient to cause a sentence of life, rather  
13:51 5 than a death sentence to be imposed. Does that make  
13:51 6 sense to you what they are asking?

13:51 7 A. A hundred percent.

13:51 8 Q. I think my opinion is that's really for the  
13:51 9 benefit of the jury. It -- it happens to also benefit  
13:51 10 the defendant. It could never hurt the defendant  
13:51 11 because the first two questions have determined his fate  
13:51 12 until you get to that question, so it never hurts the  
13:51 13 defendant. It may benefit him.

13:51 14 But I believe that question is really for  
13:51 15 the jury in their comfort because wouldn't it be awful  
13:51 16 for people to come out of the jury box saying, what  
13:51 17 happened? We answered the questions right, but he  
13:51 18 shouldn't die.

13:51 19 And the Judge says, you know, too bad.  
13:51 20 That's how it works, that kind of thing. That's what  
13:51 21 that question is designed for. Look for mitigation  
13:51 22 evidence and see if it's sufficient to warrant a life  
13:51 23 sentence, and that's going to depend on the crime  
13:51 24 itself. All right?

13:51 25 The same evidence that might mitigate for

13:52 1 Dr. Kevorkian, lots of -- I don't know if he had any  
13:52 2 happy patients that could come up because I don't think  
13:52 3 his patients could probably do that, but maybe relatives  
13:52 4 of some satisfied patients. Maybe they would come in  
13:52 5 and say a lot of good things about Dr. Kevorkian. And  
13:52 6 we don't know how he got to be the individual that he  
13:52 7 is.

13:52 8 Maybe in that case you'd say that sure is  
13:52 9 sufficient, consider the circumstances, the crime  
13:52 10 anyway. I find that is sufficient mitigating  
13:52 11 circumstances, so I'm going to vote, yes, there is, and  
13:52 12 that means I'll spare his life. Do you see how that  
13:52 13 would be?

13:52 14 A. Totally.

13:52 15 Q. On the other hand, somehow Adolf Hitler, I  
13:52 16 doubt if you could bring in any mitigating evidence that  
13:52 17 would overcome his --

13:52 18 A. That wouldn't be balanced. I think the word is  
13:52 19 sufficient mitigating. There wouldn't be anything  
13:52 20 sufficient enough in that case.

13:52 21 Q. Yeah. I mean, I doubt if we could get a tear  
13:52 22 for Hitler's life if we told every sad thing that ever  
13:52 23 happened. But even if we could, it wouldn't be  
13:53 24 sufficient, right?

13:53 25 A. Correct.

13:53 1 Q. And so personal moral culpability is not really  
13:53 2 defined. I don't know -- none of us really know what  
13:53 3 that means. We could just speculate. I look at  
13:53 4 Dr. Kevorkian. I think, well, maybe he doesn't have  
13:53 5 moral culpability because he's got consenting patients.  
13:53 6 And some people say he's a -- some people say he's a  
13:53 7 visionary. They say he's a humanitarian.

13:53 8 Other people disagree. I guess he's in  
13:53 9 the pen right now in Michigan because 12 people  
13:53 10 apparently disagreed with that. Does that question look  
13:53 11 like something you could do?

13:53 12 A. Yes.

13:53 13 Q. And you could -- again, it's a way. It's an  
13:53 14 invitation to the jury, I suppose, to do whatever they  
13:53 15 want, but at least it makes you weigh. At least you are  
13:53 16 going to come out, if somebody says, well, like the  
13:53 17 lawyer's going to say, could you help us understand how  
13:53 18 a jury is going to think about a question like that?

13:53 19 You might say we weighed it, and we  
13:54 20 weighed this against that, and there was plenty  
13:54 21 mitigation to satisfy us. Or I'm real sorry,  
13:54 22 Mr. Defense Attorney, you did a great job. But what the  
13:54 23 defendant did and what his personality was were so  
13:54 24 extreme to us that even that mitigating stuff which was  
13:54 25 well presented and well reasoned wasn't sufficient to

13:54 1 deprive the State of the use of the conviction.

13:54 2 And the -- and the answer to the first  
13:54 3 special issue, which results in a death sentence if that  
13:54 4 question is answered no, insufficient mitigating  
13:54 5 evidence. Are you with me on that?

13:54 6 A. I agree.

13:54 7 MR. SCHULTZ: A moment please, Judge?

13:54 8 THE COURT: Yes.

13:54 9 MR. SCHULTZ: Thank you very much, ma'am.

13:54 10 We'll pass the juror.

13:54 11 THE COURT: Mr. Goeller?

13:54 12 MR. GOELLER: Thank you.

13:54 13 VOIR DIRE EXAMINATION

13:54 14 BY MR. GOELLER:

13:54 15 Q. Again, good afternoon, Ms. Linden.

13:54 16 A. Hello.

13:54 17 Q. Do you prefer Ms. or Mrs. Linden?

13:55 18 A. Oh, can they call by my first name?

13:55 19 Mrs. Linden is my husband's mother.

13:55 20 Q. Leslie?

13:55 21 A. Leslie would be great.

13:55 22 THE COURT: Actually, they can't.

13:55 23 VENIREPERSON: Oh, they can't? Okay. I'm  
13:55 24 sorry.

13:55 25 THE COURT: We have rules against that.

13:55 1 Q. (BY MR. GOELLER) Ms. Linden?  
 13:55 2 A. Ms. Linden. There you go, I'm sorry.  
 13:55 3 Q. I'd call you Leslie, but he won't let me.  
 13:55 4 A. I'm sorry.  
 13:55 5 Q. Again, thank you for coming down here today. I  
 13:55 6 want to spend some time with you, talk to you about some  
 13:55 7 of the issues in this case, as far as being a  
 13:55 8 prospective juror goes, and we'll see what happens.  
 13:55 9 When you were down to the courthouse here  
 13:55 10 in this room a couple weeks ago, do you remember the  
 13:55 11 presentations by both sides?  
 13:55 12 A. Yes.  
 13:55 13 Q. I think both sides spoke roughly an hour, maybe  
 13:55 14 45 minutes to an hour. After I spoke what did you  
 13:55 15 think?  
 13:56 16 A. I know -- I can tell you what came -- my  
 13:56 17 feelings after the whole thing more than --  
 13:56 18 Q. Okay.  
 13:56 19 A. -- specifically.  
 13:56 20 Q. And you know, before you say that, I want -- I  
 13:56 21 want to tell you that's exactly, when you use the word  
 13:56 22 feelings, that's what I'm really after today.  
 13:56 23 I'm really -- one thing that I wanted to  
 13:56 24 impress upon jurors that day is, please trust me when I  
 13:56 25 tell you, if you tell me your true feelings today and

13:56 1 you absolutely know and have my promise and guarantee  
 13:56 2 you on my word, I wouldn't take issue with you. I won't  
 13:56 3 debate you. I won't argue with you. I won't try to  
 13:56 4 convert you. Okay?  
 13:56 5 A. No --  
 13:56 6 Q. Nothing like that. All I need is, if you just  
 13:56 7 shoot straight, we have some jurors from time to time  
 13:56 8 that take the witness stand, and they want to -- they  
 13:56 9 talk -- I think they give answers that they think the  
 13:56 10 Judge would want to hear, you know?  
 13:56 11 A. You know what? I guess more because I'm --  
 13:56 12 this is foreign. For -- to me this is totally foreign.  
 13:57 13 I know y'all are used to it. But for me, I guess I came  
 13:57 14 out of it going, wait a minute. Why aren't we innocent  
 13:57 15 until proven guilty? Why are we talking about the death  
 13:57 16 penalty? Why are we talking about penalty, penalty?  
 13:57 17 When, as this man sits here, as far as I'm  
 13:57 18 concerned, he's innocent. Let's talk about that. Let's  
 13:57 19 do that. And then -- and I understand, you need to know  
 13:57 20 that we know this, and that we can go through this and  
 13:57 21 that. But to me, I'm just like, a man is innocent until  
 13:57 22 proven guilty. Let's speak innocence. Let's speak the  
 13:57 23 story. Let me know the story. I can't -- I guess I was  
 13:57 24 more amazed that it was even allowed.  
 13:57 25 I thought it would be more like he would

13:57 1 be able to declare a mistrial because there was so much  
 13:57 2 talk about the death penalty and talk about all -- all  
 13:57 3 of that. And I understand it's important, and I  
 13:57 4 understand you need to know what type of a jury you  
 13:58 5 have, and I understand all that. But for me I just felt  
 13:58 6 like, wait a minute. We -- I haven't even heard  
 13:58 7 anything.  
 13:58 8 Q. Right. I understand that, and that's why I  
 13:58 9 think I told you, it's very uncomfortable to be a  
 13:58 10 defense lawyer and get up and start talking about  
 13:58 11 punishment issues. And I've got to do it in every case,  
 13:58 12 maybe except a traffic ticket or something like that.  
 13:58 13 But if I'm representing just a kid maybe  
 13:58 14 who had a little bit of marijuana, I've got to spend  
 13:58 15 probably half my time talking to the jury about maybe  
 13:58 16 probation versus, you know, six months in the county  
 13:58 17 jail.  
 13:58 18 A. Well, see, I don't know any. I've never had  
 13:58 19 any events at all that have brought me anywhere near  
 13:58 20 this.  
 13:58 21 Q. I know. And --  
 13:58 22 A. So I'm kind of like, really, this is really a  
 13:58 23 foreign event.  
 13:58 24 Q. You seem like you would be the absolute last  
 13:58 25 person I know on the face of this earth that would end

13:58 1 up in a criminal court.  
 13:58 2 A. But, and I don't have, in all honesty, I don't  
 13:58 3 have, I guess, the prejudices that -- a few things that  
 13:59 4 you said made me feel that people are prejudiced against  
 13:59 5 defense attorneys.  
 13:59 6 Q. Well, they are.  
 13:59 7 A. Well, I don't understand that. I guess it's  
 13:59 8 the same thing with the police. I can spend half an  
 13:59 9 hour talking to them and enjoy it. I guess, that's  
 13:59 10 where I just don't have -- my life's path hasn't given  
 13:59 11 me any type of --  
 13:59 12 Q. I think you are --  
 13:59 13 A. -- prejudices that way.  
 13:59 14 Q. -- you are lucky.  
 13:59 15 A. Because to me everyone is hardworking, whether  
 13:59 16 it's plaintiffs or defendants. Everyone has a hard job  
 13:59 17 to do.  
 13:59 18 Q. There's a certain segment of society that looks  
 13:59 19 at us as the scapegoats for all the problems in the  
 13:59 20 world. And Mr. Schultz has gone through this with  
 13:59 21 jurors before, to his credit. Nobody blames the dentist  
 13:59 22 for pulling the tooth of an inmate whose teeth are  
 13:59 23 impacted bad. Nobody will walk up to that dentist and  
 13:59 24 say, how could you go to the jailhouse and pull the  
 13:59 25 tooth and work on a criminal? Nobody blames the

14:00 1 preacher who administers spiritual guidance to the  
14:00 2 convicted. You know, but a lot of people say, how can  
14:00 3 you defend criminals?

14:00 4 A. But, see, I look -- I don't look at it that  
14:00 5 way. Because I look at it, if I was in his shoes, and I  
14:00 6 was sitting there, I would want the best man there. So  
14:00 7 I don't have that built-in prejudice. I, you know, I  
14:00 8 would want the smartest man right next to me defending  
14:00 9 me, so...

14:00 10 Q. Well, you are different than most folks, I'll  
14:00 11 tell you that. And I mean that in a very very  
14:00 12 admirable, positive way.

14:00 13 A. Or that or else I've been extremely sheltered.

14:00 14 Q. That may be a good thing because it hasn't  
14:00 15 clouded your mind. You ever heard people say, and I  
14:00 16 want to get back to one of your original points. You  
14:00 17 made a great point. I would love -- and I know the  
14:00 18 State would love to do this, too -- the reason why he  
14:00 19 can't, and we don't spend a whole lot of time on guilt-  
14:01 20 innocence issues is there's not a whole lot to be said  
14:01 21 other than, I'll be honest with you, the State pretty  
14:01 22 much covered it.

14:01 23 If they -- if you have a doubt about their  
14:01 24 proof, a doubt based on reason or a reasonable doubt,  
14:01 25 that he's guilty of anything that's put before you in

14:01 1 the Charge of the Court. And I think the State covered  
14:01 2 it well, even if you thought he did it, had a pretty  
14:01 3 good idea he did it, a pretty good hunch, I'm really --  
14:01 4 I think he did it. I'm pretty sure he did it, but I  
14:01 5 just have a reasonable doubt about it. The Judge would  
14:01 6 instruct you, you resolve that conflict in the  
14:01 7 defendant's favor and say "not guilty." And that's a  
14:01 8 tough thing to do, but I think you told Mr. Schultz  
14:01 9 you'd do that.

14:01 10 A. I would have to.

14:01 11 Q. Absolutely.

14:01 12 A. Because of my mind-set on not feeling guilty  
14:02 13 afterwards that I had obeyed the law. I guess that's  
14:02 14 where my --

14:02 15 Q. There you go. You hit the nail on the head.

14:02 16 A. -- obedience and guilt.

14:02 17 Q. You take an oath.

14:02 18 A. Right.

14:02 19 Q. You take an oath as a juror, and you apply the  
14:02 20 facts of the case to the law as the Court gives you.  
14:02 21 Have you ever heard of the phrase: It's better that a  
14:02 22 thousand guilty go free than one innocent man be  
14:02 23 convicted?

14:02 24 A. Yes.

14:02 25 Q. Do you believe in that phrase?

14:02 1 A. I do. And that's -- that is where, again, I  
14:02 2 say I would -- that was -- that is one of my fears is  
14:02 3 that an innocent man would go to prison. That has  
14:02 4 always been a firm belief that, even as we watch people  
14:02 5 being executed and, you know, they say, they are going  
14:02 6 to do a pardon or whatever, the governor and then that  
14:02 7 does raise your questions on guilt, and was he really  
14:03 8 guilty? If they were going to pardon him or stay the  
14:03 9 execution or something.

14:03 10 THE COURT: I tell you what. I'm going to  
14:03 11 take a five-minute recess. Let me ask the attorneys to  
14:03 12 step in chambers for just a second.

14:03 13 THE BAILIFF: All rise.

14:05 14 (Break.)

14:12 15 THE COURT: All right. Please be seated.

14:12 16 MR. SCHULTZ: I think we reached a point  
14:12 17 where the law requires us to ask for a brief recess  
14:12 18 outside the juror's presence.

14:12 19 THE COURT: All right. Would you step  
14:12 20 down for just a minute?

14:12 21 VENIREPERSON: Certainly.

14:13 22 (Venireperson Linden not present.)

14:13 23 MR. SCHULTZ: Judge, this partially  
14:13 24 relates perhaps to some of the discussions that we had  
14:13 25 in chambers with the Court. Part of the discussions had

14:13 1 to do with what everybody thought we were going to do.  
14:13 2 We have -- we have agreed with the defense, contingent  
14:13 3 upon the defendant's approval, to excuse this juror by  
14:13 4 consent. Because if we don't do that, I think there's a  
14:13 5 real decent chance that we're going to take her, and I'm  
14:13 6 not all that comfortable with it.

14:13 7 I think both sides are kind in that same  
14:13 8 situation. She's a puzzle. Not that I care about their  
14:13 9 reasons, but ours pretty simply are: This isn't the  
14:13 10 same person that answered that questionnaire, pretty  
14:13 11 obviously, and we just don't understand it. But if they  
14:13 12 want to do it, we're fine too because we don't  
14:13 13 understand her.

14:13 14 THE COURT: All right.

14:13 15 MR. GOELLER: That's -- that's our  
14:13 16 position, Your Honor. I mean, we agreed to -- agreed to  
14:14 17 release the juror.

14:14 18 THE COURT: Is that your agreement?

14:14 19 THE DEFENDANT: Yes, Your Honor.

14:14 20 THE COURT: Then would you tell Leslie  
14:14 21 Linden that she is finally excused?

14:14 22 THE BAILIFF: Yes, Your Honor.

14:14 23 THE COURT: And ask Mr. Peter Dennis, or  
14:14 24 Dennis Peter to step in.

14:14 25 MR. GOELLER: Judge, again, I've got to

14:14 1 object to taking this juror out of order. I would  
14:14 2 ask -- I would ask that this juror not be taken up until  
14:14 3 we've conducted the voir dire examination of Juror 122,  
14:14 4 Shala Jones.

14:14 5 THE COURT: All right. What says the  
14:14 6 State?

14:14 7 MR. SCHULTZ: I'm -- I might have  
14:14 8 misunderstood or confused because -- I might have it  
14:15 9 wrong -- I was thinking that what we said was that  
14:15 10 Monday would be okay to do Ms. Jones. And maybe I just  
14:15 11 misunderstood where we are.

14:15 12 If the objection is that she should have  
14:15 13 come before the next juror and that's their position, he  
14:15 14 may have a point. And the point is, I don't want to  
14:15 15 have to -- I don't see that we advantage ourselves any  
14:15 16 by having to get the Court to make a ruling on a request  
14:15 17 for additional peremptory challenge to cure this  
14:15 18 situation, if that's where we are. And I don't see that  
14:15 19 critically as a defense. It's just a reality, that's --  
14:15 20 we have enough to worry about in this case without  
14:15 21 something curable going into it, so...

14:15 22 The only other possibility, and I don't  
14:15 23 know if this meets with their approval, I suppose it's  
14:15 24 possible we could take this juror out of order, examine  
14:15 25 the juror, and then both sides withhold their acceptance

14:16 1 or challenge or peremptory challenge until such time as  
14:16 2 they have had the opportunity to examine Ms. Jones.

14:16 3 And then I suppose that would -- it seems  
14:16 4 like if I were in their problem, just like both sides  
14:16 5 delaying, and then we can do it. And then we'd be in  
14:16 6 the same position as we otherwise would be later on.

14:16 7 I guess I'm just thinking out loud. I  
14:16 8 would -- I would hate to have to try to -- I would hate  
14:16 9 for that to be an appellate issue that we'd have to try  
14:16 10 to deal with. If they are objecting, saying they don't  
14:16 11 want to have to make a strike decision on a later juror  
14:16 12 until they get a juror that's earlier. And I'll be  
14:16 13 honest, I'm not even comfortable. The Court can do what  
14:16 14 it wants to do.

14:16 15 I'm not comfortable with the possibility  
14:16 16 that it could be viewed as a waiver, because nobody said  
14:16 17 anything about it. I'd be honest with you, I wasn't  
14:16 18 doing that much thinking about it all either. I was  
14:16 19 just trying to get jurors, and let's keep them going in  
14:16 20 the mill gin. And I'm not sure that we can fairly say  
14:16 21 there's been some waiver on their part by not  
14:17 22 complaining about it earlier.

14:17 23 THE COURT: What if we interview these  
14:17 24 jurors and hold off on taking the strikes we're going to  
14:17 25 take until we see Shala -- Shala Jones on Monday? Does

14:17 1 that work?

14:17 2 MR. GOELLER: May I have a second?

14:17 3 With the understanding that all challenges  
14:17 4 and all strikes would be reserved until a later time,  
14:18 5 Judge, that's acceptable.

14:18 6 MR. SCHULTZ: Well, the later time has to  
14:18 7 be after we've examined that juror, Ms. Jones. I don't  
14:18 8 want to wait until the end of the trial or something.

14:18 9 MR. HIGH: Can I have just a second,  
14:18 10 Judge?

14:18 11 THE COURT: Sure.

14:18 12 MR. GOELLER: Judge, let me ask the Court  
14:18 13 to consider the Court's, at the defendant's request and  
14:18 14 obviously with the defendant's approval, the Court  
14:19 15 granting a sui sponte dismissal of Juror Shala Jones,  
14:19 16 No. 122. She's a problem, a big potential problem for  
14:19 17 us. She's a No. 1, and her fax to the Court that her  
14:19 18 business reasons seem to dictate an unwillingness to  
14:19 19 serve as a juror at this time.

14:19 20 Taking her out of order, I think, is a  
14:19 21 problem because of our strike situation. The Court  
14:19 22 certainly has, within its discretion, if we agree, to  
14:19 23 dismiss that juror. And we'd ask at this time, and we'd  
14:19 24 move that she be dismissed.

14:19 25 THE COURT: Well, I might consider that.

14:19 1 Let me ask you this: Do you have any objection to  
14:19 2 interviewing Dennis Peters and Rhonda Odom, I think it  
14:19 3 is? And I suppose I could entertain challenges to the  
14:20 4 juror, to both jurors. But with regard to whether or  
14:20 5 not anyone is stricken, we could take up Peters and  
14:20 6 Odom, and then Shala Jones.

14:20 7 And at the end of Shala Jones' interview,  
14:20 8 assuming that all three are still potential jurors, let  
14:20 9 you -- well, we'll take up the, I suppose the vote on  
14:20 10 Shala Jones first. Do you see any way that that  
14:20 11 prejudices you? In fact, come to think of it, when I  
14:20 12 say that --

14:20 13 MR. GOELLER: I know what you are going to  
14:20 14 say.

14:20 15 THE COURT: It's better for you, but  
14:20 16 anyway --

14:20 17 MR. GOELLER: I don't have any problem  
14:20 18 with that, Judge.

14:20 19 THE COURT: All right. If we do it that  
14:20 20 way, then it's -- we've kind of mooted the problem.

14:21 21 MR. GOELLER: Yes, sir.

14:21 22 THE COURT: All right. So here's what  
14:21 23 we're going to do. With regard to Peters, Odom and  
14:21 24 Jones, we'll take them up in that order. If either side  
14:21 25 has challenges to Peters and Odom today, then certainly



14:21 1 I'll entertain them. And if I consider them to be good,  
14:21 2 then there's no harm done on either side. And then, but  
14:21 3 if they are still standing as potential jurors, we can  
14:21 4 take the vote on -- on Monday beginning with Shala  
14:21 5 Jones.

14:21 6 MR. GOELLER: Well, in consultation with  
14:21 7 our team, the problem with doing that, now that I see  
14:21 8 it, Judge, it puts me in the position of having to make  
14:21 9 a challenge prior to the State exercising a peremptory  
14:22 10 challenge.

14:22 11 And obviously the law is that the State  
14:22 12 first has to make their challenge for cause, then they  
14:22 13 have to make a peremptory challenge. And only then do  
14:22 14 we have to exercise a peremptory challenge, so I would  
14:22 15 have to object to that on those grounds.

14:22 16 THE COURT: So what's wrong with that,  
14:22 17 though? Are you saying that you wouldn't even want me  
14:22 18 to take up any challenges on three until Monday? I can  
14:22 19 do that. We can -- we can, I suppose, interview all  
14:22 20 three.

14:22 21 MR. SCHULTZ: I may be misinformed and  
14:22 22 that's certainly a possibility, but I don't know of any  
14:22 23 requirement that we have to do our challenges -- that we  
14:22 24 have to do our peremptory challenges before they do  
14:22 25 their challenges for cause. I'm not sure that's the

14:22 1 rule. I think that's just exactly not so.

14:23 2 THE COURT: That's right.

14:23 3 MR. SCHULTZ: Many courts require it to be  
14:23 4 done at the time it arises. I know Judge Roach's policy  
14:23 5 was always at the moment that the complaint and event  
14:23 6 occurs. That's when you do your challenge, not go  
14:23 7 through the rest of it. So that can't be right, in my  
14:23 8 opinion. So it doesn't harm them any. If it doesn't  
14:23 9 harm them any to not give them the advantage of  
14:23 10 something that's not the law anyway, that I know of.

14:23 11 THE COURT: Good point. So there isn't  
14:23 12 anything wrong, as far as you are concerned, with doing  
14:23 13 the challenges and taking a vote on Monday beginning  
14:23 14 with Jones?

14:23 15 MR. SCHULTZ: Not if they agree. And  
14:23 16 here's what I don't want to be -- and this is not  
14:23 17 critical to them in any regard. I don't want it to be  
14:23 18 looked at that way. We had a lot of discussion about --  
14:23 19 earlier about taking people out of order.

14:23 20 And I remember Mr. Goeller was -- was  
14:23 21 cogent in his position that, while that wasn't causing a  
14:23 22 problem then, he envisioned perhaps down the line that  
14:23 23 it was going to put him in a -- in a possible jam as he  
14:23 24 got fewer strikes and as he might have to use strikes on  
14:24 25 somebody and burn a last strike than otherwise.

14:24 1 And in view of that record, and it did  
14:24 2 make sense in what he was saying as kind of a --  
14:24 3 certainly, it's not a new complaint that's been --  
14:24 4 that's just been dropped on us right at the 11th hour.  
14:24 5 He did that earlier.

14:24 6 I don't want -- I believe if he wants to  
14:24 7 wait, if that's his position, that they really want to  
14:24 8 wait, I think we ought to wait until Ms. Jones gets up  
14:24 9 here on Monday before we do anybody else and just keep  
14:24 10 these other jurors if we can't find some other  
14:24 11 accommodation.

14:24 12 And I don't want us to be in the position  
14:24 13 of saying, no, you can't have such a delay or have the  
14:24 14 record even somehow imply that the choice is between  
14:24 15 taking the way we're offering or you are out of luck  
14:24 16 because I think the prudent thing to do is -- is to give  
14:24 17 them the benefit of complaining about out of order, if  
14:24 18 that's what they want to do because that sure is a small  
14:25 19 thing to have to worry about, it seems to me, on appeal,  
14:25 20 as much as time and toil this has taken on everybody  
14:25 21 that's involved.

14:25 22 And I only offer that other -- that other  
14:25 23 as a possible accommodation because, as I understood the  
14:25 24 real complaint that they had, which as expressed, makes  
14:25 25 sense to me, the real complaint is: I'd like to strike

14:25 1 this next juror perhaps, but I'm thinking I might end up  
14:25 2 having to accept this juror, number one, if I can't kick  
14:25 3 her for cause.

14:25 4 And it seemed to me that what we were  
14:25 5 offering allowed them that flexibility, and then they  
14:25 6 would probably have three jurors and one peremptory  
14:25 7 challenge to make the decision which one they wanted to  
14:25 8 use it on. And I thought that would -- I thought that  
14:25 9 essentially catches us up to this out-of-order problem.

14:25 10 But if I'm missing something or if there's  
14:25 11 something about it that they don't like, I -- I'm not  
14:25 12 saying it is error, and I don't want to do that. I'm  
14:25 13 just saying I'd rather not have to be addressing an  
14:25 14 appellate court over something that we know we can cure,  
14:26 15 although somewhat inconvenient, perhaps, right now.

14:26 16 So I want to make sure that they are  
14:26 17 getting what they want and not simply that they are  
14:26 18 taking the position that they are not going to get what  
14:26 19 they are asking for and that this is somehow a bone  
14:26 20 we're throwing them somehow.

14:26 21 That's -- that's -- I'd just like the  
14:26 22 record clear on what they are wanting and what because I  
14:26 23 thought we had this worked out. And I'm not -- and I'm  
14:26 24 sure I misunderstood, but I thought we didn't have a  
14:26 25 problem with proceeding on today and doing her on

14:26 1 Monday. But I'm sure -- I'm sure I did misunderstand  
14:26 2 that. I just don't want --

14:26 3 THE COURT: You didn't misunderstand it.  
14:26 4 That's the way that he put it.

14:26 5 MR. SCHULTZ: Well --

14:26 6 THE COURT: But, be that as it may, and  
14:26 7 also it was clear to me that, whether it was yesterday  
14:26 8 or the day before, and I brought up the prospect of  
14:26 9 interviewing Shala Jones on 26th, 27th -- or excuse me,  
14:26 10 25th, 26th, 27th, that was thrown out, and you all said  
14:27 11 nothing. Is that correct, Mr. Goeller? Do you recall  
14:27 12 that?

14:27 13 MR. GOELLER: I remember when the -- Your  
14:27 14 Honor, I remember when the fax was delivered, and I  
14:27 15 remember there were discussions about concerns she  
14:27 16 expressed in the fax. I really don't remember  
14:27 17 specifically. But when I went, when I went home last  
14:27 18 night, and when I actually went back to my office and  
14:27 19 started going through this, we sat down and we were  
14:27 20 talking about this.

14:27 21 The last thing that stuck in my head was,  
14:27 22 she was today. To be honest with you, I was just real  
14:27 23 fuzzy about how the Court was going to accommodate her,  
14:27 24 but the last thing the Court told me was she was today.

14:27 25 THE COURT: Well, but you got the fax,

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14:27 1 right?

14:27 2 MR. GOELLER: Oh, yes, sir. I have had  
14:27 3 the fax since whatever day you think I got it.

14:27 4 THE COURT: It was on the 17th day it came  
14:27 5 in. And the fax clearly said, can I be -- can I take  
14:28 6 off the 21st? I've got an important meeting on the  
14:28 7 21st. That's exactly what the fax says.

14:28 8 MR. GOELLER: I don't -- I'm not debating  
14:28 9 that with the Court. I understand that. I don't know  
14:28 10 whether the Court was accommodating her because of a  
14:28 11 business reason on the 21st or was trying to accommodate  
14:28 12 her --

14:28 13 THE COURT: Because --

14:28 14 MR. GOELLER: Because of a trip schedule.  
14:28 15 I just don't recall.

14:28 16 THE COURT: So that just wasn't clear to  
14:28 17 you?

14:28 18 MR. GOELLER: Yes, sir.

14:28 19 THE COURT: I tell you what we'll do.  
14:28 20 We'll just go ahead and let Dennis Peters and Rhonda  
14:28 21 Odom come back on Monday, and we'll take up Shala Jones  
14:28 22 first on Monday. And so, just so that it's real clear,  
14:28 23 what we're going to do on Monday -- first, we're going  
14:28 24 to take up Dennis Peters, and this is at one o'clock on  
14:28 25 Monday.

14:28 1 First, we're going to take up Dennis  
14:28 2 Peters -- or excuse me, first we're going to take up  
14:28 3 Shala Jones. Then we're going to take up Dennis Peters.  
14:29 4 Then we're going to take up Rhonda Odom. Then we're  
14:29 5 going to take up Terrence Morton. Then we're going to  
14:29 6 take up Sheila Lovelace. Then we're going to take up  
14:29 7 Michael Starnes, and then we're going to take up Judith  
14:29 8 Hoffman.

14:29 9 Hey, now, Judith Hoffman has been put on  
14:29 10 this list out of order, Mr. Goeller. She's No. 167.  
14:29 11 Have you got a problem with that? Just tell me, and I  
14:29 12 tell you, everybody else goes right in order, and that  
14:29 13 will be fine with me. Is that what you want to do? Do  
14:29 14 you want to put No. 167 back down at the bottom?

14:29 15 MR. GOELLER: Yes, sir.

14:29 16 THE COURT: All right. Then I tell you  
14:29 17 what. We'll just tell Judith Hoffman. Now, she has  
14:29 18 vacation from September 26th through October 3rd. And  
14:29 19 so what you are telling me is that she will be scheduled  
14:29 20 on October 2nd, and you want me to tell her that she  
14:30 21 can't go on her trip, right?

14:30 22 MR. GOELLER: That's putting it on me,  
14:30 23 Judge. Could I discuss that? Could I discuss that with  
14:30 24 my client?

14:30 25 THE COURT: A few weeks ago you told me

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14:30 1 you were willing to have reasonable accommodations.

14:30 2 MR. GOELLER: I think early on in the  
14:30 3 process, I was sincere with the Court. With one strike  
14:30 4 left, my back's against the wall, I feel. And I've got  
14:30 5 to be very very careful in protecting that kid's rights  
14:30 6 with one strike left.

14:30 7 THE COURT: Well, I tell I what, I have a  
14:30 8 feeling, and I could be wrong, I have a feeling we'll  
14:30 9 never get to Judith Hoffman, but I could be wrong. So  
14:30 10 why don't you discuss it with your --

14:30 11 MR. GOELLER: I agree with you, Judge.  
14:30 12 It's probably a moot issue because we'll never get to  
14:30 13 her. If we get to her, I mean -- so many.

14:30 14 THE COURT: But you do want me to tell her  
14:30 15 not to take her vacation? Because not only do we not  
14:30 16 want to, and we must have her right in order, right? So  
14:31 17 she has to go right after Sara Garcia on October 2nd.  
14:31 18 We couldn't move her down or up, right? Under the  
14:31 19 scenario that you've imagined; is that correct?

14:31 20 MR. GOELLER: That's correct, judge. I  
14:31 21 don't want the Court at this time to tell her that she  
14:31 22 can't take her vacation. I really anticipate we'll have  
14:31 23 a jury way before her.

14:31 24 THE COURT: I tell you what, just do this  
14:31 25 for me. She's supposed to leave on September 26th.

14:31 1 What do you want me to tell her? Do you want me to tell  
 14:31 2 her to wait until September 25th, and then I'll let her  
 14:31 3 know, or do you want me to tell her something tomorrow,  
 14:31 4 or do you want me just to tell her nothing? You know,  
 14:31 5 what I'm talking about is, should we accommodate this  
 14:31 6 juror or not? And her vacation is not very important to  
 14:31 7 me. And also --

14:32 8 MR. GOELLER: She's so far down the list,  
 14:32 9 we may be able to take her out of order, Judge. She's  
 14:32 10 so far down the list.

14:32 11 THE COURT: Take her out of order? Where?  
 14:32 12 Also, if the State has any problems with any of this,  
 14:32 13 just jump right in so we can make sure everybody gets  
 14:32 14 accommodated. Where do you want me to put No. 167?

14:32 15 MR. GOELLER: I guess for the time being,  
 14:32 16 just leave her right where she is, Judge. Because maybe  
 14:32 17 by Tuesday of next week or -- today's is the 21, 22, 23,  
 14:32 18 24, 25. Let me tell you Monday morning, Judge.

14:32 19 THE COURT: All right.

14:32 20 MR. GOELLER: That gives her enough time.

14:33 21 THE COURT: She'll be here Monday at one  
 14:33 22 o'clock if we don't say anything to her. So what time  
 14:33 23 are you going to tell me Monday morning?

14:33 24 MR. GOELLER: 8:45.

14:33 25 THE COURT: So you have the weekend to

14:33 1 think about it?

14:33 2 MR. GOELLER: Yes, sir.

14:33 3 THE COURT: All right. All right. And  
 14:33 4 here is what we're going to do. On Monday we'll be  
 14:33 5 working until we get all these people done. So if  
 14:33 6 you-all have accommodations for children or anything  
 14:33 7 like that, make them now because we got a lot of people  
 14:33 8 to consider on Monday. All right. Anything else from  
 14:33 9 either side?

14:33 10 MR. SCHULTZ: No, sir, except I want to  
 14:33 11 correct myself. He's right. We've got to make -- we've  
 14:33 12 got to make our peremptory challenge and challenge for  
 14:33 13 cause before we move. And I know it's moot now because  
 14:33 14 the decision, but --

14:33 15 THE COURT: Okay.

14:33 16 MR. SCHULTZ: I'm educated.

14:33 17 MR. GOELLER: You stand corrected.

14:33 18 MR. SCHULTZ: I do.

14:33 19 THE COURT: That's good. All right.

14:33 20 Well, then something good came out of this.

14:34 21 MR. SCHULTZ: What? That I got corrected?

14:34 22 THE COURT: That we've all learned a good  
 14:34 23 lesson. All right. So I see y'all Monday morning at --  
 14:34 24 I think we got the jurors coming in at 8:45.

14:34 25 So if you have the defendant, and we'll

14:34 1 have the lawyers here, and we'll get people seated, and  
 14:34 2 we'll get after them.

14:34 3 THE BAILIFF: All rise.

14:34 4 (Court adjourned.)

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1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS

3 COUNTY OF COLLIN

4 I, Barbara L. Tokuz, CSR, RMR, CRR, Deputy Official

5 Court Reporter in and for the 380th Judicial District

6 Court of Collin County, State of Texas, do hereby

7 certify that the above and foregoing contains a true and

8 correct transcription of all portions of evidence and

9 other proceedings requested in writing by counsel for

10 the parties to be included in this volume of the

11 Reporter's Record, in the above-styled and -numbered

12 cause, all of which occurred in open court or in

13 chambers and were reported by me.

14 I further certify that this Reporter's Record of the

15 proceedings truly and correctly reflects the exhibits,

16 if any, offered by the respective parties.

17 WITNESS MY OFFICIAL HAND this the 11th day of

18 February, 2002.

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